

THE DIGEST
OF
ENGLISH CASE LAW

CONTAINING THE
REPORTED DECISIONS
OF THE
SUPERIOR COURTS,
AND A
SELECTION FROM THOSE OF THE SCOTCH AND IRISH COURTS
WITH
A COLLECTION OF CASES FOLLOWED, DISTINGUISHED,
EXPLAINED, COMMENTED ON, OVERRULED,
OR QUESTIONED

FROM
1898 to 1907 inclusive.

FORMING A SUPPLEMENT TO
MEWS' DIGEST OF ENGLISH CASE LAW, 16 VOLS.

BY
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· PREFACE.

THERE is no finality about English law, and we need not sigh over the fact. If there were our national life would be stagnating. Where there is life and growth there can be no finality. Day after day, month after month, year after year, the great legislative machine, and the great judicial machine in all its many-sided activity, are turning out new statutes and new cases to mould and readjust law and social order to the changing needs and conditions of the community.

The Digest of English Case Law—published in 1898—did a splendid work in reducing to rational and lucid order the case law of more than a century and a half. It consolidated at least 100,000 decisions. It fused law and equity, as represented respectively by Fisher's Digest and Chitty's Equity Index. It incorporated the statute law wherever the case law without it would have been misleading. Its sixteen volumes were, in no conventional sense, a notable achievement, not only as an editorial and publishing feat, but as marking an epoch in the history of English law. Since then the work has been carried on by supplementary Annual Digests edited, like the larger work, by Mr. John Mews.

This "Annual Digest of Decided Cases"—to give it its proper name—is a model of what such a Digest should be: the arrangement of the Titles is alphabetical—incomparably the most convenient, as Lord Lindley said; and the pith of each case is pointed in catchwords printed in clarendon type, which at once arrest the eye. The references are to all the Reports; the cross-references are abundant; and, most important of all, the range of the Digest is so comprehensive that no decision of any importance whatever is sought in vain. The Law Journal Reports, the Law Reports, the Law Times Reports, the Times Law Reports, the Weekly Reporter, the Commercial Cases, Aspinall's Maritime Cases, Cox's Criminal Cases, Manson's Bankruptcy and Company Cases, the Court of Session Cases, the Court of Justiciary Cases, the Irish Reports, the Local Government Reports, the Justice of the Peace, Smith's Registration Cases, Railway and Canal Traffic Cases, are all dealt with, and contribute to make the Digest as complete as it is excellent.

A Digest arranged on these principles is the most useful book which the practising lawyer can possess. It is better than a Code, because it is not, like a Code, a mere bundle of dry legal propositions—colourless generalities. It starts—if well arranged—like a Code from general principles, but it goes on to illustrate those principles, as a Code does not, by a number of concrete examples from decided cases, and an English lawyer—such is the power of precedent with us—is never happy unless he can found himself upon a case, which, if not identical with, yet closely resembles his own. A Code, for instance, gives us such a proposition as this—"An infant cannot bind himself except for necessities": a useful statement, no doubt, but there it stops. A Digest goes on to illustrate by decided cases what are and what are not necessities—champagne, a diamond pin, a bicycle, a marriage settlement, and so on. A Code tells us that "gambling in a public place is illegal." A Digest goes on to illustrate what is and what is not a "place"—the bar of a public-house, a newspaper office, an inclosure, a street archway, an umbrella stuck in the ground. What is even more important, in the arguments and judgments which lie behind the cases of the Digest we get the reason of the thing. In the Code the law does not disclose its reasons. "Incipit a jussione," as Bacon says.

Ten Supplementary Digests have now appeared, and as they have multiplied the task of hunting through them has become more and more troublesome. Consolidation was imperative, and it is represented by the present work—the Decennial Digest. In compiling it the author cannot hope that he has escaped all errors. He will be satisfied if it makes the path of the practitioner easier. The real test of a Digest is the arrangement—*lucidus ordo*—and it is on this that the author has bestowed more especial pains: with what success the reader must decide for himself.

EDWARD MANSON.

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<i>Wrotesley v. Adams</i> , Plowd. 187: discussed and applied in <i>Cowen v. Truefitt</i> , 67 L. J. Ch. 695; [1893] 2 Ch. 551; 79 L. T. 348	684, 1183	<i>Yewens v. Noakes</i> , 50 L. J. Q.B. 132; 6 Q.B. D. 530; 44 L. T. 128; 28 W. R. 562: distinguished in <i>London County Council v. South Metropolitan Gas Co.</i> , 73 L. J. Ch. 136; [1904] 1 Ch. 76; 89 L. T. 618; 52 W. R. 161; 63 J. P. 5; 2 L. G. R. 161	910
<i>Wyatt, Ex parte</i> , 5 Dowl. 339: explained and distinguished in <i>Rex v. Pinckney</i> , 73 L. J. K.B. 475; [1904] 2 K.B. 84; 90 L. T. 468; 52 W. R. 338	914	<i>Yorkshire Miners' Association v. Howden</i> , 74 L. J. K.B. 511; [1905] A.C. 256; 92 L. T. 701; 53 W. R. 687; 21 T. L. R. 431: considered in <i>Steele v. South Wales Miners' Federation</i> , 76 L. J. K.B. 333; [1907] 1 K.B. 361; 96 L. T. 260	2556
<i>Wylde v. Radford</i> , 33 L. J. Ch. 51; 9 Jur. (N.S.) 1169; 9 L. T. 471; 12 W. R. 38: distinguished in <i>London and Globe Finance Corporation, In re</i> , 71 L. J. Ch. 893; [1902] 2 Ch. 416; 87 L. T. 49	1979	<i>Yorkshire Railway Wagon Co. v. Maclure</i> , 51 L. J. Ch. 857; 21 Ch. D. 309; 47 L. T. 290; 30 W. R. 761: applied in <i>Liskeard and Caradon Railway, In re</i> , 72 L. J. Ch. 754; [1903] 2 Ch. 681	2052
<i>Wynne v. Wynne</i> , 78 L. T. 796: distinguished in <i>Walpole v. Walpole</i> , 70 L. J. P. 49; [1901] F. 196; 84 L. T. 727	950	<i>Yorkshire (West Riding) Rivers Board v. Scarr End Mill Co.</i> , 65 J. P. 776: overruled in <i>Yorkshire (West Riding) Rivers Board v. Robinson</i> , 76 L. J. K.B. 426; [1907] 1 K.B. 431; 96 L. T. 162; 71 J. P. 137; 5 L. G. R. 409	2698
<i>Wythes v. Lee</i> , 25 L. J. Ch. 177; 26 L. T. 192; 3 Drew. 396: followed in <i>Whitbread v. Watt</i> , 71 L. J. Ch. 424; [1902] 1 Ch. 835; 86 L. T. 395; 50 W. R. 442	2636	<i>Young v. Austen</i> , 33 L. J. C.P. 233; L. R. 4 C.P. 553; 20 L. T. 396; 17 W. R. 706: followed in <i>New London Credit Syndicate v. Neale</i> , 67 L. J. Q.B. 825; [1898] 2 Q.B. 487	815
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<i>X, In re</i> , 63 L. J. Ch. 613; [1894] 2 Ch. 415; 71 L. T. 139; 42 W. R. 657: not followed in <i>S. S. B., In re</i> , 75 L. J. Ch. 522; [1906] 1 Ch. 712; 94 L. T. 599; 54 W. R. 429	1442	<i>Young v. South African and Australian Exploration Syndicate</i> , 65 L. J. Ch. 638; [1896] 2 Ch. 268; 74 L. T. 527; 44 W. R. 509: not followed in <i>Hadleigh Castle Gold Mining Co., In re</i> , 69 L. J. Ch. 631; [1900] 2 Ch. 419; 83 L. T. 400	408
<i>Xenos v. Whickham</i> , 36 L. J. C.P. 313; L. R. 2 H.L. 296; 16 L. T. 800; 16 W. R. 38: commented on in <i>Lamont, Nisbet & Co. v. Hamilton</i> , [1907] S.C. 628	1972	<i>Young v. Turing</i> , 2 Man. & G. 593; 2 Scott N.R. 752: <i>dictum</i> in, disapproved in <i>Angel v. Merchants' Marine Insurance Co.</i> , 72 L. J. K.B. 493; [1903] 1 K.B. 811; 83 L. T. 717; 51 W. R. 530; 8 Com. Cas. 179	1067
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REPORTS COMPRISED IN THE DIGEST.

Reports.	Abbreviations.	Courts.
Aspinall's Maritime Cases . . .	Asp. M.C.	All.
Commercial Cases	Com. Cas.	Commercial Cases.
Court of Justiciary Cases . . .	F. (Just. Cas.)	Court of Justiciary.
Court of Session Cases	F.	Court of Session.
Cox's Criminal Cases	Cox C.C.	Central Criminal and Crown.
Irish Reports	Ir. R.	All.
Justice of the Peace	J. P.	—
Law Journal	L. J.	—
Law Reports	A.C.; P.; Ch.; K.B.	—
Law Times (N.S.)	L. T.	—
Local Government Reports . . .	L. G. R.	—
Manson	Manson	Bankruptcy and Company Cases.
Railway and Canal Traffic Cases	Ry. & Can. Traff. Cas. . . .	Railway Commission.
Smith (in continuation of Fox and Smith)	Smith	Registration Cases.
Times Law Reports	T. L. R.	All.
Weekly Reporter	W. R.	—

ABBREVIATIONS.

H.L., <i>House of Lords.</i>	Bk., <i>Bankruptcy.</i>
P.C., <i>Privy Council.</i>	C.O.R., <i>Crown Cases Reserved.</i>
L.J.J. and L.J., <i>Lords Justices, Lord Justice.</i>	C.A., <i>Court of Appeal.</i>
L.C., <i>Lord Chancellor.</i>	App. Cas. or A.C., <i>Appeal Cases (Law Reports).</i>
J.J. and J., <i>Justices, Justice.</i>	M.C., <i>Magistrates' Cases (Law Journal).</i>
M.R., <i>Master of the Rolls.</i>	S.C., <i>Same Case.</i>
Ch. D., <i>Chancery Division.</i>	S.P., <i>Same Point or Principle.</i>
K.B. D., <i>King's Bench Division.</i>	E., <i>England.</i>
Q.B. D., <i>Queen's Bench Division.</i>	Sc., <i>Scotland.</i>
Ex. D., <i>Exchequer Division.</i>	Ir., <i>Ireland.</i>
D., <i>Divisional Court.</i>	L. J. N.C. (<i>Law Journal, Notes of Cases.</i>)
P. D., <i>Probate, Divorce and Admiralty Division.</i>	W. N., <i>Weekly Notes (Law Reports).</i>
Prob. or P., <i>Probate.</i>	L. R., <i>Law Reports.</i>
Ch., <i>Chancery.</i>	S. J., <i>Solicitor's Journal.</i>
K.B., <i>King's Bench.</i>	L. T. J., <i>Law Times Journal.</i>
Q.B., <i>Queen's Bench.</i>	T. L. R., <i>Times Law Reports.</i>

ADDENDA.

- Bagot v. Chapman** (col. 688).
Dicta of Swinfen Eady, J., dissented from in *Howatson v. Webb*, 77 L. J. Ch. 32; [1908] 1 Ch. 1; 97 L. T. 730.
- Charrington v. Camp** (col. 1932).
Criticised in *Leney v. Callingham*, 77 L. J. K.B. 64; [1908] 1 K.B. 79; 97 L. T. 697.
- Cobbett v. Wood** (col. 2459).
Reversed, 77 L. J. K.B. 878; [1908] 2 K.B. 420.—C.A.
- English and Colonial Produce Co., In re** (col. 365).
Dicta of Buckley, J., in, overruled in *National Motor Mail-Coach Co., In re*, 43 L. J. N.C. 448.
- Jenkins v. Price** (col. 1230).
Reversed, 77 L. J. Ch. 41.
- London United Tramways Act, 1900, In re** (col. 1272).
Overruled in *Thames Tunnel Act, In re*, 77 L. J. Ch. 330; [1908] 1 Ch. 498; 98 L. T. 488; 72 J. P. 153.—C.A.
- Rex v. Marylebone County Court Judge and Great Western Railway; Phillips, Ex parte** (col. 2018).
Reversed in *Great Western Railway v. Phillips*, 77 L. J. K.B. 306; [1908] A.C. 101; 98 L. T. 319.—H.L. (E.).

ERRATA.

- Col. 322, *Baily v. British Equitable Assurance Co.*, add "see on appeal to H.L., col. 1027."
,, 401, *Allen v. Gold Reefs of South Africa*, add "but see on appeal, same col."
,, 928, line 48, for "*Ib.*," read "*Sickert v. Sickert*, col. 927."
,, 1188, line 4, for "*Ib.*," read "*Lewis v. Baker* [1905]."

THE DECENNIAL DIGEST,

BEING A CONSOLIDATION OF

THE ANNUAL DIGESTS 1898-1907 (INCLUSIVE).

ABATEMENT.

Legacies, of.]—See WILL.

Nuisance, of.]—See NUISANCE and LOCAL GOVERNMENT.

ACCIDENT.

See INSURANCE; MASTER AND SERVANT; NEGLIGENCE.

ACCORD AND SATISFACTION.

Intention of Parties — Cheque — Receipt Annexed to Cheque.]—The defendants, who were tobacco manufacturers, agreed with their customers to distribute among them annually for four years, from April, 1902, their entire net profits on goods sold by them in the United Kingdom and in addition the sum of 50,000*l.* each quarter in proportion to their purchases. The defendants paid the first quarterly bonus, and before the time for the second distribution arrived they sold their business and went into voluntary liquidation. They paid the second bonus to each customer by means of a cheque upon a banker, which was signed by the defendants and the liquidator, the cheque being stated as sent as the customer's share of the second and final bonus distribution. The cheque was payable to the customer or order, and at the foot were the words: "The receipt at back hereof must be signed, which signature will be taken as an endorsement of this cheque." On the back were the words: "Received from Mr. Joseph Hood (liquidator of Ogdens, Limited) this cheque for" the amount specified, "being my share of the second and final bonus distribution of the company." The customers did not intend by signing this receipt to waive any right they might have against the defendants. It having been decided that the sale by the defendants of their business did not get rid of their liability under the contract,—*Held*, that the acceptance of the above cheque was not an accord and satisfaction of the customer's claim against the defendants. *Nathan v. Ogdens* (A. T. Lawrence, J., 93 L. T. 553, affirmed), 94 L. T. 126; 22 T. L. R. 57—C.A.

VOL. I.

Essential Error—Mutual Error.]—An employer tendered 2*l.* 7*s.* 4*d.* to D., a workman, who had been injured in his employment, as in full satisfaction of any claim he might have in respect of the accident, stating, as was the fact, that he had obtained a report from a surgeon that D. would be fit to return to his work in six weeks from the date of the accident. D. accepted the money, and granted a discharge in full. The medical opinion on which both parties relied proved to be mistaken, for D. was not able to work for more than six months from the date of the accident:—*Held* (Lord Young *dissentiente*), that these facts were not sufficient to shew that the parties in entering into the agreement for settlement of the workman's claim were under essential error to the effect of rendering the discharge null and void. *Dornan v. Allan*, 3 F. 112—Ct. of Sess.

Acceptance of Money in Full Discharge of Claim for Compensation for Injuries—Subsequent Development of Injuries not before Apparent—Right to bring Action for Further Damages.]—The plaintiff, who was injured in a railway collision, signed a receipt for a sum of money paid him by the railway company in full satisfaction and discharge of all claims. He returned to work, but his eyesight soon began to fail, and he became totally blind. Having commenced an action to recover damages from the railway company, the defendants pleaded that the action was not maintainable, and the question was ordered to be tried first, whether the plaintiff had by his conduct debarred himself from suing for damages:—*Held*, that the action was maintainable, it being a question for the jury. *Ellen v. Great Northern Railway*, 49 W. R. 395—Bucknill, J.

Debtor and Creditor—Promise to Pay Debt by Instalments—Consideration.]—An agreement by a debtor to pay, and the creditor to accept payment of, an existing debt by instalments is *nudum pactum*. Therefore, where a judgment creditor put in an execution upon the goods of the judgment debtor, an agreement by the debtor to pay part of the debt at once and the balance by monthly instalments affords no consideration for a promise by the execution creditor to withdraw the sheriff. *Hookham v. Mayle*, 22 T. L. R. 241—Walton, J.

ACCOUNT.

Action for—What is.]—An action for an account in equity is an action for the balance found due on taking the account; it is not a series of actions for the various items included in the account, nor a series of actions for damages for breaches of covenants to make particular payments. *Manners v. Pearson*, 67 L. J. Ch. 304; [1898] 1 Ch. 581; 78 L. T. 432; 46 W. R. 498—C.A.

Periodical Payments—Foreign Currency—Rate of Exchange—Date of Conversion.]—When a plaintiff sues a defendant in England on a contract made abroad, under which periodical payments in foreign currency ought to have been made to him in a foreign country, and the Court orders an account, he is not entitled to have each periodical sum treated as converted into English money at the rate of exchange which prevailed at the date when the payment ought to have been made under the contract. The date of conversion cannot be fixed before the balance is found on the account. *Per LINDLEY, M.R., and RIGBY, L.J. (dissentiente, VAUGHAN WILLIAMS, L.J.)*. *Ib.*

Agent, by.]—*See* PRINCIPAL AND AGENT.

Duty.]—*See* REVENUE.

Executor, by.]—*See* EXECUTOR AND ADMINISTRATOR.

Mortgagee, by.]—*See* MORTGAGE.

Partnership.]—*See* PARTNERSHIP.

Taking.]—*See* PRACTICE.

Trustee, by.]—*See* TRUSTER.

ACCUMULATIONS.

Debts—Payment out of Capital—Direction for Recoupment.]—Where debts (or portions) have been paid and satisfied out of capital moneys, a provision in a will for accumulation to recoup capital what has so been taken from it is not within the excepted cases mentioned in section 2 of the Accumulations Act, 1800, and cannot take effect after twenty-one years from the testator's death. *Tewart v. Lawson* (43 L. J. Ch. 673; L. R. 18 Eq. 490) followed. *Heathcote, In re; Heathcote v. Trench*, 73 L. J. Ch. 543; [1904] 1 Ch. 826; 90 L. T. 505—Swinfen Eady, J.

Trust to Accumulate Income until Youngest Child attains Twenty-one—Gift to all the Children of A who shall attain Twenty-one—Period of Ascertaining Class—“Portions.”]—Where a fund is settled upon parents and their children with a direction to accumulate a part of the income of the fund until the youngest child attains twenty-one, and then to distribute it, the accumulated fund is a “portion” within the meaning of section 2 of the Accumulations Act, 1800, and therefore the period of accumulation is not limited to the periods prescribed by section 1 of that Act. *Beech v. St. Vincent (Lord)* (19 L. J. Ch. 180; 3 De G. & Sm. 678) followed. *Stephens, In re; Kilby v. Betts*, 73 L. J. Ch. 8; [1904] 1 Ch. 322; 91 L. T. 167; 52 W. R. 89—Buckley, J.

The class thus entitled to take under a direction to accumulate for a period which is not cut down by the limitations imposed by section 1 of the Act is determined not by the first child attaining twenty-one, but by the arrival of the date at which the testator directs the distribution to take place. *Watson v. Young* (54 L. J. Ch. 502; 28 Ch. D. 436) followed. *Wenmoth's Estate, In re; Wenmoth v. Wenmoth* (57 L. J. Ch. 649; 37 Ch. D. 266), discussed and explained. *Ib.*

A testator gave his residuary estate to trustees in trust to set apart out of the income thereof the sum of 24l. a year until the youngest child of his daughter should attain twenty-one, and subject thereto to pay the income to his daughter for life, remainder to her husband for life, with a direction that if the daughter survived her husband the accumulation should cease, and the whole income become payable to her. After the death of the survivor the capital was given to the children:—*Held*, that section 1 of the Accumulations Act, 1800, did not apply, as the accumulation directed was a “portion” for the children within section 2 of the Act, and that the class of children did not close until the period of distribution arrived, which was when the youngest child attained twenty-one. *Ib.*

“Provisions for raising portions.”]—By a codicil to his will a testator directed his trustees to pay the income of the residue of his estates to A, his nephew's widow, during her life, and by a subsequent codicil directed them out of this income “to reserve 1,000l. annually, and to invest the same with the interest . . . accruing thereon,” in the trustees' names, for behoof of A's two daughters “equally between them, share and share alike, or in the event of one dying without leaving lawful issue, then the whole to the survivor,” “declaring that said sum shall be payable” to the daughters on A's death, “provided they have attained the age of twenty-one or have been married”:—*Held*, that the directions as to the annual reservations for behoof of A's daughters was a “provision for raising portions” for the children of a person taking an interest under the testator's will within the meaning of the second exception in section 2 of the Thellusson Act, and that consequently section 1 of that Act did not apply. *Colquhoun's Trustees v. Colquhoun*, [1907] S. C. 346—Ct. of Sess.

Will—Trust—Investment in Land—Will Made before Death of Testator after Act—Retrospective Effect.]—The Accumulations Act, 1892, applies to a will of a testator made before the passing of the Act who died after the Act came into force, for a testator does not “settle or dispose” of any property by his will until such will is brought into effective operation by his death. *Llanover (Baroness), In re; Herbert v. Freshfield (No. 2)*, 72 L. J. Ch. 729; [1903] 2 Ch. 330; 88 L. T. 856; 51 W. R. 615—Farwell, J.

The Act cannot be evaded by putting in some alternative dispositions for the accumulations, such as paying off incumbrances; those dispositions which offend against the Act will be void, and those which do not offend will remain in force. *Ib.*

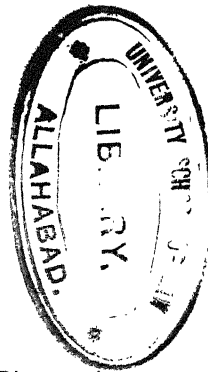
And see PERPETUITIES and WILL.

ACQUIESCENCE.*See* WAIVER.**ACT OF PARLIAMENT.***See* STATUTE.**ADEMPMENT.***See* POWERS; WILL.**ADJUDICATION.***Of Bankrupts.*—*See* BANKRUPTCY.**ADMINISTRATION.***Action.*—*See* EXECUTOR AND ADMINISTRATOR.*Assets, of.*—*See* EXECUTOR AND ADMINISTRATOR; WILL.*Letters of.*—*See* WILL.**ADMIRALTY.***See* SHIPPING.**ADMISSIONS.***As Evidence.*—*See* EVIDENCE.**ADULTERATION.***See* LOCAL GOVERNMENT.**ADULTERY.***See* HUSBAND AND WIFE.**ADVANCEMENT.***See* SETTLEMENT; WILL.**ADVERTISEMENT.***See* CRIMINAL LAW; GAMING.*Metropolis, in.*—*See* METROPOLIS.*Payment for.*—*See* TRAMWAY.*Sale of Goods—Misrepresentation.*—*See* TRADE.**AFFIDAVIT.***Evidence by.*—*See* EVIDENCE.**AGENT.***See* PRINCIPAL AND AGENT.**AGREEMENT.***See* CONTRACT.*Leases for.*—*See* LANDLORD AND TENANT.*Sale of Goods on.*—*See* SALE OF GOODS.*Sale of Land on.*—*See* VENDOR AND PURCHASER.*Shares, for.*—*See* COMPANY.**AGRICULTURE, BOARD OF.***Statute.*—3 Edw. 7 c. 31 is the *Board of Agriculture and Fisheries Act, 1903.***AGRICULTURAL HOLDING.***See* LANDLORD AND TENANT.**ALEHOUSE.***See* INTOXICATING LIQUORS.**ALIEN.***Resident—Temporary Occupation of Territory by Enemy's Forces—Alien's Duty of Allegiance—High Treason.*—*See* INTERNATIONAL LAW.*Stowaway—Ship in which Alien has been Brought to United Kingdom—Liability of Master for Expenses of Deportation.*—*See* SHIPPING (MASTER).**ALIMONY.***See* HUSBAND AND WIFE.**ANIMALS.**

1. *Statutes, 6.*
2. *Particular Animals, 6.*
3. *Cruelty to, 8.*
4. *Damage by, 11.*
5. *Other Matters, 12.*

1. STATUTES.*Diseases.*—3 Edw. 7 c. 43 is the *Diseases of Animals Act, 1903.**Dogs.*—6 Edw. 7 c. 32 is the *Dogs Act, 1906.**Injured Animals.*—7 Edw. 7 c. 5 is the *Injured Animals Act, 1907.**Wild Birds.*—63 & 64 Vict. c. 33 is the *Wild Animals in Captivity Protection Act, 1900.***2. PARTICULAR ANIMALS.**

Cows—Cowhouses—Ventilation and Air-Space—Order of Privy Council, June 15, 1885—Regulations by Local Authority.—The word "ventilation" in clause 13 of the Privy Council Order, 1885, made under the Contagious Diseases (Animals) Act, 1878, s. 34, includes air-space; and a regulation made by a local authority, under the order, that cowkeepers shall not suffer any greater number of cattle to be kept in a building used as a cowhouse than will admit of the provision of 800 cubic feet of free air-space for each cow, is *intra vires*. *Baker v. Williams*, 66 L. J. Q. B. 880; [1898] 1 Q. B. 23; 77 L. T. 495; 46 W. R. 64; 62 J. P. 21; 19 Cox C.C. 81—D.

Dogs.—*See* 6 Edw. 7 c. 32—the *Dogs Act, 1906.**Bite by—Ferocious Character—Evidence of Scierter.*—In order to render the owner of a dog liable for a bite by the dog it is not neces-

sary to show that the dog has, to the knowledge of its owner, actually bitten or attempted to bite anybody. It is sufficient to prove that the dog is to the knowledge of its master ferocious in regard to human beings. Such ferocity may be of an intermittent character, as, for instance, when a bitch has pups. *Barnes v. Lucille*, 96 L. T. 680; 23 T. L. R. 389—D.

— **Control—Summons for Order that Dog be Kept under, or Destroyed—Dangerous to Mankind—Evidence of Injury to Sheep.**—To obtain an order under section 2 of the Dogs Act, 1871, that a dog be kept under proper control or destroyed upon a complaint that the dog is dangerous, it is not necessary to prove that the dog is dangerous to mankind, as the word "dangerous" in that section is not confined to meaning dangerous to mankind. *Williams v. Richards*, 76 L. J. K.B. 589; [1907] 2 K.B. 88; 96 L. T. 644; 71 J. P. 222; 23 T. L. R. 423—D.

— **Shooting at Dog Trespassing—No Intention to Kill—Ill-treating and Abusing.**—Shooting at a dog that is trespassing, without intending to kill it, but with the intention of injuring it if necessary to frighten it away, is not of necessity cruelly ill-treating it. Each case is a question of degree and is for the Justices. *Armstrong v. Mitchell*, 88 L. T. 870; 67 J. P. 329; 20 Cox C.C. 497—D.

— **Injury to Cattle or Sheep—Liability of Owner.**—The plaintiff's sheep were trespassing on the defendant's field, which adjoined the plaintiff's land, and while the sheep were being driven by their owner back to his own field, the defendant's dog, which was in the field where the sheep were so trespassing, worried and killed one of the sheep. The defendant had several times warned the plaintiff to prevent his sheep from trespassing on his land:—*Held*, that under section 1 of the Dogs Act, 1865, the owner of the dog was liable for the injury done by his dog to the sheep, although such sheep was trespassing on his land at the time when the injury was inflicted. *Grange v. Silcock*, 77 L. T. 340; 46 W. R. 221; 61 J. P. 709; 18 Cox C.C. 644—D.

— **Dangerous Dog—Order for Destruction—Form of.**—An order for the destruction of a dangerous dog need not contain an adjudication by the Justices that the dog was not under proper control, nor by section 2 of the Dogs Act, 1871, need the Justices give the owner of the dog the option of keeping the animal under proper control before ordering its destruction. *Pickering v. Marsh* (43 L. J. M.C. 143) followed. *Rev v. Dymock*, 49 W. R. 618—D.

— **Advertising Reward for.**—See *Miramis v. "Our Dogs" Publishing Co.*, *post*, CRIMINAL LAW.

— **Sheep—Sheep Suffering from Scab—Certificate of Inspector—"Lawful Excuse."**—An inspector of a local authority certified under the Diseases of Animals Act, 1894, that certain sheep were suffering from scab, and, in terms of an order of the Board of Agriculture, gave written notice to the owner of the sheep to have them treated by dipping or other remedy in his (the inspector's) presence. The owner failed to comply with this notice. In a complaint against the owner for failing to comply with the notice the owner pleaded lawful excuse, and gave evidence to shew that the sheep were not in fact suffer-

ing from scab at the time in question. The Justices found that the sheep were not suffering from scab, and that the respondent had lawful excuse within section 52 of the Act for not complying with the notice:—*Held*, that the certificate of the inspector was conclusive evidence of what was therein stated, and that the respondent had failed to shew any lawful excuse for not obeying the notice. *Jamieson v. Dow*, 2 F. (Just. Cas.) 24—Ct. of Just.; and see CRUELTY.

— **Swine—Holding Sale of—Taking Round Swine in Cart and Offering for Sale.**—By an order of the Board of Agriculture, dated December 11, 1896, made in pursuance of the Diseases of Animals Act, 1894, s. 22, sub-s. 19, "no market, fair, sale, or exhibition of swine shall be held in a district to which this order applies, except as expressly authorised by this order," and "a sale of swine (not being in a swine fever infected area) may be held with the licence of the local authority." The respondent Monk was in charge of a horse and float passing along a highway containing pigs, two of which had been previously ordered, and, whilst so travelling, asked other people if they wanted to buy pigs, and subsequently sold them all to various people. This was not a swine fever infected area, and there had been no licence obtained from the local authority. The magistrates held that there had been no contravention of the order of 1896, and dismissed the information:—*Held*, that the magistrates were right, for, although there was a selling, there was no holding a sale. *McLean v. Monk*, 77 L. T. 663; 62 J. P. 180; 18 Cox C.C. 686—D.

3. CRUELTY TO.

— **Intention to Commit Cruelty.**—An intention to commit cruelty is no part of an offence under section 2 of the Cruelty to Animals Act, 1849. The question is, whether in fact there is cruelty. *Duncan v. Pope*, 80 L. T. 120; 63 J. P. 217; 19 Cox C.C. 241—D.

— **Branding Sheep—Branding Nose with Hot Iron—Necessity for Identification.**—The respondent, who was a farmer in a mountain district in Wales, used to brand his sheep by marking their noses with a red-hot iron so as to burn the hair away and destroy the hair cells, thus leaving a permanent mark. Upon an information under section 2 of the Cruelty to Animals Act, 1849, charging the respondent with having cruelly ill-treated and tortured the sheep, the Justices found that branding the sheep with a hot iron as above described caused substantial pain and suffering; that there had been no unnecessary abuse of the sheep; that the practice of branding sheep on the uninclosed mountain lands in certain counties in Wales had existed for a great number of years; and that it was reasonably necessary for the purpose of identifying sheep grazing in large numbers on uninclosed mountain lands, which could not be effectually obtained by earmarking and pitchmarking. They accordingly dismissed the information:—*Held*, that there was evidence upon which the Justices could come to the conclusion that the branding was necessary, and the Court could not interfere. *Bowyer v. Morgan*, 95 L. T. 27; 70 J. P. 253; 22 T. L. R. 426—D.

Working Horse in an Unfit State—Guilty Knowledge.—The appellant, who was charged with causing two horses to be worked in an unfit state, carried on business in London, and the two horses in question were under the charge of one L. at a farm at C., where the appellant resided. He was practically always away, and did not see the horses above once a fortnight, they being under the entire management of L. There was some evidence that the appellant knew that the horses had been out of condition at some time, but no evidence was given as to the date when that was, or how long it was before the alleged improper working. There was no evidence that the appellant had interfered with L., had given any order for the horses to be worked, or knew of their condition on the day in question. On May 2, 1901, the horses were being worked in an unfit state. The Justices convicted the appellant:—*Held*, that there was a failure on the part of the prosecution to give any evidence of guilty knowledge with regard to the offence in question. *Greenwood v. Backhouse*, 86 L. T. 566; 66 J. P. 519; 20 Cox C.C. 196—D.

Lion Tamer—Pony in Lion's Cage—Pony Attacked by Lion.—The appellant conducted a public performance with lions in a cage. The performance consisted of a roundabout with six boats, in each of which there was a lion, the roundabout being drawn by a pony. At one of the performances a lion jumped out of its boat on to the hindquarters of the pony and sniffed at it. It was driven back to its boat by the appellant, but immediately afterwards, when his attention was diverted, the lion attacked the pony, and so injured it that it died. The appellant had given a similar performance for several years. Formerly, during the performance, three or four men with iron bars kept watch on the stage; but recently, instead thereof, one man with a fire-hose kept watch. The magistrates convicted the appellant under section 2 of the Cruelty to Animals Act, 1849, of having caused the pony to be cruelly ill-treated:—*Held*, that there was evidence of *mens rea* upon which the magistrates could convict, and that the conviction must be affirmed. *Thielbar v. Craigen*, 93 L. T. 600; 69 J. P. 421; 21 Cox C.C. 44; 21 T. L. R. 745—D.

Cock—Cock-fighting.—A cock is an animal within section 2 of the Cruelty to Animals Act, 1849, and to cause cocks to fight is an offence within that section. *Budge v. Parsons* (3 B. & S. 382) and *Bates v. McCornick* (8 Ir. Jur. N.S. 239) followed. *Allen v. Small*, [1904] 2 Ir. R. 705—K.B. D.

"Brought to or delivered at such place for the purpose of being slaughtered."—The respondent, a licensed horse-slaughterer, purchased a mare for 10s., for working which the seller had been fined, and sent it by his servant to his premises licensed for the slaughter of such animals. He entered it in his statutory register "... bought ... brown mare to kill for 10s." The mare was kept on those premises for nine days, and, after being cautioned, the respondent had cut the hair from its neck:—*Held*, that the mare had been brought to the premises for the purpose of being slaughtered within section 8 of the Cruelty to Animals Act, 1849. *Edgar v. Spain*, 84 L. T. 631; 65 J. P. 502; 19 Cox C.C. 719—D.

Shooting a Cat—Cat left in Pain.—The respondent shot a cat which belonged to his next-door neighbour, and which was at the time in the respondent's garden, with a saloon rifle, intending to kill it. The bullet struck the cat in the back, wounding it severely, but not killing it. The respondent saw that the cat was not dead, and it crawled away on to its owner's property out of sight of the respondent. After about half an hour the cat was found by its owner alive, but in great pain, and it was killed. Upon an information charging the respondent, under section 2 of the Cruelty to Animals Act, 1849, with cruelty to the cat, the Justices dismissed the summons upon the authority of *Powell v. Knight* (38 L. T. 607), there being no finding by them that, after shooting the cat, the respondent with knowledge of what he had done allowed the cat to linger on in pain:—*Held*, that the Justices were right. *Hooker v. Gray*, 96 L. T. 706; 71 J. P. 337; 23 T. L. R. 472—D.

"Domestic Animal"—Tame Seagull used in Photographer's Business.—In order to bring an animal wild by nature within the meaning of the term "domestic animal" in the Cruelty to Animals Acts, 1849 and 1854, it must be proved not only that it is tame, but that it is sufficiently tamed to serve some purpose for the use of man. *Yates v. Higgins*, 65 L. J. M.C. 31; [1896] 1 Q.B. 166; 44 W. R. 335; 60 J. P. 88—D.

It was found by justices that a tame seagull had been used by a photographer in her business, but there was nothing to show that the finding meant more than that the bird had been photographed:—*Held*, that it was not shown that the bird was sufficiently tamed to serve some purpose for the use of man, and therefore the bird was not proved to be a domestic animal within the meaning of the Cruelty to Animals Acts, 1849 and 1854. *Id.*

—Performing Lions.—Lions kept in a cage are wild animals kept in confinement, and not "domestic animals" within the Cruelty to Animals Acts, 1849 and 1854. A domestic animal is one which has been tamed for the service of man. *Harper v. Marks*, [1894] 2 Q.B. 319; 63 L. J. M.C. 167; 70 L. T. 804; 42 W. R. 605; 58 J. P. 527; 17 Cox C.C. 758; 10 R. 335—D.

Failure to Dip Sheep on Certain Date—Conviction Disclosing no Offence.—The appellant, as the owner of certain sheep, duly obtained an exemption from the provisions of article 3 of the Sheep Dipping (North of England) Order of 1906, subject to the condition that the sheep should be dipped between September 15 and 30, 1906, and should not be moved in the meantime. On September 26, 1906, the sheep were dipped in a sheep-dip which was not a sheep-dip approved by the Board of Agriculture and Fisheries. The sheep were not again dipped on or before September 30. The appellant was thereupon prosecuted and convicted "for that he on the 26th day of September, 1906 ... then being the owner of certain sheep, did not dip the same in a sheep-dip approved by the Board of Agriculture and Fisheries ...":—*Held*, that the conviction must be quashed, as it disclosed no offence, the offence created by the order in question being not that the sheep were not dipped in an approved dip on September 26, but that they were not dipped in an approved dip by September 30. *Bingley v. Quest*, 97 L. T. 394; 71 J. P. 443; 5 L. G. R. 938—D.

Counselling Commission of Offence.—Where a person aids or abets an offence which is punishable on summary conviction, he is liable under section 5 of the Summary Jurisdiction Act, 1848, to be proceeded against in every respect as if he were a principal offender. Therefore a person who knowingly counsels the owner of a horse to perpetrate an act of cruelty upon the animal may be convicted, upon an information under section 2 of the Cruelty to Animals Act, 1849, for cruelly ill-treating the horse, although the advice given by him to the owner was the remote and not the proximate cause of the cruelty. *Benford v. Sims*, 67 L. J. Q.B. 655; [1898] 2 Q.B. 641; 78 L. T. 718; 47 W. R. 46; 19 Cox C.C. 141—D.

Cruelty to Five Animals—Summons—Whether Distinct and Separate Offences.—Where a person has been guilty under section 2 of the Cruelty to Animals Act, 1849, of cruelty to a number of animals at the same time, it is competent, but not necessary, to take out separate summonses in respect of each animal; one summons may charge the offence in respect of the whole of the animals. Therefore the conviction of a person for cruelty to five animals is not bad on its face as being a conviction for five separate and distinct offences. *Rex v. Cable*; *O'Shea, Ex parte*, 75 L. J. K.B. 381; [1906] 1 K.B. 719; 94 L. T. 772; 54 W. R. 626; 70 J. P. 246; 21 Cox C.C. 186; 22 T. L. R. 438—D.

4. DAMAGE BY.

Animals Feræ Naturæ — Rabbits—Deer.—In the year 1898 W. came into possession of a demesne where there were rabbits and deer, which trespassed upon adjoining lands in the occupation of B., doing considerable damage to his crops. W.'s predecessor had, on two occasions, let loose foreign rabbits, with a view to the improvement of the breed, and W. had, since he entered into possession, trapped the rabbits for profit, and exported them to England, but had done nothing to improve them or increase their numbers. Rabbits bred in considerable numbers on B.'s lands as well. The deer, which at one time had been confined within a walled deer-park in the demesne, broke loose in the year 1893 through a temporary breach in the wall, and only portion were recaptured. The remainder had since been wandering about the demesne, breeding there, and trespassing continually on B.'s lands, but always returning to the demesne. W., with his friends, occasionally shot the deer for sport; and, in response to B.'s complaints, told him that he might shoot them; and, in fact, gave it out generally in the neighbourhood that he desired that any one who could shoot them might do so. At the same time he kept a wood-ranger, whose duty it was to look after the deer, and his predecessor had occasionally fed the deer in winter time with bay, laurels, and oats:—*Held*, that W. was not liable in respect of the damage done by the trespass of the rabbits. *Held* also (Bovd, J., dissenting), that there was evidence to support the finding of the jury that the deer were W.'s deer, that they were tame, and "kept" by W., and under his control; and that W. was liable upon that finding for any damage done by the deer to B.'s land and crops. *Brady v. Warren*, [1900] 2 Ir. R. 632—Q.B. D.

5. OTHER MATTERS.

Diseases—By-laws.—*See* MARKETS.

Diseases—Liability of Local Authority for Negligence of Inspector.—*See* LOCAL GOVERNMENT.

Shooting at Dog — Malicious Damage.—*See* CRIMINAL LAW.

Unlawful Possession of Deer.—*See* CRIMINAL LAW.

Wild Birds.—*See* WILD BIRDS.

ANNUITY.

1. *Direction to Purchase*, 12.
2. *Charge of*, 13.
3. *Duration*, 14.
4. *Payment*, 15.
5. *Valuation*, 16.
6. *Commutation*, 16.
7. *Other Matters*, 17.

1. DIRECTION TO PURCHASE.

Direction in Will to Purchase Government Annuity for Life of Widow—Death of Widow before Probate—Right to Value of Annuity.—Where a testator gave his residuary estate to trustees upon trust to convert the same, and out of the proceeds to purchase a Government annuity of a given amount for the life of an annuitant, and the annuitant survived the testator, but died before the annuity could be purchased or the will proved, her legal personal representatives were entitled to such a sum as would at the date of the testator's death have sufficed to purchase the annuity. *Dawson v. Hearn* (9 L. J. (o.s.) Ch. 249; 1 Russ. & M. 606) followed. *Robbins, In re*; *Robbins v. Legg*, 75 L. J. Ch. 751; [1906] 2 Ch. 648—Swinfen Eady, J.

Government Annuity for Life of Testator's Widow—No Time prescribed for Purchase—Death of Widow before Probate—Right to Value in Money of Annuity at Testator's Death.—Where a testator gave his residuary real and personal estate to trustees upon trust to convert the same and out of the proceeds to purchase a Government annuity of 400l. for the life of his wife, and she survived the testator, but died sixteen days later and before the will was proved or any steps had been taken by the executors to purchase the annuity, her legal personal representatives were held entitled to such a sum as would at the date of the testator's death have been required to purchase the annuity. The character of the annuity does not depend upon the form in which it is secured, and in the absence of words defining the date of its commencement it ought in all cases to commence from the testator's death. *Robbins, In re*; *Robbins v. Legg*, 76 L. J. Ch. 531; [1907] 2 Ch. 8; 96 L. T. 755—C.A.

In the case of a Government annuity directed to be purchased on a prescribed day there is an implied gift of the annuity out of the testator's estate from the prescribed day until the purchase is made; and when no time is prescribed

there is an implied gift of the annuity from the testator's death until the purchase is made. *Ib.*

Dawson v. Hearn (9 L. J. (o.s.) Ch. 249; 1 Russ. & M. 606) explained and applied. Decision of SWINFEN EADY, J. (75 L. J. Ch. 751; [1906] 2 Ch. 648), affirmed. *Ib.*

2. CHARGE OF.

Whether Charged on Corpus or on Income only.]

—By marriage settlement the intended husband granted lands to trustees upon trust to permit him to receive the rents and profits for life, without impeachment of waste, and after his death to permit the intended wife to receive 300*l.* a year "out of the rents, issues, and profits thereof, for and during her life, without impeachment of waste, and for her jointure," and in lieu of dower, and "immediately after her decease" in trust for the settlor, his heirs and assigns. The settlor covenanted that the lands or any property to be taken in exchange therefor under a power of exchange therein contained should, during the life of the wife, produce the clear yearly sum of 300*l.* In case of there being issue of the marriage living at the death of the settlor, all his estate and property at the time of his death was charged with a sum of 3,500*l.* for such issue:—*Held*, that the annuity was a charge upon the *corpus* of the settled property. *West's Estate, In re*, [1898] 1 Ir. R. 75—C.A.

Grant of—Charge on Moiety of Tenant in Common—Right of Distress.]—By his will, dated November, 1831, J. W. devised certain lands and premises to his daughters A. and H. as tenants in common in tail. A. married H. A. and H. the defendant. In 1858 by a deed of settlement on her marriage H. disentailed her moieties, and settled them upon trust to pay the income to the defendant for his life or until he became bankrupt, and then for the issue of the marriage, and in default of issue (which was the case) in default of appointment for her next-of-kin. H. died in 1863, and the defendant became bankrupt in 1873, and thereupon A. became entitled to the whole. In 1881 a deed was executed between A., her husband and the defendant, whereby A. with the assent of her husband, in contemplation of the defendant's second marriage, agreed to grant to the defendant an annuity of 300*l.* charged upon the moieties, shares, and premises comprised in the marriage settlement of 1858 payable out of the rents and profits and income thereof respectively. And by that deed if the annuity should be in arrear the defendant could enter into and distrain upon all or any of the said moieties, shares or premises, and hold them and receive and take the rents and profits thereof until the arrears were satisfied. The rental value of the undivided moiety has been of late years quite insufficient to satisfy the annuity, the profits of the whole hardly amounting to that sum:—*Held*, that although there was power to distrain on the entirety of the lands, the deed gave him no power to distrain for more than one-half of the rents and profits of the whole. *Ashwin v. Bullock*, 81 L. T. 48—Bucknill, J.

Charge on Certain Freehold Land—No Specific Devise of the Land—Mixed Residue—Rent-charge

or Legacy—Estate Duty.]—Whether a gift of an annuity followed by a direction that it is to be a charge on certain land makes it a charge on that land only, and renders the personalty not liable, depends upon whether, according to the true construction of the instrument in question, that is the result. Where there is a simple gift of a legacy or annuity with a mere charge upon real estate, the personal estate is not only not exonerated, but remains primarily liable. *Trenchard, In re; Trenchard v. Trenchard*, 74 L. J. Ch. 135; [1905] 1 Ch. 82; 92 L. T. 265; 53 W. R. 235—Warrington, J.

A testator by his will gave his wife, so long as she should remain his widow, an annuity of 500*l.*, and declared that the same should be a first charge on certain freehold land at Greenwich not specifically devised by the testator, and after giving certain legacies devised and bequeathed all his real and personal estate not otherwise disposed of to trustees upon trust for sale and conversion and out of the proceeds to pay his funeral and testamentary expenses and debts and legacies, and to stand possessed of the residue upon certain trusts:—*Held*, on the construction of the will, that the annuity was not a rentcharge, but a mere personal legacy payable like the other legacies out of the mixed residue of real and personal estate, but with a special charge if necessary on the land at Greenwich, and that consequently the estate duty was payable out of such residue as a testamentary expense. *Ib.*

Lomax v. Lomax (19 L. J. Ch. 137; 12 Beav. 285), *Shipperdson v. Tower* (1 Y. & C. C.C. 441) *Patching v. Barnett* (51 L. J. Ch. 74), *Buckley v. Buckley* (19 B. R. Ir. 544), and *Waring, In re; Greer v. Waring* ([1896] 1 Ir. R. 427), considered. Statement of law in *Theobald on Wills* (5th ed.), p. 442, modified. *Ib.*

"Use upon a use"—"Rent"—Express Trust.]—

A "rent" may be created after a use, so as not to transgress the rule that a use cannot be limited upon a use. The gift of a "rent" by a limitation of a use upon a use does not necessarily create a trust or equitable estate, but may create a new legal estate and give the seisin in the "rent" to the annuitant, and such a "rent" will not be deemed a "use upon a use." *Hanly v. Carroll*, [1907] 1 Ir. R. 166—C.A.

3. DURATION.

Whether for Life or Perpetual.]—A testator devised all his property to his two sons, William and Thomas, equally. Portion of his property, which he specified, he charged item by item with certain annuities. He also gave to his two sons all other unmentioned property of his. The will contained the following direction: "My two sons Thomas and William are to pay out my property as follows: to pay to my wife yearly during her life 18*l.* 4*s.*; to my daughter Mrs. O'Neill yearly 36*l.* 8*s.*; to my son Tim Ward yearly 18*l.* 4*s.*; to said William Ward's eldest son yearly 3*l.* 12*s.*" The testator then directed that after the death of his wife her annuity was to be equally divided between Thomas, William, and Tim Ward and Mrs. O'Neill, and that after the decease of Mrs. O'Neill her annuity was to be divided equally between her surviving children. Should Tim

Ward not come home, or die without issue, his annuity was to be divided equally "on the surviving families, viz. Mrs. O'Neill, Thomas, William, and mother":—*Held*, that the annuities were for the lives of the annuitants only, and not perpetual. *Ward v. Ward*, [1903] 1 Ir. R. 211—V.C.

— A testatrix devised her interest in certain lands to trustees on trust "to permit my nephew R. B. O. to receive every year the sum of 100*l.* during his natural life, and after his death to the use of his son or sons as may be most deserving, or as he may by will appoint." The power of appointment was never exercised. R. B. O. left two sons who received the annuity during their lives and the life of the survivor. On the death of the survivor,—*Held*, that the annuity terminated with the death of the survivor of the two sons of R. B. O. *Smith's Estate*, *In re*, [1905] 1 Ir. R. 453—C.A.

Terminable or Perpetual.—By marriage settlement, L. R., being entitled to certain lands held under a bishop's lease for twenty-one years, customarily renewable, and also to certain other lands held under a lease for a term of sixty-one years, demised the former to the trustees of the settlement for the term of one hundred years, and the latter for a term of thirty years, upon trust, after the solemnisation of the intended marriage, for the said L. R. and his assigns, during the residue of the said terms of one hundred years and thirty years, if he should so long live, and from and after the decease of L. R., during the continuance of the said terms, in trust to permit T. N. (the intended wife), if she should survive L. R., yearly during as many years of the said term as she should survive L. R., to have, receive, and take out of the said premises an annual sum or yearly rentcharge of 300*l.*, as and for her jointure, and also the said annuity or yearly rentcharge of 300*l.* to be charged and chargeable on the said lands for ever, in trust, after the decease of T. N., for the issue of the marriage, in such shares as L. R. and T. N. should appoint, and in default of appointment share and share alike. The lands comprised in the bishop's lease were subsequently conveyed to L. R. in fee-simple:—*Held*, that the annuity was terminable by the expiration of the terms vested in the trustees. *Finlay's Estate*, *In re*, [1907] 1 Ir. R. 24—Wylie, J.

4. PAYMENT.

Payable out of Income—Arrears of Annuity—Charge on Corpus—Continuing Charge on Income.—A testatrix, after bequeathing certain legacies, devised and bequeathed all the residue of her estate to trustees upon trust to convert and invest the same, and out of the income thereof to pay annuities to three persons for their respective lives, including an annuity of 300*l.* to D., and "subject thereto" to pay the income of all the said moneys and investments to her sister during her life; and the testatrix directed her trustees after her sister's death to raise out of capital and pay certain pecuniary legacies, and "subject to the trusts aforesaid" to hold the trust premises and the income thereof in trust for certain persons in equal shares absolutely. D. died in 1902, and at his death his annuity was largely in arrears, as the income of the residuary estate had proved insufficient

to pay the annuities:—*Held*, that, in so far as the annuity of D. was in arrear at his death, the annuity failed, the testatrix having shewn no intention in her will either to charge the annuities on *corpus* or to make the arrears of the annuities a continuing charge on income. *Bigge*, *In re*; *Granville v. Moore*, 76 L. J. Ch. 413; [1907] 1 Ch. 714; 96 L. T. 903—Neville, J.

The question whether an annuity is charged on *corpus*, or, if not so charged, whether it is payable out of current income only, or constitutes a continuing charge on income, depends in every case on the words of the particular will construed in their ordinary grammatical sense. *Id.*

Payment—Capital or Income.—*See* TENANT FOR LIFE AND REMAINDERMAN.

5. VALUATION.

Administration—Valuation of Annuity—Successive Annuitants—Arrears—Hotchpot.—Where a life annuity is given to persons in succession, and the estate being ascertained to be insufficient at some period after the testator's death, the annuity requires to be valued for the purposes of administration, the interest in future of such of the annuitants as may still be living are alone valued, and a prior annuitant is not required to bring into hotchpot sums already paid to him before the date fixed for the valuation to be made. Where the annuity of a prior annuitant who dies before a valuation is made is in arrear at his death, the arrears must be paid up in full out of the fund applicable to that purpose before a reversionary annuitant is entitled to claim anything, notwithstanding that the fund is thereby entirely exhausted. *Todd v. Bielby* (27 Beav. 353) and *Potts v. Smith* (39 L. J. Ch. 131; L. R. 8 Eq. 633) considered. *Metcalf*, *In re*; *Metcalf v. Blencowe*, 72 L. J. Ch. 786; [1903] 2 Ch. 424; 88 L. T. 727; 51 W. R. 650—Farwell, J.

Upon the construction of the will, the Court held that sums raised out of capital under a power to mortgage, and paid in satisfaction of prior annuities, need not be brought into hotchpot for the benefit of subsequent annuitants. *Id.*

6. COMMUTATION.

Commutation for Fixed Sum—Tenant for Life and Remaindermen—Capital and Income—Apportionment—Actuarial Values.—A testator gave property, subject to an annuity, to his daughter for life with remainder to her children. The annuitant agreed to take a fixed sum of 3,500*l.* for the annuity, which sum the daughter paid out of her own moneys:—*Held*, that the daughter was entitled to be repaid the 3,500*l.* out of the estate, and that it ought to be raised by sale or mortgage so as to throw a fair proportion of the burden on the tenant for life and remaindermen. *Muffett*, *In re*; *Jones v. Mason* (57 L. J. Ch. 1017; 39 Ch. D. 534), and *Bacon*, *In re*; *Grissel v. Leathes* (62 L. J. Ch. 445), followed. *Dawson*, *In re*; *Arathoon v. Dawson* (75 L. J. Ch. 604; [1906] 2 Ch. 211), not followed. *Henry*, *In re*; *Gordon v. Gordon*, 76 L. J. Ch. 74; [1907] 1 Ch. 30; 95 L. T. 776—Kekewich, J.

7. OTHER MATTERS.

Covenant to Pay—Apportionment—Capital and Income.]—See *TENANT FOR LIFE AND REMAINDERMAN*.

Payment without Deduction—Income Tax—Breach of Trust.]—See *Sharp, In re, post, TRUST*.

Statutory Charge—Deduction from Rent—Incidence.]—See *Smith, In re; Smith v. Dods-worth, post, WILL*.

Wife, to, under Separation Deed—Deduction of Income Tax.]—See *HUSBAND AND WIFE*.

APPEAL.

1. Generally, 17.

(a) *To House of Lords*, 17.

(b) *To Court of Appeal*, 18.

(c) *To Divisional Court*, 21.

(d) *In other Cases*, 22.

2. Interlocutory or Final Appeal, 22.

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8. Evidence, 26.

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10. Costs, 28.

1. GENERALLY.

(a) *TO HOUSE OF LORDS.*

Final Character of Decision.]—A decision of the House of Lords upon a question of law is conclusive and binding upon the House itself. Nothing but an Act of Parliament can set right that which is alleged to be wrong in such decision. *London Tramways Co. v. London County Council*, 67 L. J. Q.B. 559; [1898] A.C. 375; 73 L. T. 361; 46 W. R. 609; 62 J. P. 675—H.L. (E.)

Certiorari—Jurisdiction.]—By the joint operation of section 12 of the Appellate Jurisdiction Act, 1876, and section 86 of the Judicature (Ireland) Act, 1877, there is no appeal to the House of Lords from an order of the Irish Court of Appeal affirming or discharging an order for the issue of a writ of *certiorari*. *Reg. v. Barton*, 71 L. J. P.C. 80; [1902] A.C. 268; 87 L. T. 82—H.L. (Ir.)

Practice—Concurrent Findings of Fact by Tribunals Below.]—There is no rule of practice that the House of Lords will not entertain an appeal on a question of fact where there have been concurrent findings in the Courts below. Observations in *Gray v. Turnbull* (L. R. 2 H.L. Sc. 53), *The P. Caland (Owners) v. Glamorgan Steamship Co.* (62 L. J. P. 41, 44; [1893] A.C. 207, 215), and *McIntyre Bros. v. McGavin* ([1893] A.C. 268, 275) explained. *Montgomerie v. Wallace-James* (No. 1), 73 L. J. P.C. 25; [1904] A.C. 73; 90 L. T. 1—H.L. (Sc.)

Common Law Court in Ireland—Interlocutory Order.]—No appeal lies to the House of Lords from an interlocutory order made in Ireland by a common law Court, or by the Court of Appeal

therefrom. *Gosford (Earl) v. Irish Land Commission*, 68 L. J. P.C. 69; [1899] A.C. 435; 81 L. T. 330—H.L. (Ir.)

Interlocutor of Court of Session.]—In cases arising in the Sheriff Court and appealed to the Court of Session the interlocutor of the Court of Session must contain all the findings of fact; for, if a fact is not found by the interlocutor appealed against, the House of Lords must, unless the parties agree to the fact not found, remit the cause to the Court of Session to find the fact in question. *Glasgow Corporation v. M'Omish*, [1898] A.C. 432—H.L. (Sc.)

Appeal from Several Interlocutors—Allowance of Appeal—Interlocutors not Argued—Form of Order.]—Where an appeal was brought from several interlocutors of the Court of Session in Scotland, but the appeal from one interlocutor only was argued, the defendants were held not to be entitled to an order for the reversal generally of the interlocutors appealed from, but only of that on which the House had heard arguments. *Montgomerie v. Wallace-James* (No. 2), 73 L. J. P.C. 116; [1904] A.C. 214—H.L. (Sc.)

From Scottish Courts.]—See *SCOTLAND*.

Right of Peer to Argue as Counsel.]—See *PEERAGE*.

(b) *TO COURT OF APPEAL.*

Statute.]—62 & 63 Vict. c. 6 is the *Supreme Court of Judicature Act*, 1899.

— 2 Edw. 7 c. 31 is the *Supreme Court of Judicature Act*, 1902.

“Criminal cause or matter”—Order to Pull down Building in London.]—A magistrate convicted a person of having erected a building beyond the general line of buildings in a street in London and made an order for the demolition thereof, under the provisions of the London Building Acts, 1894 and 1898, and he refused to state a Case for the opinion of the High Court. The King's Bench Division refused to grant a rule *nisi* for a *mandamus* to the magistrate to state a Case, but a rule *nisi* was granted by the Court of Appeal:—*Held*, that this was a “criminal cause or matter” within the meaning of section 47 of the Judicature Act, 1873, and that the Court of Appeal had no jurisdiction to entertain the application for a *mandamus*. *Re v. D'Eyncourt*, 85 L. T. 501; 20 Cox C.C. 68—C.A.

“Criminal cause or matter”—Recovery of General District Rate.]—Sections 6 and 22 of the Summary Jurisdiction Act, 1879, apply to proceedings taken under section 256 of the Public Health Act, 1875, for the recovery of a general district rate made by an urban authority under that Act, and an appeal lies to the Court of Appeal from a judgment of the High Court, on a Case stated by Justices on the hearing of a complaint for non-payment of the rate, for such appeal is not an appeal “from a judgment of the said High Court in any criminal cause or matter” within the meaning of section 47 of the Judicature Act, 1873. *Seaman v. Burley* (65 L. J. M.C. 208; [1896] 2 Q.B. 344) distinguished. *Southwark and Vauxhall Water Co. v. Hampton Urban Council*, 68 L. J. Q.B.

207; [1899] 1 Q.B. 273; 79 L. T. 512; 47 W. R. 177; 63 J. P. 100—C.A. And see *Robson v. Biggar*, 77 L. J. K.B. 203; [1908] 1 K.B. 672; 97 L. T. 859—C.A.

Case Stated—Judgment Entered by Quarter Sessions before Hearing of Appeal.—An appeal lies to the Court of Appeal from a decision of the Queen's Bench Division upon a Case stated under the Quarter Sessions Act, 1849, s. 11, notwithstanding that judgment has been entered by the Court of quarter sessions in conformity with the decision before the hearing of the appeal. *Lodge v. Huddersfield Corporation* (No. 2), 67 L. J. Q.B. 571; [1898] 1 Q.B. 859; 78 L. T. 582; 46 W. R. 482; 62 J. P. 515—C.A.

Special Case.—No appeal lies from the decision of the High Court upon a Special Case stated by an arbitrator with regard to a question of law arising in the course of the reference under section 19 of the Arbitration Act, 1889. *Knight and Tabernacle Permanent Building Society, In re* (62 L. J. Q.B. 33; [1892] 2 Q.B. 613), followed. *Shrewsbury (Countess) v. Shrewsbury (Earl)*, 23 T. L. R. 224—C.A.

— **Order in "any matter not being an action"** — **Proceedings under Merchant Shipping Act, 1894, and Employers and Workmen Act, 1875—Time for Appealing—Order LVIII. rule 15.**—The decision of a Divisional Court on Special Cases stated under section 164 of the Merchant Shipping Act, 1894, and under the Employers and Workmen Act, 1875 (as amended by section 11 of the Merchant Seamen (Payment of Wages) Act, 1880), being an order in a matter not being an action within Order LVIII. rule 15, no appeal can be brought from that decision to the Court of Appeal after the expiration of fourteen days from the date of the decision, except by special leave. *Austin Friars Steamship Co. v. Strack*, 75 L. J. K.B. 658; [1906] 2 K.B. 499; 94 L. T. 875; 70 J. P. 528; 22 T. L. R. 701—C.A.

Arbitration Clause in Statute—Objection to Jurisdiction of High Court.—The provision for arbitration contained in section 33 of the Tramways Act, 1870, ousts the jurisdiction of the High Court with regard to differences coming within the terms of the section. Where such a provision applies, objection to the jurisdiction of the High Court may be taken on appeal in the Court of Appeal, although it has not been taken at the trial. *Norwich Corporation v. Norwich Electric Tramways Co.*, 75 L. J. K.B. 636; [1906] 2 K.B. 119; 95 L. T. 12; 54 W. R. 572; 70 J. P. 401; 4 L. G. R. 1114; 22 T. L. R. 553—C.A.

Judicial Separation—Divorce—Consolidation of Suits—Costs against Co-respondent.—A wife having filed a petition for judicial separation, on the ground of her husband's cruelty, the husband afterwards filed a petition for dissolution of the marriage. An order was made for the consolidation of the two suits, and they came on for trial together. The wife's charge against the husband was withdrawn, there being no evidence in support of it; and her petition was dismissed. On the husband's petition a decree *nisi* was made for dissolution of the marriage, with costs and damages against the co-respondent, and the decree was afterwards made absolute. Upon the taxation of the costs under the final decree, the co-respondent was ordered to pay the costs of the wife's petition:—

Held, that this order, not being an interlocutory order within section 1 of the Judicature Act, 1894, was part of the final decree, and that consequently an appeal against the order could be brought without the leave of the Court. *Forbes-Smith v. Forbes-Smith*, 70 L. J. P. 61; [1901] P. 258; 84 L. T. 789; 50 W. R. 6—C.A.

From Judge at Chambers—Order directing Arbitrator to State a Case—Appeal to Court of Appeal—"Matters of practice and procedure."

—An order of a Judge at chambers under section 19 of the Arbitration Act, 1889, directing an arbitrator to state a question of law arising in the course of a reference in the form of a Special Case for the opinion of the Court is not a matter of practice and procedure within the meaning of section 1, sub-section 4 of the Judicature Act, 1894, and therefore an appeal will not lie from it to the Court of Appeal. *Frere and Staveley Taylor & Co. and North Shore Mill Co., In re*, 74 L. J. K.B. 208; [1905] 1 K.B. 866; 92 L. T. 194; 53 W. R. 242; 21 T. L. R. 188—C.A.

Action Referred to Master with Consent of Parties—Appeal from Master to Court of Appeal.

—No appeal from the decision of a Master, to whom an action has been referred with the consent of the parties, under Order XIV. rule 7, lies direct to the Court of Appeal. *Fraser v. Fraser* (No. 1), 73 L. J. K.B. 6; [1904] 1 K.B. 56; 89 L. T. 491; 52 W. R. 147; 20 T. L. R. 54—C.A.

But a motion lies to a Divisional Court under Order XL. rules 6, 6A, to set aside the judgment which he has directed to be entered, and to enter some other judgment. *Fraser v. Fraser* (No. 2), 74 L. J. K.B. 183; [1905] 1 K.B. 368—C.A.

Amendment at Trial—Patent—Assignee's Right to Sue.—At the trial of an action for infringement of patent the Court held that

the plaintiffs had no title to sue without joining other parties as co-plaintiffs. The plaintiffs having elected to amend by adding these parties, the Court gave the defendants leave to amend their defence on certain terms as to costs. On an appeal by the plaintiffs from this order, *Held*, that there was no order against which they could appeal. *Bowden's Patents Syndicate v. Smith*, 73 L. J. Ch. 776; [1904] 2 Ch. 122—C.A.

Interlocutory Order—Refusal to Commit—Liberty of the Subject.—By the Supreme Court of Judicature Act, 1894, s. 1, sub-s. 1 (b), no

appeal lies without the leave of the Judge or of the Court of Appeal from an interlocutory order made by a Judge dismissing a motion to commit. Such an order is not within the exception contained in sub-clause (i) of that section. *Bowden v. Yozall*, 70 L. J. Ch. 5; [1901] 1 Ch. 1; 83 L. T. 419; 49 W. R. 247—C.A.

Transfer of Action to Commercial List.—Where a Judge of the Queen's Bench Division

charged with commercial business orders the transfer of a cause to the Commercial List, an appeal lies to the Court of Appeal upon the ground that the cause is not a commercial cause. *Sea Insurance Co. v. Carr*, 69 L. J. Q.B. 954; [1901] 1 K.B. 7; 83 L. T. 517; 49 W. R. 55; 9 Asp. M.C. 138; 6 Com. Cas. 11—C.A.

Liverpool Court of Passage—Interpleader Issue—Ruling of Judge at Trial—Appeal.—An appeal lies to the Court of Appeal from the ruling of the Judge of the Liverpool Court of Passage at the trial of an interpleader issue. *Coates v. Moore*, 72 L. J. K.B. 539; [1903] 2 K.B. 140; 89 L. T. 8; 51 W. R. 648—C.A.

From Order as to Costs.—*See* COSTS.

Defect of Parties.—A member of an industrial and provident society became insane, and the society, purporting to act under section 29 of the Industrial and Provident Societies Act, 1893, transferred a balance standing to the lunatic's credit in their books to the credit of his wife (who was also a member of the society) on the footing that she was a person whom they deemed proper to receive the balance on the lunatic's behalf. Guardians who had incurred expenses in relation to the lunatic then presented a petition to the County Court, to which the society were made respondents, but to which the wife was not a party, asking for an order for the payment of the balance to them to defray their expenses in relation to the lunatic. No objection was taken in the County Court that the wife had not been made a party to the proceedings, nor was it made a ground of appeal to the Divisional Court, and it was raised for the first time on behalf of the society in the Court of Appeal:—*Held*, that in those circumstances the point could not be taken in the Court of Appeal. *Gloucester Union v. Gloucester Industrial Society*, 5 L. G. R. 493; 71 J. P. 169—C.A.

(c) TO DIVISIONAL COURT.

Appeal from Judge at Chambers—Application for Prohibition to County Court—“Practice and procedure.”—An appeal from an order of a Judge at chambers upon an application for a writ of prohibition to a County Court is to a Divisional Court of the Queen's Bench Division. *Watson v. Petts* (No. 1), 67 L. J. Q.B. 970; [1899] 1 Q.B. 54; 79 L. T. 330; 47 W. R. 68—C.A.

—“Matters of practice and procedure”—**Claim against Railway Company for Compensation in Respect of Lands—Notice to Settle by Jury—Order for Trial in High Court.**—An order of a Judge at chambers under section 41 of the Regulation of Railways Act, 1868, for the trial in the High Court of a question of compensation in respect of lands falling within the operation of that section, is not a matter of practice and procedure within the meaning of section 1, subsection 4 of the Supreme Court of Judicature (Procedure) Act, 1894, and an appeal from such an order lies to a Divisional Court under Order LIV. rule 23 of the Rules of the Supreme Court. *Long v. Great Northern and City Railway*, 71 L. J. K.B. 598; [1902] 1 K.B. 813; 86 L. T. 440; 50 W. R. 402—C.A.

Reference to Master by Consent—Right of Appeal.—Where an action in the King's Bench Division has been referred to a Master, with the consent of the parties, under Order XIV. rule 7, a motion lies to a Divisional Court, under Order XL. rules 6 and 6a, to set aside the judgment which he has directed to be entered, and to enter some other judgment.

Fraser v. Fraser (No 2), 74 L. J. K.B. 183; [1905] 1 K.B. 368; 92 L. T. 341; 53 W. R. 310; 21 T. L. R. 186—C.A.

Divisional Court Specially Constituted—Power to Review Former Decisions.—*Semble*, in cases where there is no appeal from the Divisional Courts, a specially constituted Divisional Court appointed by the Lord Chief Justice of England has power to review, and if it thinks fit to differ from, previous decisions of Divisional Courts on the same subject. *Kruse v. Johnson*, 67 L. J. Q.B. 782; [1898] 2 Q.B. 91; 78 L. T. 647; 46 W. R. 630; 62 J. P. 469—D.

(d) IN OTHER CASES.

Admiralty Appeals.—*See* SHIPPING.

Bankruptcy Appeals.—*See* BANKRUPTCY.

Contempt, by Person in.—*See* CONTEMPT OF COURT.

Costs, for.—*See* COSTS.

County Courts, from.—*See* COUNTY COURT.

Illegality—Question not Raised in Courts Below.—*See Connolly v. Consumers' Cordage Co., post, PRACTICE.*

Inferior Court, from.—*See* COURT.

Interpleader, in.—*See* INTERPLEADER.

Justices, from.—*See* INTOXICATING LIQUORS.

Master, from, as to Sufficiency of Security.—*See* PRACTICE.

Poor Law Cases, in.—*See* POOR LAW.

Privy Council, to.—*See* COLONY.

Registrar in Winding-up, from.—*See* COMPANY.

Third Party, by.—*See* PRACTICE.

Workmen's Compensation Cases, in.—*See* MASTER AND SERVANT, AND SCOTLAND.

2. INTERLOCUTORY OR FINAL.

Test.—In an action for damages for failure to carry out a contract an order was made that the action should be transferred to the non-jury list, “Questions of liability and breach of contract only to be tried. Rest of case (if any) to go to the Official Referee.” At the trial an order was made dismissing the action, on the ground that there was no contract binding on the defendants:—*Held*, that this order was a final order within Order LVIII. rules 3 and 15. *Shubbrook v. Tufnell* (9 Q.B. D. 621) followed. *Salaman v. Warner* (60 L. J. Q.B. 624; [1891] 1 Q.B. 734) not followed. *Bozson v. Altrincham Urban Council* (No. 1), 72 L. J. K.B. 271; [1903] 1 K.B. 547; 51 W. R. 337; 67 J. P. 397—C.A.

Per LORD ALVERSTONE, C.J.—The test as to whether an order should be considered final or interlocutory is this: If the order finally disposes of the rights of the parties, it ought to be

treated as final; if, on the other hand, further proceedings are necessitated, it ought to be treated as interlocutory. *Ib.*

Summons for Delivery of Solicitor's Bill of Costs and Taxation.—Upon an originating summons taken out by a client against his solicitor for the delivery of a bill of costs and taxation, the order, whether allowing or refusing the application, finally determines the question between the parties, and is a final order for the purpose of an appeal within Order LVIII. rule 3. The test laid down in *Salaman v. Warner* (60 L. J. Q.B. 624; [1891] 1 Q.B. 734) applied. *Reeves & Co., In re*, 71 L. J. Ch. 70; [1902] 1 Ch. 29; 85 L. T. 495; 50 W. R. 252—C.A.

Order Refusing Review of Taxation.—An order refusing a review of a taxation under the Solicitors Act, 1843, is an interlocutory order within the Judicature Act, 1894, s. 1, sub-s. 1 (b), from which no appeal lies without leave of the Judge or of the Court of Appeal. *Furber, In re* (43 Sol. J. 65), followed. *Jerome, In re*, 76 L. J. Ch. 432; [1907] 2 Ch. 145; 96 L. T. 866—C.A.

School Board Election Petition—Order for Special Case to be Stated.—An order of a Judge at chambers upon an application under section 93, sub-section 7 of the Municipal Corporations Act, 1882, for a Special Case to be stated in proceedings relating to a school board election petition, is an order on an interlocutory question arising in such petition, from which an appeal lies to the Court of Appeal. *Harman v. Park* (50 L. J. Q.B. 227; 6 Q.B.D. 323) followed. *Monks-well (Lord) v. Thompson* (No. 1), 67 L. J. Q.B. 243; [1898] 1 Q.B. 353; 77 L. T. 707—C.A.

And see next heading—LEAVE TO APPEAL.

Special Case Stated by Arbitrators—Opinion of Court—Right of Appeal.—Arbitrators stated a Special Case in which the question for the opinion of the Court was thus stated: "Whether our construction of the contracts upon the two points above stated is correct. If both points are correctly decided, this our award is to stand. If either or both points is or are wrongly decided, the matter is to be remitted to us to give effect to the true construction of the contract in our interim and final awards. The costs of the Special Case are referred to the Court":—*Held*, that the Special Case was stated under section 19 of the Arbitration Act, 1889, and not under section 7, and that therefore an appeal would not lie to the Court of Appeal from the decision of the High Court. *Quare*, whether the appeal was a final or an interlocutory appeal. *Holland Steamship Co. and Bristol Steam Navigation Co., In re*, 95 L. T. 769; 23 T. L. R. 59—C.A.

3. LEAVE TO APPEAL.

Expiration of Time for Appealing—Mistake of Counsel—Discretion of Court to Allow Appeal to be Brought.—Where an appeal to the Court of Appeal from an order in a matter not being an action has not been brought within fourteen days as prescribed by Order LVIII. rule 15, that Court will not grant special leave to appeal under the rule on the ground that the delay has been caused by a mistake of the appellant's

counsel. *Helsby, In re; Trustee, ex parte* (63 L. J. Q.B. 265; [1894] 1 Q.B. 742; 9 R. 139), followed. *Coles and Ravenshear, In re*, 76 L. J. K.B. 27; [1907] 1 K.B. 1; 95 L. T. 750; 23 T. L. R. 32—C.A.

Order of Divisional Court Varying Findings of Official Referee—"Right of appeal to the High Court from any Court or person."—An application to a Divisional Court to vary the findings of an official referee is a case "where there is a right of appeal to the High Court from any Court or person" within the meaning of section 1, sub-section 5 of the Judicature Act, 1894, and the determination thereof by the Divisional Court is final, unless leave to appeal is given by that Court or by the Court of Appeal. *Daglish v. Barton*, 68 L. J. Q.B. 1044; [1900] 1 Q.B. 284; 81 L. T. 551; 48 W. R. 50—C.A.

Refusal to Commit—Liberty of the Subject.—By the Supreme Court of Judicature Act, 1894, s. 1, sub-s. 1 (b), no appeal lies without the leave of the Judge or of the Court of Appeal from an interlocutory order made by a Judge dismissing a motion to commit. Such an order is not within the exception contained in sub-clause (i.) of that section. *Bowden v. Yowall*, 70 L. J. Ch. 5; [1901] 1 Ch. 1; 83 L. T. 419—C.A.

Order Setting Aside Award.—An order setting aside an award on the ground of the conduct of the arbitrator is an interlocutory order within the meaning of rules 3 and 15 of Order LVIII. *Croasdell and Cammell, Laird & Co., In re*, 75 L. J. K.B. 769; [1906] 2 K.B. 569; 95 L. T. 441; 54 W. R. 620; 22 T. L. R. 759—C.A.

Refusal of Divisional Court to Grant Leave—Appeal from County Court—Jurisdiction of Court of Appeal.—The Court of Appeal has jurisdiction under section 1, sub-section 5 of the Supreme Court of Judicature (Procedure) Act, 1894, notwithstanding the provisions of section 45 of the Judicature Act, 1873, to grant leave to appeal from the decision of a Divisional Court on a judgment of a County Court where the Divisional Court has refused to grant leave to appeal. *Godman v. Moses*, 69 L. J. Q.B. 823; 83 L. T. 46; 48 W. R. 689—C.A.

From Inferior Court—Leave of Judge—Right to Appeal from Divisional Court to Court of Appeal—By Leave of Court of Appeal.—"In all cases where there is a right of appeal."—The words "in all cases where there is a right of appeal to the High Court from any Court," in section 1, sub-section 5 of the Judicature Act, 1894, include cases in which leave to appeal has been given by a County Court Judge, and the Court of Appeal has jurisdiction in such cases to give leave to appeal from the Divisional Court, notwithstanding that leave has been refused by the Divisional Court. *Moore, Nettlefold & Co. v. Singer Manufacturing Co.*, 73 L. J. K.B. 457; [1904] 1 K.B. 820; 90 L. T. 469; 52 W. R. 385; 68 J. P. 369; 20 T. L. R. 366—C.A.

Appeal in Forma Pauperis—Certificate of Counsel.—On an application for leave to appeal *in forma pauperis* it is not necessary that the application should be supported by the certificate of an independent counsel who did not appear for the applicant in the Court below. *Mitchell v. New Zealand Loan and Mercantile Agency Co.*, 89 L. T. 83—P.C.

Application—Affidavit—Respondent—Leave to Appear in Forma Pauperis.—A respondent to an appeal may apply *ex parte*, by way of original motion, to the Court of Appeal for leave to appear *in forma pauperis* upon an affidavit that he is not worth 25*l.*, his wearing apparel and the subject-matter of the cause or matter only excepted. The affidavit need not be accompanied by a case or opinion of counsel. *Handford v. Clarke* (No. 1), 76 L. J. K.B. 76; [1907] 1 K.B. 181; 96 L. T. 175; 23 T. L. R. 127—C.A.

4. HOW BROUGHT.

Notice—Party Directly Affected—Bankruptcy—Receiving Order—Stay of Proceedings—Creditors—Appeal of Official Receiver.—Upon an appeal by the official receiver against an order staying proceedings under a receiving order in bankruptcy, the petitioning creditor is a party "directly affected by the appeal" within Order LVIII. rule 2, and he ought to be served with notice of the appeal unless he has assented to the order in such a way that he must be taken to have waived his right to be served. The other creditors who appeared when the order appealed against was made are not parties directly affected by the appeal, and need not be served. *W. L. (a debtor), In re*, 70 L. J. K.B. 699; [1901] 2 K.B. 354; 84 L. T. 666; 8 Manson, 247—C.A.

Cross-notice of Appeal—Different Subject-Matter.—Where the claim and the counterclaim in an action are addressed to separate and distinct matters, and the defendant appeals against the order on the counterclaim, it is not proper for the plaintiff to appeal against the order on the claim by means of a cross-notice under the Rules of the Supreme Court, 1883, Order LVIII. rule 6. He should give a substantive notice of appeal under rule 1. If, however, the Judge has, with the acquiescence of the parties, linked the claim and counterclaim together so that one decision disposes of them both, the cross-notice may be treated as a distinct notice of appeal. *National Society for the Distribution of Electricity by Secondary Generators v. Gibbs*, 69 L. J. Ch. 457; [1900] 2 Ch. 280; 82 L. T. 443; 48 W. R. 499—C.A.

5. TIME.

Extension of Time for Appealing to Court of Appeal—Jurisdiction.—A Judge at chambers cannot make an order extending the time for appealing to the Court of Appeal, and an order so made is of no effect. *Sellar v. Bright*, 91 L. T. 9; 20 T. L. R. 586—C.A.

6. STAY OF PROCEEDINGS.

Stay of Execution Pending Appeal—Jurisdiction of Court of Appeal.—The Court of Appeal has jurisdiction to hear an application for a stay of execution in a cause in which an appeal has been entered in that Court, although no application for a stay has previously been made to the Judge who tried the cause. *Brown v. Brook*, 86 L. T. 373—C.A.

Staying Proceedings Pending Appeal to House of Lords.—The Court of Appeal refused an application to stay an order, directing enquiries as to the market value of shares in a company pending an appeal to the House of Lords. *Shaw v. Holland*, 69 L. J. Ch. 621; [1900] 2 Ch. 305; 82 L. T. 782; 7 Manson, 409—C.A.

7. JURISDICTION AT HEARING.

Variation of Order of Court of First Instance—No Cross-Appeal—Will.—Where a Court of Appeal varies the order of the Court below on a point not raised at the trial, and that point is not made the subject of a cross-appeal to the King in Council, the appeal being against the order as a whole, no order can be made with respect to it. *Karunaratne v. Ferdinandus*, 71 L. J. P.C. 76; [1902] A.C. 405; 86 L. T. 329—P.C.

A testator's next-of-kin presented a petition for the revocation of probate of an alleged will on the grounds of undue influence and that the testator was not of sound mind. The Court of first instance ordered revocation. On appeal by the executrix the Supreme Court varied the order by declaring the will valid as to the personal estate but invalid as to the real estate of the testator, no such question having been raised below. The executrix appealed to the King in Council, but there was no cross-appeal by the heirs or next-of-kin:—*Held*, that, though the appeal must be dismissed, the course taken by the Supreme Court was not correct unless that Court were prepared to pronounce against the will, but only forebore to do so because the testator's heirs were content with less. *Id.*

On the principle stated in *The Tasmania* (15 App. Cas. 223), a Court of Appeal ought only to decide in favour of an appellant on a ground then put forward for the first time, if it is satisfied that it has complete possession of the facts. *Id.*

Varying Order in Matter as to which no Notice of Appeal.—The defendant appealed against the whole of the order of Court below except one declaration. The plaintiffs gave no notice of appeal:—*Held*, that the Court had power, under Order LVIII. rule 4, to vary the order of the Court below by substituting a different declaration in the place of that in respect of which there was no appeal. *Att.-Gen. v. Simpson*, 70 L. J. Ch. 828; [1901] 2 Ch. 671; 85 L. T. 325—C.A.

Assessor—Opinion of Assessor—Reasons for Opinion—Admissibility of, on Hearing of Appeal.—Where a trial takes place before a Judge, assisted by an assessor, and the assessor has given his opinion to the Judge, upon an appeal from the decision of the Judge the Court of Appeal has power to consider the opinion given by the assessor, and the reasons, if any, stated by him for that opinion. *Hattersley & Sons v. Hodgson, Lim.*, 21 T. L. R. 178—C.A.

8. EVIDENCE.

Judge's Notes—Practice.—In appeals from the Chancery Division in witness actions it is the duty of solicitors to apply to the Court of Appeal in good time for the Judge's notes of

evidence in order that the Court of Appeal may apply to the Judge for them. *Batt & Co.'s Trade Mark, In re*, 67 L. J. Ch. 579; [1898] 2 Ch. 482, 701; 79 L. T. 206, 298 n.—C.A.

Findings of Judge—Questions of Fact—Inferences of Fact.—When a Judge after trying a case upon *viva voce* evidence comes to a conclusion regarding a specific and definite matter of fact, his finding ought not to be reversed by a Court that has not the same opportunity of seeing and hearing the witnesses unless it is so clearly against the weight of the testimony as to amount to a manifest defeat of justice. The same rule does not apply, at least in the same degree, where the conclusion is an inference of fact. Where the decisive finding is a deduction from facts hardly disputed or easily ascertained, the appellate tribunal is in as good a position for arriving at a correct conclusion as the Judge appealed from, and it would be an undue restriction of the functions of the former if it were to hold itself bound by what has been found by the latter. *The Gairloch*, [1899] 2 Ir. R. 1—C.A.

Point as to Evidence not Raised in Court Below.—The Court of Appeal will not entertain technical objections to the admissibility of documentary evidence which were not taken in the Court below, and which if taken might have been met by calling further evidence. *Bradshaw v. Waddington*, 71 L. J. Ch. 627; [1902] 2 Ch. 480; 86 L. T. 726; 50 W. R. 561—C.A.

Action Tried by Judge Sitting without Jury—Evidence—Reversing Judgment on Question of Fact.—The hearing of an appeal from a decision of a Judge sitting without a jury is a re-hearing of the case, and it is the duty of the Court of Appeal to reconsider the evidence, and, if the circumstances warrant, to differ from the Judge even on a question of fact turning on the credibility of the witnesses. *Coghlan v. Cumberland*, 67 L. J. Ch. 402; [1898] 1 Ch. 704; 78 L. T. 540—C.A.

9. NEW TRIAL.

Jurisdiction to Order New Trial.—See PRACTICE.

New Trial Ordered by Court of Appeal—Competency of Appeal to the House of Lords.—An appeal without leave lies to the House of Lords from an order of the Court of Appeal for a new trial of a suit in which a decree *nisi* has been granted by the Divorce Court on the verdict of a jury. *Butchart v. Butchart and Hill*, 70 L. J. P. 29; [1901] A.C. 266; 84 L. T. 209—H.L. (E.)

Entering Judgment for Defendant.—Where the Court of Appeal has set aside a verdict for the plaintiff and ordered a new trial on the ground that the verdict was against the weight of evidence, if, on an appeal against that decision by the plaintiff, the House of Lords comes to the opinion that there is no evidence to go the jury, they will order judgment to be entered for the defendant, though there has been no cross-appeal on his part, instead of sending the case for a new trial. *Ibo Syndicate v. Wyler*, 87 L. T. 83; 51 W. R. 320—H.L. (E.)

Consent Order—New Trial.—Where both parties to an appeal to the House of Lords agree to a new trial the application must be made to the House itself, and not to the Appeal Committee, and a proper consent be filed. *Hannah v. Hunter*, 73 L. J. P.C. 72; [1904] A.C. 379—H.L. (Sc.)

Costs.—See *infra*, COSTS.

10. COSTS.

Company—Winding-up—Dismissal of Petition—Unsuccessful Appeal—Two Sets of Contributories Opposing Petition.—On an appeal against an order made by a Judge on a winding-up petition in which, according to the established practice, one set of costs has been allowed between the creditors and contributories respectively who supported the winning side, if the appellant does not wish to run the risk of incurring additional costs by asking for the discharge or modification of the order so far as it gave those costs, he must make it clear by his notice of appeal that he does not ask for that; and if the notice of appeal goes to the whole order of the Court below, he must write to the creditors or contributories, as the case may be, or to their solicitors, and inform them that he does not propose to ask for an order which would affect the part of the order of the Court below under which they got their costs. If the creditors or contributories choose to appear on the appeal after receiving this notice, and the order of the Court below is affirmed, the rule as to allowing one set of costs only between them respectively will be applied in the Court of Appeal. *New Gas Co., In re* (5 Ch. D. 703), explained. *Ibo Investment Trust, Lim., In re*, 72 L. J. Ch. 661; [1903] 2 Ch. 373; 88 L. T. 752; 51 W. R. 593; 10 Manson, 309—C.A.

Will—Construction of—Trustees—Right to Appear.—According to the established practice in an appeal upon the construction of a will, trustees served with notice of appeal are entitled to appear by counsel and to be paid their costs of appearance; but the Taxing Master in taxing the costs should allow a moderate fee only in the case of trustees not required to take any active part in argument. *Semble, per VAUGHAN WILLIAMS, L.J.*, there is no reason why trustees who are neutral should appear in such an appeal by separate counsel. *Carroll v. Graham*, 74 L. J. Ch. 398; [1905] 1 Ch. 478; 92 L. T. 66; 53 W. R. 549—C.A.

Trustees—Costs of Appearance of—Construction of Will.—Where the trustees of a will had been duly served in the ordinary course with notice of appeal in an action relating to the construction of the will, no intimation having at the same time been given to them that their appearance at the hearing would not be expected, and they accordingly appeared by separate counsel thereat—who was not, however, in the events which happened, called upon to take any part in the proceedings or to assist the Court in any way—they were held to be entitled to have their costs of appearance, notwithstanding the decision in *Carroll v. Graham* (74 L. J. Ch. 398; [1905] 1 Ch. 478). *Catterson v. Clark*, 95 L. T. 42—C.A.

Deed of Separation.—Trustees were not allowed the costs of an appeal by the wife against her husband on a question as to whether income tax could be deducted from an allowance under a deed of separation. *Barry's Trusts, In re*; *Barry v. Smart*, 75 L. J. Ch. 676; [1906] 2 Ch. 358; 95 L. T. 165—C.A.

Shorthand Notes.—The costs of copies of shorthand notes of evidence taken at the trial will be allowed on an appeal where such copies are necessary to enable the Court to follow the argument. *Castner Kellner Alkali Co. v. Commercial Development Corporation*, 68 L. J. Ch. 402; [1899] 1 Ch. 803; 80 L. T. 476; 47 W. R. 534—C.A.

—Costs of shorthand notes of evidence will only be allowed by the Court of Appeal in very special cases. *Goldberg v. Liverpool Corporation*, 82 L. T. 362—C.A.

Shorthand Note of Judgment.—Costs in the Court of Appeal include the costs of shorthand notes of the judgment in the Court below without express mention. *De Falbe, In re*; *Ward v. Taylor*, 70 L. J. Ch. 286; [1901] 1 Ch. 523—C.A.

Costs—Copies of Material Documents for the Use of the Court—Affidavits.—Where an appeal is brought, office copies of affidavits are *prima facie* sufficient, and, if on any appeal further copies are made for the use of the learned Judges of the Court of Appeal, that Court should be asked at the time to allow them; and unless the Court is asked to, and does allow such copies, the Taxing Master properly disallows the costs thereof. *Bollason's Registered Design, In re*, 78 L. T. 511—C.A.

House of Lords—Court Equally Divided.—Where their Lordships were equally divided in favour of affirming and reversing the decision of the Court of Appeal, the judgment of that Court was affirmed without costs, following the rule laid down in *Eastern Steamship Co. v. Smith* (unreported). *Paquin v. Beaucherk*, 75 L. J. K.B. 895; [1906] A.C. 148; 94 L. T. 350; 54 W. R. 521; 22 T. L. R. 395—H.L. (Ex.).

Security for Costs—Motion for New Trial.—The Court of Appeal will no longer act upon the general rule of practice laid down in *Heckscher v. Crosley* (60 L. J. Q.B. 75; [1891] 1 Q.B. 224), not to require security for costs to be given by a party moving for a new trial. *Wightwick v. Pope*, 71 L. J. K.B. 709; [1902] 2 K.B. 99; 86 L. T. 750; 50 W. R. 531—C.A.

The practice laid down in *Heckscher v. Crosley* (60 L. J. Q.B. 75; [1891] 1 Q.B. 224), that no security for costs is required to be given by a party moving in the Court of Appeal for a new trial, after trial of an action with a jury, under the Supreme Court of Judicature Act, 1890, applies to a motion for a new trial of a petition for a divorce. *Rickaby v. Rickaby and Swift*, 70 L. J. P. 24; [1901] P. 134; 84 L. T. 182—C.A.

—“**Satisfaction of Judge in Chambers.**”—In orders for security for the costs of appeals in the Chancery Division, the practice, as in the King's Bench Division, is to require that the security be approved by the Judge in chambers. *Hope v. Hope*, 86 L. T. 863—C.A.

Workmen's Compensation Act.—The rule that no security for costs is required on an application to the Court of Appeal under the Supreme

Court of Jurisdiction Act, 1890, for the new trial of an action in the King's Bench Division will not be extended to an appeal under the Workmen's Compensation Act, 1897, which, if successful, will practically result in a new trial of the case. *Harwood v. Abrahams*, 70 L. J. K.B. 746; [1901] 2 K.B. 304; 84 L. T. 857—C.A. See MASTER AND SERVANT.

Arbitration, in case of.—See ARBITRATION.

Interest on.—See COSTS.

APPOINTMENT.

See POWER.

APPORTIONMENT.

Dividends on Shares—Company's Articles—Express Stipulation against Apportionment.—

A testator bequeathed certain shares in a company to his trustees upon trust to pay “the income arising therefrom” to his wife for life. The testator died on January 4, 1906. Some time after his death a dividend for the financial year ending October 31, 1905, was declared. The full dividend for the next financial year was not yet declared. The company's articles provided (*inter alia*) as follows: Article 90: “Every dividend, whether arising from past or current profits, shall for all purposes be deemed to accrue and fall due upon the day on which it is declared, and not before.” Article 91: “Every dividend shall belong and be paid (subject to the company's lien) to those members who shall be on the register at the date when every such dividend is declared, notwithstanding any subsequent transfer or transmission of shares.”—*Held*, that, as between the testator's estate and the widow, these articles did not amount to an express stipulation against apportionment within section 7 of the Apportionment Act, 1870, and the dividends were therefore apportionable. Whether the express stipulation referred to in section 7 can be contained elsewhere than in a will or other instrument of gift, *quære*. *Oppenheimer, In re*; *Oppenheimer v. Boatman*, 76 L. J. Ch. 287; [1907] 1 Ch. 399; 96 L. T. 681; 14 Manson, 139—Swinfen Eady, J. And see *Lysaght, In re*; *Lysaght v. Lysaght*, 67 L. J. Ch. 65; [1898] 1 Ch. 115; 77 L. T. 637—C.A. (*under Will*).

Direction Excluding Apportionment—Bequest of Dividends “as received.”—A testator directed that certain shares in a company “shall be retained by my trustees during the survivance of my wife, and the dividends accruing from said shares shall, as received, be paid over to her.” The testator died on July 7, 1905, survived by his wife. The accounts of the company had to be made up yearly on April 30, and it was the practice to hold the annual meeting of the company in the following October. In October, 1905, a dividend for the year ending April 30 was declared, and was afterwards paid:—*Held*, that the use of the words “as received” amounted to an express direction which excluded apportionment within the meaning of section 7 of the Apportionment Act, 1870, and that the whole dividend fell to be paid to the widow. *Macpherson's Trustees v. Macpherson*, [1907] S. C. 1067—Ct. of Sess.

Rent, of.—See LANDLORD AND TENANT.

APPRENTICE.

Validity of Deed.]—See INFANT.

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ARBITRATION.

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1. REFERENCES BY CONSENT.

(1) SUBMISSION.

Submission—Statute of Limitations.—A submission to arbitration does not *per se* exclude the right of either party to raise the defence of the Statute of Limitations; but if it be intended to exclude such a defence, an express term to that effect must be imported into the agreement of submission. *Astley and Tyldesley Coal Co. and Tyldesley Coal Co., In re*, 68 L. J. Q.B. 252; 80 L. T. 116—D.

Application to Revoke Submission—Building Contract—Submission of Disputes to Architect—Litigation Between Builder and Architect—Action of Fraud.—Where, by the terms of a building contract, all questions are submitted to the arbitration of an architect appointed by the building owners, the mere fact that the builders, or those claiming through them, bring an action against the architect charging him with fraud in relation to the contract does not entitle them to revoke the submission. *Baring and Doulton, In re* (61 L. J. Q.B. 704), distinguished. *Belcher v. Roedean School*, 85 L. T. 468—C.A.

Agreement to Submit to Jurisdiction of Court having Jurisdiction Abroad.—By a policy of insurance entered into at Budapest, in Hungary, a foreigner resident abroad effected an insurance with an English company, having its head office at London, upon his own life in favour of his wife. The policy contained a condition that, for all disputes which might arise out of the contract of insurance, all the parties interested expressly agreed to submit to the jurisdiction of the Courts having jurisdiction in such matters of Budapest. In an action upon the policy against the insurance company by an assignee of the policy, *Held*, that the condition was a "submission" within the meaning of section 4 of the Arbitration Act, 1889, so as to entitle the insurance company to a stay of the action. *Austrian-Lloyd Steamship Co. v. Gresham Life Assurance Society*, 72 L. J. K.B. 211; [1903] 1 K.B. 249; 88 L. T. 6; 51 W. R. 402—C.A.

Clause in Contract.—See WORK and LABOUR.

(2) STAY OF PROCEEDINGS.

"Court"—County Court.—Whether the word "Court" in section 4 of the Arbitration Act, 1889, includes a County Court, *quære*. *Runciman v. Smyth*, 20 T. L. R. 625—D. See *Morriston Tinplate Co. v. Brooker*, 77 L. J. K.B. 197; [1908] 1 K. B. 403—D.

Matters in Dispute coming within Arbitration Clause—Fraud—Construction of Contract.—On a motion to stay an action on the ground that the matters in dispute come within a clause in a contract for the execution of works agreeing to refer matters in dispute, arising in the settlement of the accounts, to arbitration, the construction of the clause is for the Court. The Court will not stay the action where it is of opinion—first, that the plaintiff is suing upon substantial and *bona fide* causes of action which do not come within the clause; or secondly, that there are serious and difficult questions of law involved in the action not proper to be submitted to the determination of an arbitrator; or thirdly, that a cause of action based upon fraud actual or constructive, is *bona fide* sued upon; or fourthly, that in the exercise of its judicial discretion it ought not to refer the matters in dispute to arbitration. *Vaudrey v. Simpson* (65 L. J. Ch. 369; [1896] 1 Ch. 166) followed. *Workman v. Belfast Harbour Commissioners*, [1899] 2 Ir. R. 234—Q.B. D.

Claim under Accident Policy—Arbitration—Negligence.—P. was insured with the defendant company to the extent of 100l. against liability for injuries caused to third persons through the negligence of his servants, it being a condition precedent to his right to sue the company under the policy that he should accept arbitration if required. A sum of 270l. having been awarded against him in respect of a cause of action contemplated by the policy, P. alleged that the company had been guilty of negligence in the conduct of the defence, and, refusing arbitration, sought in this action to recover from the company the full sum of 270l., together with the costs on both sides of the former proceedings. The company was willing to pay the 100l., together with the costs on both sides, upon such sum being accepted in final settlement. Otherwise they reserved the right to defend as to the entire amount claimed in this action, inasmuch as they charged that P.'s alleged interference in the defence of the former action was the cause of the award of damages against him;—*Held*, on motion to stay proceedings, that as the substantial portion of the present action was founded upon negligence, the Court should not stay the proceedings. *Patteson v. Northern Accident Insurance Co.*, [1901] 2 Ir. R. 262—Q.B. D.

Master and Servant—Agreement to Refer Disputes—Wrongful Dismissal.—An agreement by the defendants to employ the plaintiff as their agent contained a provision that any dispute arising in connection with the agreement should be referred to arbitration in accordance with the provisions of the arbitration clause in the by-laws of the Liverpool Corn Trade Association. That clause provided that all disputes arising out of transactions connected with the trade should be referred in the manner therein provided. Disputes arose between the parties, which were referred to arbitration and resulted in an award adverse to the plaintiff, and the

defendants dismissed him from their employment. He brought an action for wrongful dismissal:—*Held*, that the matters in dispute in the action were disputes arising in connection with the agreement, and the action ought to be stayed under section 4 of the Arbitration Act, 1889. *Reishaw v. Queen Anne Mansions Co.* (66 L. J. Q.B. 496; [1897] 1 Q.B. 662) followed. *Parry v. Liverpool Malt Co.*, 69 L. J. Q.B. 161; [1900] 1 Q.B. 339; 81 L. T. 621—C.A.

Per LINDLEY, M.R.—*Davis v. Starr* (58 L. J. Ch. 808; 41 Ch. D. 242) was decided upon an erroneous view of the facts. *Ib.*

Arbitration Clause in Charterparty—Bill of Lading—Charterer the Holder of Bill of Lading—Cesser Clause—Action for Demurrage by Shipowners against Charterers.—By a clause in a charterparty it was provided that delay in loading arising from certain specified causes should not be counted as part of the lay days, and that any dispute arising under that clause "in the loading" of the vessel should be settled by arbitration in the Argentine Republic. The charterparty contained the usual cesser clause. A cargo was shipped by the charterers, at a port in the Argentine Republic, under a bill of lading which incorporated all the terms and exceptions of the charterparty and gave the shipowners an absolute lien on the cargo for freight, demurrage, and all other charges. There was delay in loading, which the charterers alleged, but the shipowners denied, arose from the causes specified in the charterparty. At the port of discharge the shipowners claimed a lien on the cargo for demurrage at the port of loading, and they brought this action against the charterers, who were the holders of the bill of lading, for a declaration that they were entitled to the lien. The charterers applied for a stay of proceedings in order that the dispute might be referred to arbitration under the clause in the charterparty:—*Held*, that the arbitration clause was binding between the parties, and that the dispute came within that clause. *Runciman v. Smyth* (20 T. L. R. 625) overruled. *Temperley Steam Shipping Co. v. Smyth*, 74 L. J. K.B. 876; [1905] 2 K.B. 791; 93 L. T. 471; 54 W. R. 150; 10 Com. Cas. 301; 10 Asp. M.C. 123; 21 T. L. R. 739—C.A.

Authority of Master—Lloyd's Salvage Agreement—Committee of Lloyd's.—The master of two steamships signed an agreement known as "Lloyd's Salvage Agreement," by clause 1 whereof they agreed to perform salvage services to another steamship for a fixed sum, and that in the event of any dispute arising as to the adequacy or otherwise of such sum, the remuneration should be fixed by the Committee of Lloyd's. By another clause (11) (4) of the agreement it was provided that the Committee of Lloyd's might itself object to the sum named in the salvage agreement. The owners of the salving steamers instituted salvage actions in the Admiralty Court, whereon the defendants applied to have the actions stayed under section 4 of the Arbitration Act, 1889. The Court refused to stay the actions:—*Held*, that the discretion given by section 4 of the Arbitration Act had been rightly exercised, upon the ground that there is great doubt whether the master of a vessel has authority to bind his owners to arbitration. *Held, also*, by RIGBY, L.J., that the fact that the Committee of Lloyd's were to

be the arbitrators, and that it also had the right to send the matter to arbitration, was a good ground for refusing to stay the actions. *Quere*, whether the master of a vessel has authority to bind the owners to submit to arbitration. *The City of Calcutta*, 79 L. T. 517; 8 Asp. M.C. 442—C.A.

Insurance—Reference of Dispute—Condition Precedent to Right to Sue.—The Railway Passengers Assurance Company's Act, 1864, provided by section 3 that any question arising on any contract of insurance should, if either party required it, be referred to arbitration; and by section 16 that, if there should be any question or difference as to the liability of the company, it should, if either the company or the persons claiming required it, and as a condition precedent to the enforcing of any claim to which the question or difference related, be referred to arbitration. The Railway Passengers Assurance (Consolidation) Act, 1892, repealed the Act of 1864, but provided by section 7 that contracts made with the company and in force at the date of the repeal should be valid and effectual to all intents as if the repealing Act had not been passed, and that arbitrations pending or existing at the date of such repeal should not be prejudicially affected by the passing of the Act. A policy purporting to be made under the Act of 1864 contained a clause providing that any question as to the liability of the company to pay the sum assured should, if the company required it, be referred to arbitration in the manner specified by that Act. The legal representative of a person who had insured his life with the defendant company having made a claim against the company, the company disputed liability and served a notice demanding arbitration. The claimant nominated an arbitrator, but an objection to this arbitrator was raised by the company. The claimant then brought an action upon the policy. The company took out a summons to stay proceedings in the action:—*Held*, that the rights of the company under the policy to require an arbitration in the manner specified by the Act of 1864 were preserved by the Act of 1892, and that, as the conduct of the company before action brought was such as to entitle them to say that under the policy arbitration was a condition precedent to the plaintiff's right of action, section 4 of the Arbitration Act, 1889, enabled the Court to grant the company's application for a stay of the action. *Hodson v. Railway Passengers Assurance Co.*, 73 L. J. K.B. 1001; [1904] 2 K.B. 833; 91 L. T. 648—C.A.

Reference to Three Arbitrators—Stay of Action.—Where an agreement provides that matters in dispute shall be referred to three persons, one to be appointed by each of the parties and the third by the two so chosen, and one of the parties brings an action against the other party with reference to a matter in dispute under the agreement, the Court has power, under section 4 of the Arbitration Act, 1889, to stay the action. *Smith and Service, In re* (59 L. J. Q.B. 533; 25 Q.B. D. 545), explained. *Manchester Ship Canal Co. v. Pearson*, 69 L. J. Q.B. 852; [1900] 2 Q.B. 606; 83 L. T. 45; 48 W. R. 689—C.A.

"Step in Proceedings"—Attendance upon

Hearing of Summons for Directions.—Where upon the hearing of a summons for directions taken out under Order XXX. the defendant in an action appears and an order is made in his favour, as, for example, for discovery—this constitutes a “step in the proceedings” by the defendant, so as to preclude him from subsequently applying under section 4 of the Arbitration Act, 1889, to stay the action. *Chappell v. North* (60 L. J. Q.B. 554; [1891] 2 Q.B. 252) followed. *County Theatres and Hotels, Lim. v. Knowles*, 71 L. J. K.B. 351; [1902] 1 K.B. 480; 86 L. T. 132—C.A.

— **Attending Summons for Directions.**—A defendant who attends a summons for directions, upon which an order is made with his assent for the delivery of a defence, is to be deemed to have taken a “step in the proceedings” and to have debarred himself from applying for a stay of proceedings under section 4 of the Arbitration Act, 1889. *County Theatres and Hotels, Lim. v. Knowles* (71 L. J. K.B. 351; [1902] 1 K.B. 480) followed. *Richardson v. Le Maitre*, 72 L. J. Ch. 779; [1903] 2 Ch. 222; 88 L. T. 626—Swinfen Eady, J.

— **Motion for Receiver—Filing Affidavits in Opposition.**—The mere filing of affidavits in answer to affidavits filed in support of a motion for the appointment of a receiver in an action for dissolution of partnership is not taking “a step in the proceedings” within section 4 of the Arbitration Act, 1889, so as to preclude the Court from referring all matters in dispute to arbitration. *Zalinoff v. Hammond*, 67 L. J. Ch. 370; [1898] 2 Ch. 92; 78 L. T. 456—Stirling, J.

(3) ARBITRATOR.

Powers of—Amendment of Pleadings.—Disputes having arisen between the plaintiffs and the defendants, it was agreed between them “that all points in dispute in reference to the contract for the sale and purchase of S. F.” should be referred to the arbitration of some practical man. Points of claim and defence and counterclaim with particulars were delivered, and re-delivered on being amended, between the parties:—*Held*, that these documents were in the nature of pleadings or particulars, and could be amended by the arbitrator in his discretion, and all points in dispute between the parties relating to the subject-matter could be so raised, although not in the first instance disclosed by such documents. *Lloyd (Edward) v. Sturgeon Falls Pulp Co.*, 85 L. T. 162—P.

Negligence—Building Contract—Architect—Quasi-Arbitrator—Cause of Action.—A building owner employed an architect to measure up certain works to be done by a builder under a building contract. The building contract provided that the architect should give certificates upon which payments were to be made to the builder by the building owner. As regards, first, discrepancies between drawings and specifications; secondly, the quality of materials used and work done; thirdly, the appearance of defects within six months after completion of the works—all questions relating to these matters were left to the sole jurisdiction of the architect.

Subject to these provisions, in case the builder should be dissatisfied with any certificate given or withheld by the architect, or in case of any difference arising between the building owner or the architect on his behalf and the builder, as to any other matter arising under the building contract, the question was to be referred to a special referee. By clause 20 the certificate of the architect or award of the referee shewing the final balance was to be conclusive evidence of the works having been duly completed:—*Held* (per A. L. SMITH, M.R., and COLLINS, L.J.; ROMER, L.J., dissenting), that under clause 20 of this contract the architect was in the position of an arbitrator, and was not liable in an action for negligence in giving certificates for work done. *Chambers v. Goldthorpe*, 70 L. J. K.B. 482; [1901] 1 K.B. 624; 84 L. T. 444; 49 W. R. 401—C.A.

Disqualification—Interest—Member of Town Council.—By a clause of reference in a contract entered into by the town council of a burgh for the mason work of a building, the parties agreed to refer disputes which might arise under the contract to an arbiter named. The arbiter named was afterwards appointed Dean of Guild, and became *ex officio* a member of the town council:—*Held*, first, that he was thereby disqualified from acting as arbiter; secondly, that this disqualification might be pleaded by the town council; and thirdly, that it was not removed by his ceasing to hold the office of Dean of Guild. *Edinburgh Magistrates v. Lownie*, 5 F. 711—Ct. of Sess.

— **Barrister—Named Arbitrator.**—An agreement contained a clause providing that all disputes arising in respect of it should be referred to the arbitration of a certain barrister. In the course of the arbitration a charge of misconduct was made against a firm of solicitors, or their authorised representative, who were clients of the barrister:—*Held*, on motion to restrain the continuance of the proceedings before the named arbitrator, that, there being no charge of incompetence or unfitness or bias against the arbitrator, the motion could not succeed. *Jackson v. Barry Railway* ([1893] 1 Ch. 238) and *Eckersley v. Mersey Docks and Harbour Board* ([1894] 2 Q.B. 667) followed. *Bright v. River Plate Construction Co.*, 70 L. J. Ch. 59; [1900] 2 Ch. 835; 82 L. T. 793; 49 W. R. 132; 64 J.P. 695—Cozens-Hardy, J.

— **Engineer to one of Parties Named as Arbitrator—Letters by Engineer Expressing Opinion on Matters in Dispute.**—By the contract for the construction of a pier the contractor and his employers agreed to refer any question arising out of the contract to the employers' engineer as arbitrator. After the pier had been completed, a question arose as to whether a sum for extra work was due to the contractor, and the engineer wrote letters to the employers (in answer to a request by them) giving a detailed opinion to the effect that the greater part of the sum in question was not due to the contractor:—*Held*, that the engineer had not disqualified himself from acting as arbitrator, there being nothing in his letters to shew that he would not, as arbitrator, regard the question in dispute with an open mind. *Halliday v. Hamilton's Trustees*, 5 F. 800—Ct. of Sess.

Fees—Statement of, in Awards.]—An arbitrator or umpire ought not to state his award in such a way as to deprive the parties of their right to challenge the amount charged by him for his services. Where therefore an umpire fixed by his award a lump sum as costs, including therein his own and the arbitrators' fees, the award was remitted back for him to state how much he awarded to himself and how much to the arbitrators. *Gilbert & Wright, In re*, 68 J. P. 143; 20 T. L. R. 164—D.

— Whether Extortionate—Certificate of Taxing Master.]—In the absence of evidence to shew that the fees charged by arbitrators or umpires are extortionate or unfair and unreasonable, the Court will not interfere with such charges. The certificate of the Taxing Master in the arbitration proceedings, disallowing a portion of the fees charged by the arbitrators and umpire, is not evidence against the arbitrator and umpire that the fees charged by them are excessive. *Llandrindod Wells Water Co. v. Hawksley*, 68 J. P. 242; 20 T. L. R. 241—C.A.

— Excessive Fees Charged by Arbitrator—Right of Party to Recover Excess Paid.]—If in arbitration proceedings a party has had to pay excessive fees to the arbitrator in order to take up his award, an action will lie at the suit of such party against the arbitrator to recover back the excess which has been improperly charged. *Llandrindod Wells Water Co. v. Hawksley*, 67 J. P. 439—Ridley, J.

— Jurisdiction of Court to Determine Remuneration—Fairness of Charges.]—A taxing officer, when determining the remuneration to be paid to a professional arbitrator under section 15, sub-section 3 of the Arbitration Act, 1889, is not entitled, if the evidence all goes to shew that in the opinion of persons in the same profession the charges made by the arbitrator are, for a person in his position in that profession, fair, to disregard that evidence and to reduce the remuneration to such an amount as is in his opinion fair. *Mason v. Lovatt*, 23 T. L. R. 486—C.A.

(4) AWARD.

Validity—Arbitrators "called on to act."]—A notice to arbitrators requiring them to appoint an umpire is a notice by which they are "called on to act" within the meaning of clause (c) of Schedule I. to the Arbitration Act, 1889, so as to bring into operation clause (d), and give jurisdiction to the umpire in the event of the arbitrators not making an award within three months after such notice. *Baring-Gould and Sharpington Combined Pick and Shovel Syndicate, In re*, 68 L. J. Ch. 429; [1899] 2 Ch. 80; 80 L. T. 739; 47 W. R. 564—C.A.

Presumption that Everything Rightly Performed.]—By an agreement, matter in dispute was to be submitted to arbitration on the "basis of Riga usance." An award regular upon the face of it was made by an arbitrator validly appointed, who did not have the agreement before him at the time of the arbitration and had never heard of Riga usance, and in making his award had no regard to Riga usance:—*Held*, that, the award being regular upon the face of it, it must be presumed, in the absence of evidence to the contrary, that everything was

rightly and duly performed, and that the award was in accordance with Riga usance. *Bland v. Russian Bank for Foreign Trade*, 11 Com. Cas. 71—Bigham, J.

Claims Outside the Reference—Jurisdiction.]—If a lump sum be awarded by an arbitrator, and it is shewn that matters have been taken into account which the arbitrator had no jurisdiction to consider, the award is bad; but it is not necessarily bad because it fails to state in terms that the arbitrator has rejected matters which were not properly referable. In such a case the award can only be impeached by proof of actual excess of jurisdiction. Nor does the fact that the arbitrator took evidence on matters which turned out not to be within his jurisdiction vitiate the award, as such evidence may have been necessary to ascertain whether the matter was or was not within the jurisdiction. *Falkingham v. Victorian Railway Commissioners*, 69 L. J. P.C. 89; [1900] A.C. 452; 82 L. T. 506—P.C.

Award Ultra Vires—Arbitrator or Umpire—Functus Officio—Power of Court to Remit Matters Referred for Reconsideration.]—An arbitrator who has made an award is at once *functus officio*; and, if his award does not embrace the matters really in issue between the parties, he cannot, of his own motion, treat it as no award and make another. But in a case where the mistake is due to misapprehension of the terms of the submission to arbitration, the Court has, under section 10 of the Arbitration Act, 1889, general power and jurisdiction to remit the matters referred by the submission to the reconsideration of the arbitrator. *Stringer and Riley's Arbitration, In re*, 70 L. J. Q.B. 19; [1901] 1 Q.B. 105; 49 W. R. 111—D.

Extension of Time—Power of the Court.]—Section 180, sub-section 9 of the Public Health Act, 1875, provides that the time for making an award by arbitrators under that Act shall not in any case be extended beyond the period of two months from the date of the submission, and that the time for making an award by an umpire under that Act shall not in any case be extended beyond the period of two months from the date of the reference of the matters to him. Section 9 of the Arbitration Act, 1889, provides that the time for making an award may from time to time be enlarged by order of the Court or a Judge, whether the time for making the award has expired or not:—*Held*, that the Court has power under section 9 of the Arbitration Act, 1889, to enlarge the time for making an award beyond two months from the date of the submission, notwithstanding section 180 of the Public Health Act, 1875. *Warburton v. Haslingden Local Board* (48 L. J. C.P. 451) followed. *Mackenzie, In re* (55 L. J. Q.B. 309; 17 Q.B. D. 114), dissented from. *Knowles v. Bolton Corporation*, 69 L. J. Q.B. 481; [1900] 2 Q.B. 253; 82 L.T. 229; 48 W. R. 433—C.A.

Remitting Back Award—Mistake of Arbitrator—Omission to Award Costs.]—In an arbitration under the Light Railways Act, 1896, in which under the statute the costs were in the discretion of the arbitrator, the arbitrator made and published an award in which he said nothing as to costs. Upon an affidavit by the arbitrator that the reason why he had made no

award as to costs was that he had been under the misapprehension that the arbitration was subject to the provisions of the Lands Clauses Act, 1845, under which costs follow the event, and that if he had known that he had power to award costs he would have awarded them to the claimants.—*Held*, that as the mistake made by the arbitrator was merely one of omission, and he did not seek in any way to impeach the award that he had made, the matter ought to be remitted to him for his reconsideration. *Barbers and Midland Railway, In re*, 95 L. T. 20; 70 J. P. 445; 22 T. L. R. 616—C.A.

— **Mistake in Law.**—An award will not be remitted for the reconsideration of an arbitrator upon the sole ground that the arbitrator has made a mistake in law. *Montgomery, Jones & Co. and Liebenthal, In re*, 78 L. T. 406—C.A.

Award Condition Precedent to Action.—Where a fire policy made in Jersey is nevertheless an English contract, no action can be brought upon it until the amount has been settled by arbitration according to the condition contained therein. *Scott v. Avery* (25 L. J. Ex. 303; 5 H.L. C. 811) followed. *Spurrier v. La Cloche*, 71 L. J. P.C. 101; [1902] A.C. 446; 86 L. T. 631; 51 W. R. 1—P.C.

— The plaintiffs, who carried on business in Belfast, contracted with the defendants, timber merchants in Canada, for the purchase of a quantity of timber "warranted to be of fair average quality, of the sellers' usual shipment." The contract contained an arbitration clause as follows: "Should any difference arise under this contract, the buyers shall not reject the goods, if shipped, nor refuse payment; . . . but such dispute shall be referred to two arbitrators in the trade . . . having power to appoint an umpire, who shall decide whether any, or what, allowance shall be made; the decision of such arbitrators or their umpire shall be final and binding on buyers and sellers, and this submission shall and may be made a rule of H.M. High Court of Justice." There were three shipments of cargo, the two first being, as the plaintiffs alleged, below contract quality; and this was so found by the jury, to whom the question was left for the purpose of assessing contingent damages. An arbitration was held in respect of the two first shipments, which resulted in an invalid award. In an action on the award and for breach of warranty,—*Held*, on the construction of the contract, that a valid award was a condition precedent to enforcing liability under the warranty. *Gregg v. Fraser*, [1906] 2 Ir. R. 545—C.A.

Enforcing—Summons—Service on Foreigner out of Jurisdiction.—A summons to enforce an award under section 12 of the Arbitration Act, 1889, cannot be served upon a foreigner resident out of the jurisdiction. *Rasch v. Wulfert*, 73 L. J. K.B. 20; [1904] 1 K.B. 118; 89 L. T. 493; 52 W. R. 145; 20 T. L. R. 70—C.A.

— **Order Giving Leave to Enforce Right to Bring Action—Election.**—A person who has obtained an order for leave to enforce an award under section 12 of the Arbitration Act, 1889, is not thereby prevented from bringing an action

upon the award. *China Steam Navigation Co. v. Van Laun*, 22 T. L. R. 26—Bigham, J.

Agricultural Holdings Act.—See LANDLORD AND TENANT.

• **Appeal—Award in Form of Special Case—Time.**—See APPEAL.

(5) SPECIAL CASE.

Agreement not to Require Special Case—Validity.—*Quere*, whether an agreement, that the parties to an arbitration will not ask that a special Case shall be stated for the opinion of the Court, is valid. *Montgomery, Jones & Co. and Liebenthal, In re*, 78 L. T. 406—C.A.

Duty of Arbitrator.—An arbitrator cannot, after he has made his award, state a Case for the opinion of the Court under section 19 of the Arbitration Act, 1889, and the power of the Court to order a Case to be stated under that section is limited in like manner. *Tabernacle Permanent Building Society v. Knight* (62 L. J. Q.B. 50; [1892] A.C. 298) on this point followed. *Palmer and Hosken, In re*, 67 L. J. Q.B. 1; [1898] 1 Q.B. 131; 77 L. T. 350; 46 W. R. 49—C.A.

— **Misconduct of Arbitrator—Remission of Award.**—Section 19 of the Arbitration Act, 1889, impliedly confers on the parties to an arbitration the right to apply to the Court for an order directing the arbitrator to state at any stage of the proceedings, in the form of a Special Case for the opinion of the Court, a question of law arising in the course of the reference; and this right must be respected by arbitrators. If, therefore, a party to an arbitration *bona fide* requests the arbitrator to state a Case, or to delay making his award until the party can apply to the Court for an order directing a Case, and the arbitrator refuses to comply with either request, he is *prima facie* guilty of misconduct within section 11 of the Arbitration Act, 1889, such as would justify the Court in setting aside the award, or in remitting it to the arbitrator for further consideration under section 10. *Ib.*

Statement of Special Case after Award—Jurisdiction.—An arbitrator cannot be directed by the Court or a Judge to state a Special Case for the opinion of the Court under the Arbitration Act, 1889, s. 10, when no request or application to state a Case has been made before the award has been made and the arbitration concluded. *Montgomery, Jones & Co. and Liebenthal, In re*, 78 L. T. 406—C.A.

Order to State Special Case—Contract to Construct Railway—Clause Referring all Matters to Consulting Engineer.—By a contract for the construction of a railway for a lump sum it was provided that, "in the event of any dispute or question arising as to the intent and meaning of any part of the specification . . . or the interpretation, meaning, or effect of the clauses and conditions of the contract, or as to any other matter or thing whatever connected with or arising out of the contract or incidental thereto or not thereby provided for, such questions or disputes should be referred to the consulting engineer, whose decision should be

conclusive and binding on both parties." The cost of construction was greatly increased by the necessity of blasting rock instead of excavating earth, and the contractor claimed a large sum beyond the contract price, alleging that the contract provided for excavation of earth only. This claim was referred to the consulting engineer as arbitrator:—*Held*, that, as a substantial and serious point of law arose upon the construction of the contract, the case was one in which the Court would, in the exercise of its discretion, order the arbitrator to state a special Case for the opinion of the Court under section 19 of the Arbitration Act, 1889. *Nuttall and Lynton and Barnstaple Railway, In re*, 82 L. T. 17—C.A.

Reference by Local Act—Power of Arbitrator to State Case.—Under a provision in a local Act that "any dispute or difference arising between the corporation and any person or persons who are or may be interested in the provisions of this section as to the proper construction of such provisions or as to the carrying out of the matters dealt with in this section or in anywise in connection therewith shall be referred to" A. M. "or such other fit person as shall be mutually agreed upon, whose decision shall be final," the arbitrator has power to state his award in the form of a Special Case. *Carpenter and Bristol Corporation, In re*, 76 L. J. K.B. 1145; 97 L. T. 461; 71 J. P. 417; 5 L. G. R. 977; 23 T. L. R. 654—C.A.

Order to Arbitrator to State Case.—*See* APPEAL.

Special Case Stated by Arbitrators—Appeal.—*See* APPEAL.

(6) UMPIRE.

Jurisdiction of Arbitrators "called on to act."—A notice to arbitrators requiring them to appoint an umpire is not a notice by which they are "called on to act" within the meaning of clause (c) of Schedule I. to the Arbitration Act, 1889, so as to bring into operation clause (d), and give jurisdiction to the umpire in the event of the arbitrators not having made an award within three months after such notice. *Baker v. Stephens* (36 L. J. Q.B. 236; L. R. 2 Q.B. 523) applied. *Baring-Gould v. Sharpington Pick and Shovel Syndicate*, 67 L. J. Ch. 622; [1898] 2 Ch. 633; 79 L. T. 185; 47 W. R. 23—Stirling, J.

Fees of.—*See* ARBITRATOR, as above.

(7) COSTS.

Discretion of Arbitrator—Award Fees—Costs of Reference.—Costs left to the discretion of the arbitrator, but not dealt with by him, only follow the event when the matter is referred by the Court under section 14 of the Arbitration Act, and not when the action is stayed and arbitration is directed by the Court under the submission of the parties, for to such a reference section 15, sub-section 2, does not apply. *Warburg v. McKerrow*, 90 L. T. 644—Walton, J.

Of Renewing Lease.—Where a lease is renewable "at the cost of the lessee" on payment of a

fine, such cost includes the costs of an arbitration properly entered upon for the purpose of determining the fine payable by the lessee. *Fitzsimmons v. Lord Mostyn*, 73 L. J. K.B. 72; [1904] A.C. 46—H.L. (E.)

Agreement to Pay Costs, Charges, and Expenses "to be taxed"—Taxation—Jurisdiction to Review.—By an agreement, confirmed by a private Act, a district council agreed to purchase the undertaking of a gas company at a price to be fixed by arbitration, and it was provided that the agreement should be "deemed a 'submission' within the meaning of the Arbitration Act, 1889." The council also agreed to pay "all the costs, charges, and expenses of the company preliminary and incidental to the negotiation for the sale and the said arbitration, the same to be taxed in case the parties differ." An award was made which did not deal with costs. The costs were taxed by a Master, who allowed costs upon a scale lower than the scale as between solicitor and client. A Judge at chambers ordered a review of taxation:—*Held*, that there was jurisdiction to review the taxation of the Master; and that the company was entitled to costs as between solicitor and client. *Malvern Urban Council v. Malvern Link Gas Co.*, 83 L. T. 326—C.A.

Taxation of Costs—Light Railways.—*See* RAILWAY.

2. REFERENCES BY THE COURT.

Partnership Disputes—Questions of Law Involved—Prima facie Case of Fraud set up.—Disputes between partners involving questions of law, or where a *prima facie* case of fraud is set up, should not as a rule be referred to arbitration. *Barnes v. Youngs*, 67 L. J. Ch. 263; [1898] 1 Ch. 414; 46 W. R. 332—Romer, J.

Official Referee—Order of Divisional Court Varying Findings—Leave to Appeal—"Right of Appeal to the High Court from any Court or person."—An application to a Divisional Court to vary the findings of an official referee is a case "where there is a right of appeal to the High Court from any Court or person" within the meaning of section 1, sub-section 5 of the Judicature Act, 1894, and the determination thereof by the Divisional Court is final, unless leave to appeal is given by that Court or by the Court of Appeal. *Daglish v. Barton*, 68 L. J. Q.B. 1044; [1900] 1 Q.B. 284; 81 L. T. 551; 48 W. R. 50—C.A.

— Action in Chancery Division—Motion to Set Aside Judgment—Jurisdiction of Court of Appeal to Entertain Motion.—Where an official referee, under Order XL. rule 2, directs judgment to be entered in an action brought in the Chancery Division and referred to him under Order XXXVI. rule 7a, an application to set aside such judgment, under Order XL. rule 6, should be made to the Chancery Division, and not in the first instance to the Court of Appeal. *Serle v. Fardell* (44 Ch. D. 299) not followed. *Daglish v. Barton* (68 L. J. Q.B. 1044; [1900] 1 Q.B. 284) overruled. *Wynne-Finch v. Chaytor*, 72 L. J. Ch. 723; [1903] 2 Ch. 475; 89 L. T. 123; 52 W. R. 24—C.A.

Costs—Order of Reference and Award Silent as to Costs.]—Where an action is referred to an arbitrator under section 14 of the Arbitration Act, 1889, by an order which is silent as to costs, and the arbitrator makes an award which does not deal with costs, the costs of the action, reference, and award follow the event, inasmuch as under section 15, sub-section 2 of the Act the award is equivalent to the verdict of a jury. *Carr v. Dougherty*, 67 L. J. Q.B. 371—Phillimore, J.

Appeal from Official Referee—Security for Costs—Inherent Jurisdiction of the Court.]—The Divisional Court, on an appeal from an official referee, has inherent jurisdiction to order the appellant to give security for the costs of the appeal. *Billington, Lim. v. Billington*, 76 L. J. K.B. 664; [1907] 2 K.B. 106; 96 L. T. 665; 23 T. L. R. 473—D.

Official Referee—Appeal from Order as to Costs.]
—See COSTS.

Reference of Action to Master by Consent.]
—See APPEAL.

3. REFERENCES UNDER SPECIAL AND PRIVATE ACTS.

Ouster of Jurisdiction of Courts—Private Act—Statutory Agreement—Corporation—Traders—Waiver.]—The jurisdiction of the Court may be completely ousted by an arbitration enactment contained in a private Act of Parliament or in an agreement confirmed by such an Act, not only by express language constituting arbitration the only tribunal, but by necessary implication, where the arbitration provision is for the public good and not for the benefit of individuals; and no deficiency of pleading and no waiver by litigants can give the Court jurisdiction in such a case. *Caledonian Railway v. Greenock and Wemyss Bay Railway* (L. R. 2 H.L. Sc. 347) explained and followed as a direct authority for the complete ouster of the jurisdiction of the Court in such a case, notwithstanding the observations of COTTON, L.J., and BOWEN, L.J., in *London, Chatham, and Dover Railway v. South-Eastern Railway* (58 L. J. Ch. 75; 40 Ch. D. 100). *Crossfield v. Manchester Ship Canal Co.*, 73 L. J. Ch. 345; [1904] 2 Ch. 123; 90 L. T. 557; 52 W. R. 635; 68 J. P. 421; 20 T. L. R. 371—C.A.

The Manchester Ship Canal Act, 1885, s. 88, enacted that for the protection of the corporation and traders of Warrington certain provisions, "unless otherwise agreed on between the Corporation and the Company," should have effect. Then followed a number of sub-sections (*inter alia*) imposing on the Canal company the obligation of keeping dredged a portion of the river Mersey, and providing by sub-section 22 that if any difference should arise "between the Company and the Corporation," as to the true meaning of the section, or as to anything to be done under it, the same should be determined by an arbitrator. Section 202 also contained a general arbitration clause between the company and "any person." In 1896 an agreement between the company and corporation was confirmed by the Manchester Ship Canal Act, 1896. This agreement somewhat modified the company's statutory obligation as to dredging the river Mersey, and while that obligation as

modified remained unfulfilled gave the traders a right of using the canal free of toll, and clause 10 contained an arbitration clause similar to that contained in sub-section 22. A difference arose as to the extent of the company's obligation to keep the river Mersey dredged under section 88 as modified by the agreement, and the traders, alleging the obligation to be unfulfilled, claimed the right of free navigation of the canal and paid tolls under protest. In an action by the corporation and certain traders, suing in both a representative and an individual capacity, for a declaration of rights, and (on the part of the traders in their individual capacity) for repayment of the tolls improperly demanded, and damages for breach of their statutory obligations by the company,—*Held*, that, so far as the action was brought by the corporation, the jurisdiction of the Court was completely ousted either by sub-section 22 of section 88, or by clause 10 of the agreement. *Held*, also, by VAUGHAN WILLIAMS, L.J., and STIRLING, L.J. (*dissentiente* COZENS-HARDY, L.J.), that, so far as the action was brought by the traders, the jurisdiction of the Court was equally ousted until the difference had been determined by arbitration, STIRLING, L.J., so deciding on the ground that the case was within section 202. *Held*, by COZENS-HARDY, L.J., that the action lay by the traders. *Ib.*

Jurisdiction—Private Acts—Statutory Agreement—Corporation—Traders.]—The corporation of Warrington is not, under the Manchester Ship Canal Acts, 1885 and 1896, entitled to bring an action against the Manchester Ship Canal, but is compelled to resort to arbitration as provided by the Acts for the adjustment of differences between the corporation and the company. *Crossfield v. Manchester Ship Canal* (No. 1), 73 L. J. Ch. 637; [1905] A.C. 421; 93 L. T. 141; 54 W. R. 172; 69 J. P. 441; 21 T. L. R. 689—H.L. (E.)

Held also, that the traders referred to in the Acts were not by the Acts excluded from access to the Courts. *Ib.*

Under Housing of Working Classes.]—See LOCAL GOVERNMENT.

Under Public Health Act, 1875.]—See LOCAL GOVERNMENT.

Under Tramways Act.]—See TRAMWAYS.

Costs—Light Railway.]—The Arbitration Act, 1889, applies to an arbitration under the Light Railways Act, 1889, and not the Lands Clauses Act, 1845, even though the latter Act is incorporated in the order authorizing the construction of the light railway. The costs therefore of the reference and award are in the discretion of the arbitrator. *Baxter v. Midland Railway*, 93 L. T. 538; 69 J. P. 389; 21 T. L. R. 708—A. T. Lawrence, J.

ARCHITECT.

Negligence of.]—See NEGLIGENCE.

Remuneration.]—See WORK AND LABOUR.

ARMY AND NAVY.

1. *Statutes*, 45.
2. *Generally*, 46.
3. *Army*, 47.
4. *Navy*, 50.

1. STATUTES.

(a) ARMY.

Annual Act.—61 & 62 Vict. c. 1 is the *Army (Annual) Act*, 1898.

— 62 & 63 Vict. c. 3 is the *Army (Annual) Act*, 1899.

— 63 & 64 Vict. c. 5 is the *Army (Annual) Act*, 1900.

— 1 Edw. 7 c. 2 is the *Army (Annual) Act*, 1901.

— 2 Edw. 7 c. 2 is the *Army (Annual) Act*, 1902.

— 3 Edw. 7 c. 4 is the *Army (Annual) Act*, 1903.

— 4 Edw. 7 c. 5 is the *Army (Annual) Act*, 1904.

— 5 Edw. 7 c. 2 is the *Army (Annual) Act*, 1905.

— 6 Edw. 7 c. 2 is the *Army (Annual) Act*, 1906.

— 7 Edw. 7 c. 2 is the *Army (Annual) Act*, 1907.

Reserve Forces.—62 & 63 Vict. c. 40 is the *Reserve Forces Act*, 1899.

— 61 & 62 Vict. c. 9 is the *Reserve Forces and Militia Act*, 1898.

— 63 & 64 Vict. c. 42 is the *Reserve Forces Act*, 1900.

— 6 Edw. 7 c. 11 is the *Reserve Forces Act*, 1906.

Police Reservists.—63 & 64 Vict. c. 9 is the *Police Reservists (Allowances) Act*, 1900.

Militia and Yeomanry.—1 Edw. 7 c. 14 is the *Militia and Yeomanry Act*, 1901.

— 2 Edw. 7 c. 39 is the *Militia and Yeomanry Act*, 1902.

Volunteers.—63 & 64 Vict. c. 39 is the *Volunteer Act*, 1900.

Military Works.—62 & 63 Vict. c. 41 is the *Military Works Act*, 1899.

— 1 Edw. 7 c. 40 is the *Military Works Act*, 1901.

— 3 Edw. 7 c. 29 is the *Military Works Act*, 1903.

Military Lands.—63 & 64 Vict. c. 56 is the *Military Lands Act*, 1900.

— 3 Edw. 7 c. 47 is the *Military Lands Act*, 1903.

Patriotic Fund.—62 & 63 Vict. c. 45 is the *Patriotic Fund Act*, 1899.

Exportation of Arms.—63 & 64 Vict. c. 44 is the *Exportation of Arms Act*, 1900.

War Loan.—63 & 64 Vict. c. 2 is the *War Loan Act*, 1900, and 63 & 64 Vict. c. 61 is the *Supplemental War Loan Act*, 1900.

False Characters.—6 Edw. 7 c. 5 is the *Seamen's and Soldiers' False Characters Act*, 1906.

Territorial Forces.—7 Edw. 7 c. 9 is the *Territorial and Reserve Forces Act*, 1907.

(b) NAVY.

Greenwich Hospital.—61 & 62 Vict. c. 24 is the *Greenwich Hospital Act*, 1898.

Naval Works.—62 & 63 Vict. c. 42 is the *Naval Works Act*, 1899.

Naval Reserve.—63 & 64 Vict. c. 17 is the *Naval Reserve (Mobilisation) Act*, 1900, and 63 & 64 Vict. c. 52 is the *Naval Reserve Act*, 1900.

Naval Works.—1 Edw. 7 c. 39 is the *Naval Works Act*, 1901.

Royal Naval Reserve.—2 Edw. 7 c. 5 is the *Royal Naval Reserve Act*, 1902.

Naval Forces.—3 Edw. 7 c. 6 is the *Naval Forces Act*, 1903.

Naval Works.—3 Edw. 7 c. 22 is the *Naval Works Act*, 1903.

— 5 Edw. 7 c. 20 is the *Naval Works Act*, 1905.

2. GENERALLY.

Martial Law—Supersession of Civil Tribunals.]

—Where war actually prevails the ordinary Courts have no jurisdiction over the action of the military authorities, and the mere fact that some of the ordinary Courts are open is not sufficient to constitute a time of peace, and thereby to exclude the operation of martial law. *Marais (D. F.) v. General Officer Commanding the Lines of Communication*, 71 L. J. P.C. 42; [1902] A.C. 109; 85 L. T. 734; 50 W. R. 273—P.C.

Under the Petition of Right a state of peace is the necessary condition of the illegality of unconstitutional procedure. *Ib.*

— **Special Leave to Appeal.**—Special leave to appeal from an order refusing to interfere with the custody by the military authorities of a person arrested by military authority refused, it appearing that war had at the time and place of the arrest been and was still raging. *Ib.*

— **Resident Magistrate Acting as Administrator of Martial Law—Record—Application to Review in Civil Court.**—There is no jurisdiction in a civil Court to review a sentence or judgment of a Court of martial law. A martial law Court is not a Court of record, and the administrator, even though he happen to be also a civil magistrate, and describe himself in a memorandum as acting in the double capacity, must be taken

to have acted solely in the administration of martial law. *Att.-Gen. of the Cape of Good Hope v. Van Reenen*, 73 L. J. P.C. 13; [1904] A.C. 114; 89 L. T. 591; 20 T. L. R. 90—P.C.

Effect of War on Contracts—Mere Imminence of War not Sufficient—Public Policy.—The law recognises a state of peace and a state of war, but knows nothing of an intermediate state which is neither one thing nor the other; and though the effect of war is to dissolve contracts and put an end to commercial relations between the subjects of the belligerent Powers, the actual existence and not the mere imminence of war at the time of the creation of the contract is necessary to bring about such a result. It is for the State and its rulers and not for private individuals to set up a standard and to determine questions of public policy. In these matters the individual must conform to the rule and guidance of the State. *Janson v. Driefontein Consolidated Mines*, 71 L. J. K.B. 857; [1902] A.C. 484; 87 L. T. 372; 51 W. R. 142; 7 Com. Cas. 268—H.L. (E.)

Defence Works—Land Compulsorily Taken—“Compensation”—Injurious Affection.—Where land is compulsorily acquired by the Government for defence purposes under the Defence Acts, the owner of the land taken is entitled to compensation in respect of any injurious affection of his adjoining lands. *Reg. v. Abbott* ([1897] 2 Ir. R. 362) and *Ned's Point Battery, In re* ([1903] 2 Ir. R. 192) followed. *Blundell v. Ilegen*, 74 L. J. K.B. 91; [1905] 1 K.B. 516; 92 L. T. 58; 53 W. R. 412; 21 T. L. R. 143—Ridley, J.

Defence Acts—Artillery Range and Camp—Compensation—Other Lands of Owner Injuriouly Affected.—Where lands are compulsorily taken, under the Defence Code, for use as a camp and artillery range, compensation may be allowed for depreciation in value of other lands of the same owner not taken, resulting from the natural and ordinary use of the lands taken as such camp and range. In estimating such compensation regard may be had to loss of privacy and amenity, and the vulgarisation of the neighbourhood, by the establishment of a camp, but not to loss or injury from apprehended trespass by soldiers or their friends to other lands of the same owner. Compensation may be allowed for injury, caused by the nature of the artillery range, to a fishery attached to the ownership of the lands not taken. *Semble*, compensation may be allowed for injury to an incorporeal hereditament, such as a several fishery. *Ned's Point Battery, In re*, [1903] 2 Ir. R. 192—K.B. D.

3. ARMY.

Soldiers' Pay—Service in South African War—Rate of Pay—Agreement with Colonial Government—Part Payment by Imperial Government.—Service in the army or in Colonial contingents incorporated with the army is service under the King, and the King is paymaster, whether the supplies are granted by the Imperial or a Colonial Legislature. *Williams v. Howarth*, 74 L. J. P.C. 115; [1905] A.C. 551; 93 L. T. 115; 21 T. L. R. 670—P.C.

The respondent served with the troops sent from New South Wales to South Africa under

an agreement with the Government of the Colony by which he was to receive 10s. a day. Whilst he was on active service he received 4s. 6d. a day from the Imperial Government:—*Held*, that this payment was in part discharge of the 10s. a day under the contract. *Ib.*

Unlawful Possession of Regimental Necessaries—Personal Knowledge of Pawnbroker.—In a prosecution for a contravention of section 156, sub-section 2 of the Army Act, 1881, it is not necessary to prove personal knowledge on the part of the accused that the regimental necessaries described in the complaint were in his possession. Therefore, a pawnbroker who had three shops, in one of which certain regimental necessaries were pawned, was held liable, although he had no personal knowledge that the articles had been pawned or were in any of his premises. *O'Brien v. Macgregor*, 5 F. (Just. Cas.) 74—Ct. of Justy.

Rifle Range—Nuisance—Foreshore—Artillery and Rifle Ranges Act, 1885.—The firing on a rifle range near the sea leased by a certain corps of volunteers, and sanctioned by the Secretary of State for War, made the foreshore in the vicinity of the targets unsafe for persons passing along the foreshore. The public had from time immemorial used this part of the foreshore for recreation and as a means of passage. The consent of the Board of Trade under section 3 of the Artillery and Rifle Ranges Act, 1885, had not been obtained to any by-laws made by a Secretary of State restricting the use of the foreshore by the public in order that the range might be used as such:—*Held*, that a member of the public was entitled to interdict against the use of the rifle range. *Fergusson v. Pollock*, 3 F. 1140—Ct. of Sess.

Public Road—Military Lands Act, 1892.—A member of the public was held entitled to interdict against the use of a rifle range by volunteers in respect that the noise of the firing was a source of danger to horse traffic on a public road in the vicinity, and that the consent of the road authorities had not been obtained under section 16 of the Military Lands Act, 1892. *Ib.*

Gift to Officers' Mess for Upkeep of Library.—Gift of residuary estate for upkeep of a mess library held to be a charitable gift within the Statute of Elizabeth (43 Eliz. c. 4). *Good, In re; Harington v. Watts*, 74 L. J. Ch. 512; [1905] 2 Ch. 60; 92 L. T. 796; 53 W. R. 476; 21 T. L. R. 450—Farwell, J.

Gift of Houses for Use of Former Officers—Perpetuity.—Gift of leasehold houses for old officers of a regiment at a small rent held void for perpetuity. *Income Tax Commissioners v. Pemsel* (61 L. J. Q.B. 265; [1891] A.C. 583) discussed and explained. *Stratheden, In re* (63 L. J. Ch. 872; [1894] 3 Ch. 265), approved. *Ib.*

Volunteer Corps—Training or Exercising in Camp with Regular Forces—Period during which Training Continues—“Persons subject to Military Law as Soldiers”—Arrest of Volunteer for Alleged Larceny—Detention in Military Custody Elsewhere than in Camp—Legality of Order for Detention.—Upon the true construction of section 176 of the Army Act, 1881, members of volunteer forces of the United Kingdom who attend

a training or exercise in camp with a portion of the regular forces, commence such training or exercise as soon as each member of such volunteer forces falls in and forms up with his comrades as a regiment under arms and under command in order to carry out such training or exercise, and the members of such volunteer regiment continue subject to military law as soldiers as long as the regiment remains under arms and under command—that is, until the regiment or particular company has reached its homeward destination and has been finally dismissed. *Marks v. Frogley*, 67 L. J. Q.B. 605; [1898] 1 Q.B. 888; 78 L. T. 607; 46 W. R. 548; 19 Cox C.C. 91—C.A.

An order given by an officer in command of a volunteer corps to arrest, within the actual boundaries of the camp, a member of such corps upon a charge of larceny alleged to have been committed whilst such camp is breaking up, and to escort him in military custody in a military train, then on the point of starting, for the conveyance of the corps to its home destination, and, on arrival at the railway station nearest his home, to escort him to the police station and hand him over to the civil authority, is an order which such officer can lawfully give under section 176 of the Army Act, 1881, and article 374 of the Regulations for the Volunteer forces, inasmuch as at the time when such order is given the person so arrested is subject to military law as a soldier. *Ib.*

Such arrest and ultimate detention in civil custody can also be justified under section 158 of the Army Act, 1881, and it is not necessary under that section that an offence should have been actually committed, for the section applies to a case where an offence is alleged to have been committed. *Ib.*

Volunteers—Supply of Goods to Corps—Personal Liability of Officer Commanding.—Where goods supplied to a volunteer regiment are ordered by or on behalf of the officer commanding, that officer is personally liable for their price. *Samuel v. Wetherly*, 76 L. J. K.B. 357; [1907] 1 K.B. 709; 96 L. T. 552; 23 T. L. R. 280—Walton, J. Affirmed in C.A. on a finding of fact, 77 L. J. K.B. 69; [1908] 1 K.B. 184; 98 L. T. 169; 24 T. L. R. 160.

Turnpike Road—Toll—Exemption—Carriage “Employed” in Her Majesty’s Military Service—Private Carriage of Officer Used by Him on Duty.—The private carriage of an officer of her Majesty’s regular forces, used by him in the discharge of his official duties, he not being in receipt of or entitled to any government allowance for such a carriage nor entitled to hire such a carriage at the cost of the Government, is not “employed” in her Majesty’s military service within the meaning of section 143 of the Army Act, 1881, and consequently, in passing along a turnpike road, is not exempted by that section from payment of a statutory toll payable on such road. *Craig v. Nicholas*, 69 L. J. Q.B. 608; [1900] 2 Q.B. 444; 82 L. T. 765; 49 W. R. 48; 64 J. P. 569; 19 Cox C.C. 526—D.

Paving and Sewerage Expenses—Premises Used as Headquarters of Volunteer Battalion—Liability of Legal Owner.—The commanding officer of a volunteer corps who acquires premises by virtue of the Volunteer Act, 1863, for the use of the corps is not liable under

section 150 of the Public Health Act, 1875, as owner of the premises, to pay the apportioned part of the expense of sewerage and paving the street upon which the premises abut, inasmuch as the premises are owned upon behalf of the Crown, which is not bound by the provisions of the section. *Hornsey Urban Council v. Hennell*, 71 L. J. K.B. 479; [1902] 2 K.B. 73; 86 L. T. 423; 50 W. R. 521; 66 J. P. 613—D.

In order that a pecuniary burden may be imposed upon Crown property by statute, the Crown must be expressly named or it must appear by necessary implication that the Crown has agreed or is intended to be bound; and the insertion of a particular protecting clause is not of itself sufficient to shew that only the class of property included within it was intended to be exempt. *Ib.*

Committal Order against Army Officer.—See DEBTORS ACT.

Courts-martial—Leave to Appeal.—See *Tilonko v. Att.-Gen. for Natal*, post, COLONY.

Rating Drill Hall.—See POOR LAW.

Soldier’s Will—What is.—See WILL.

Volunteer Drill Hall—Exemption from Rates.—See POOR LAW.

4. NAVY.

Making False Statement—Joining Royal Naval Reserve—“Naval service.”—The words “naval service” in section 16 of the Naval Enlistment Act, 1853, do not include service in the Royal Naval Reserve. A person, therefore, is not liable to be proceeded against under that section for making a false statement on joining the Royal Naval Reserve. *Westhorpe v. Powley*, 74 L. J. K.B. 150; [1905] 1 K.B. 286; 92 L. T. 57; 53 W. R. 366; 69 J. P. 77; 20 Cox C.C. 747; 21 T. L. R. 152—D.

ARRANGEMENT, DEEDS OF.

See BANKRUPTCY.

ASSIGNMENT.

1. Chose in Action, 50.

(a) What Assignable, 50.

(b) Absolute Assignment or by Way of Security, 53.

(c) Equitable Assignments, 56.

(d) Priorities, 57.

2. Other Cases, 59.

1. CHOSE IN ACTION.

(a) WHAT ASSIGNABLE.

Negotiable Instrument—Notice of Assignment—Effect of.—Notice to a debtor who has given a negotiable instrument for his debt that the debt has been assigned by the creditor can be disregarded by the debtor, even if the creditor who has assigned the debt is the holder of the negotiable instrument. *Bence v. Shearman*, 67 L. J.

Ch. 513; [1898] 2 Ch. 582; 78 L. T. 804; 47 W. R. 350—C.A.

Reversion—Contract to Sell.—Where a contract to sell a reversion is, before breach, absolutely assigned by the purchaser, the assignee can sue the vendor in his own name under section 25, sub-section 6 of the Judicature Act, 1873, for a breach of contract arising after the assignment. *Torkington v. Magee*, 71 L. J. K.B. 712; [1902] 2 K.B. 427; 87 L. T. 304—D. Reversed on the facts. *Torkington v. Magee*, 72 L. J. K.B. 336; [1903] 1 K.B. 644; 88 L. T. 443—C.A.

Notice to Treat—Damage Done in Exercise of Statutory Powers—Assignment of Right to Compensation.—A right to compensation for damage, arising directly by reason of a notice to treat given by a railway company under section 68 of the Lands Clauses Act, 1845, and which damage might be done in the lawful exercise of statutory powers conferred upon the company, is a legal *chose in action* within the meaning of sub-section 6 of section 25 of the Judicature Act, 1873, and is capable of being assigned under that sub-section. *Dawson v. Great Northern and City Railway*, 74 L. J. K.B. 190; [1905] 1 K.B. 260; 92 L. T. 137; 69 J. P. 29; 21 T. L. R. 114—C.A. Reversing *WRIGHT, J.*, 21 T. L. R. 114.

Fund in Court—Assignment of Share—Defective Title—Subsequent Acquisition of Good Title.—Where a person purports to convey one-sixth of a fund in Court representing real estate, though only entitled to one ninth share, and afterwards becomes entitled to one sixth, the Court will make the good title subsequently acquired available to make the assignment effectual. *Noel v. Bewley* (3 Sim. 103) followed. *Hoffe's Estate Act, In re*, 82 L. T. 556; 48 W. R. 507—Kekewich, J.

Contract—Assignability.—A., who was the owner of a patent for the construction of a machine, supplied and erected a machine for the respondent. Afterwards he assigned the patent to the appellant company, "together with the benefit of all contracts and concessions." The company, with the consent of A., sued the respondent for the price of the machine supplied to him:—*Held*, that the action was not maintainable. *International Fibre Syndicate v. Dawson*, 84 L. T. 803—H.L. (Sc.)

Contract to Pave Streets and Maintain Paving for Fixed Period.—A company which had entered into a contract to pave certain streets and maintain the surface in good condition for a term of years, was *held* entitled to assign the execution of the contract in respect that in such a contract there was no *delectus personarum*. *Asphaltic Limestone Concrete Co. v. Glasgow Corporation*, [1907] S. C. 463—Ct. of Sess.

New Company taking over Business of Old Company.—A contract for the supply of materials during a term of fifty years, or, if the source of supply should fail, for thirty-five years at least, is an assignable contract; and where the company to which the materials are supplied and with which the contract was made transfers its business to a new company, the latter is entitled to the benefit of the contract

(LORD ROBERTSON dissenting). *Tolhurst v. Associated Portland Cement Manufacturers*, 72 L. J. K.B. 834; [1903] A.C. 414; 89 L. T. 196; 52 W. R. 143—H.L. (E.) Reversing *Tolhurst v. Associated Portland Cement Manufacturers*, 71 L. J. K.B. 949; [1902] 2 K.B. 660; 87 L. T. 465; 51 W. R. 81—C.A.

to Supply Goods as Purchaser may Require for His Business—Agreement by Purchaser not to Buy Similar Goods from Others—Assignment of Purchaser's Business—Right of Assignee to Require Supply of Goods from Vendor.—The defendant contracted with K., a cake manufacturer, to supply him with all the eggs of a specified quality "that he shall require for manufacturing purposes for one year," K. undertaking not to purchase eggs from any other merchant during the year so long as the defendant was ready to supply them. During the year K. transferred his business to a company, whereupon the defendant claimed to be discharged from his contract, and refused to supply any more eggs either to K. or to the company. In an action brought by K. and the company, as co-plaintiffs, for breach of the contract,—*Held*, that the defendant's contract was with K. personally; that the benefit of it was not assignable; and that the defendant was discharged from his obligation. *Tolhurst v. Associated Portland Cement Manufacturers* (72 L. J. K.B. 834; [1903] A.C. 414) distinguished. *Kemp v. Baerelman*, 75 L. J. K.B. 873; [1906] 2 K.B. 604—C.A.

Vendor and Purchaser—Assignment by Vendor—Payment by Common Consent to Assignee—Failure of Consideration—Liability of Assignee.—Under a contract of sale money due to the vendor was by common consent paid by the purchaser to a third person to whom the vendor executed an assignment of the contract. Periodical payments were also made by the purchaser to the assignee to be applied for a specified purpose. There was a failure of consideration on the part of the vendor which would have entitled the purchaser to repayment from him:—*Held*, that the purchaser was not entitled to repayment from the assignee of the money paid by common consent or of the periodical payments in so far as they were in fact appropriated to the specified purpose. *Mackusick v. Fleming*, 73 L. J. Ch. 826; 90 L. T. 101; 20 T. L. R. 263—H.L. (E.)

Vendor and Purchaser—Money Paid by Purchaser to Assignee—Rescission—Failure of Consideration—Money Had and Received.—Payments made by a purchaser on account of moneys payable to the vendor under the contract, to a third person who is assignee of or interested in the vendor's contract can, on total failure of the consideration, be recovered by the purchaser in an action for money had and received to his use from such third person, though he was not a party to the contract. *Aberaman Ironworks v. Wickens* (L. R. 4 Ch. 101) distinguished and explained. *Fleming v. Loe*, 70 L. J. Ch. 805; [1901] 2 Ch. 594; 85 L. T. 480; 50 W. R. 55—Cozens-Hardy, J. Reversed on facts, 71 L. J. Ch. 687; [1902] 2 Ch. 359; 87 L. T. 213—C.A.

Personal Covenant—Notice—Tied House—Lessee's Covenant.—*Semble*, a covenant by the

lessee of a beerhouse that he will during the tenancy purchase from the landlords and their successors in business all ale, beer, porter, &c., and will not at any time directly or indirectly sell on the premises any ale, beer, porter, &c., other than such as shall have been so *bona fide* purchased, is a personal contract binding on the lessee, and the benefit of it could have been assigned in equity before the Judicature Act, 1875, and the assignees could sue upon it if there had been an absolute assignment thereof to them in writing signed by the assignor, of which express notice in writing had been given to the lessee. *Manchester Brewery Co. v. Coombs*, 70 L. J. Ch. 814; [1901] 2 Ch. 608—Farwell, J.

Claim for Damages—"Debts"—"Effects"—"Contracts and engagements."—A person having a claim against the defendants for unliquidated damages for breach of contract became bankrupt, and his trustee in bankruptcy assigned to the plaintiff the bankrupt's business and goodwill, together with "the plant, stock-in-trade, book and other debts, securities, moneys, credits, effects, contracts and engagements to which the vendor as such trustee is entitled in connexion with the said respective business":—*Held*, that the assignment included the claim for damages. *Ogdens v. Weinberg*, 95 L. T. 567; 22 T. L. R. 729—H.L. (E.)

(b) ABSOLUTE ASSIGNMENT, OR BY WAY OF SECURITY.

Debt—Trust in Favour of Assignor—Assignee Taking no Beneficial Interest—Purpose of Assignee to Make Debtor Bankrupt—Maintenance—Public Policy.—The plaintiff, being satisfied that it was for the best interests of a company, of which he was a shareholder and director, that the defendant, a co-director of the company, should be removed from the board, obtained from creditors of the defendant an absolute assignment in writing of the debts due to them from the defendant, with the object of making the defendant a bankrupt, and so removing him from the board. The assignment was made in consideration of a covenant by the plaintiff that in case he should be able to recover the amount of the debts he would immediately pay over to the assignors the respective amounts, or so much thereof as he might be able to recover, after payment of all costs necessarily incurred by him. Notice in writing of the assignment was given to the defendant:—*Held*, that, upon the authority of *Comfort v. Betts* (60 L. J. Q.B. 656; [1891] 1 Q.B. 737), the plaintiff was entitled to maintain an action upon the assignment; and (by *MATHEW, L.J.*, and *COZENS-HARDY, L.J.*) that, as the plaintiff was simply asserting a legal right consequential upon the possession of property which had been validly assigned to him, his action was not open to the objection of maintenance, or otherwise such that upon the grounds of public policy the Court ought to refuse its assistance. *Fitzroy v. Cave*, 74 L. J. K.B. 829; [1905] 2 K.B. 364; 93 L. T. 499; 54 W. R. 17; 21 T. L. R. 612—C.A.

Moneys under Building Contract—Judicature Act, 1873, s. 25, sub-s. 6.—The plaintiff, a builder, who had entered into a building contract with the defendants, executed an assignment in the following terms in favour of his bankers:

"In consideration of your continuing a banking account with me . . . and by way of continuing security to you for all moneys due or to become due to you from me . . . I hereby assign to you all moneys due or to become due to me from [the defendants] under or by virtue [of the said building contract]. And I hereby empower you on my behalf and in my name to settle and adjust all accounts in connection with the works and matters aforesaid, to give effectual receipts for the moneys hereby assigned . . . also if necessary to sue for or take such other steps as you may think necessary for enforcing payment of the moneys hereby assigned. . . . And I hereby undertake at your request and my cost to do and execute all such further acts deeds and things as you may reasonably require for giving full effect to the security hereby created":—*Held*, that this was an "absolute assignment" within section 25, sub-section 6 of the Judicature Act, 1873, and that, therefore, the plaintiff was not entitled to sue the defendants in respect of a balance alleged to be due to him under the building contract. *Hughes v. Pump House Hotel Co. (No. 1)*, 71 L. J. K.B. 630; [1902] 2 K.B. 190; 86 L. T. 794; 50 W. R. 660—C.A.

Notice—Letter Directing Payment to a Creditor—Acknowledgment by Creditor.—K. & Co., who owed money to the plaintiffs, sold goods to the defendants. On January 6 K. & Co. wrote to the plaintiffs inclosing a printed document, which they requested the plaintiffs to forward to the defendants for their signature. This document consisted of two detachable parts: one part was signed by K. & Co., and was addressed to the defendants, and requested them to sign the attached letter and to forward the same to the plaintiffs; the other part (the attached letter) was addressed to the plaintiffs, and was in these terms: "Herewith we beg to confirm that we shall remit, subject to the approval of the goods, the amount of invoices—viz. 369*l.* and 3,263*l.*, for 75 packages of raw rubber, received to-day from K. & Co., when due, direct to your good selves for account of K. & Co." The plaintiffs, on January 7, forwarded this printed document to the defendants, and it was signed on their behalf and returned to the plaintiffs. The defendants failed to pay the sum of 3,263*l.* to the plaintiffs, who brought an action to recover it:—*Held*, that K. & Co.'s letter of January 6, together with the printed document inclosed, amounted to an absolute assignment within section 25, sub-section 6 of the Judicature Act, 1873, and that there was written notice to the defendants within that section. *Brandt v. Dunlop Rubber Co.*, 8 Com. Cas. 174—Walton, J.

Power to Assignee to Sue.—A document, purporting to be an assignment of a debt or legal chose in action as security for the repayment of a loan, and empowering the assignee to sue either in his own name or in that of the assignor, —*Held*, not to be an absolute assignment within section 25, sub-section 6 of the Judicature Act, 1873. *Mercantile Bank of London v. Evans*, 68 L. J. Q.B. 921; [1899] 2 Q.B. 613; 81 L. T. 376—C.A.

Written Request to Debtor to Sign Promise to Pay Debt to Third Person.—A firm of merchants, having sold goods, sent to a firm of

bankers, in accordance with an arrangement which they had with them, a document, with a counterpart attached thereto, which they requested them to forward to the purchasers of the goods. The bankers forwarded to the purchasers the document, the first part of which was a request signed by the merchants to the purchasers to sign the attached letter and forward it to the bankers. The counterpart was addressed to the bankers, and was, so far as material, "We beg to confirm that we shall remit" . . . the amount of invoices . . . "direct to your good selves, for account of" the merchants. The counterpart was signed and sent to the bankers by a person in the employ of the purchasers who had no authority so to act. In an action by the bankers against the purchasers to recover the amount of the invoices,—*Held*, that the document was not an absolute assignment of the debt by the merchants to the bankers within the meaning of section 25, sub-section 6 of the Judicature Act, 1873, and that the bankers were not entitled to recover the amount from the purchasers. *Brandt v. Dunlop Rubber Co.*, 73 L. J. K.B. 247; [1904] 1 K.B. 387; 90 L. T. 106; 52 W. R. 501; 9 Com. Cas. 149; 20 T. L. R. 195—C.A.

— **Unascertained Part of Debt—Validity of Assignment.**—Under section 25, sub-section 6 of the Judicature Act, 1873, there cannot be a valid assignment of an unascertained part of a debt. *Jones v. Humphreys*, 71 L. J. K.B. 23; [1902] 1 K.B. 10; 85 L. T. 488; 50 W. R. 191—D.

— **Valid Equitable Assignment—"Absolute Assignment."**—The contractors for the erection of certain buildings under a contract made between them and the defendant, the building owner, wrote the plaintiffs the following letter: "In consideration of money advanced from time to time we hereby charge the sum of 1,080*l.*, being the agreed price for the sale of 60*l.* per annum ground-rent which will become due to us from" the defendant on the completion of the buildings in question, "as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you":—*Held*, that the document did not constitute an "absolute assignment" within section 25, sub-section 6 of the Judicature Act, 1873, but only a conditional assignment, inasmuch as, although it was a valid equitable assignment, yet it was by way of security only and without power to give a valid discharge to the debtor; and consequently the plaintiffs were not entitled to sue upon it. *Brice v. Bannister* (47 L. J. Q.B. 722; 3 Q.B. D. 569) discussed. *Durham v. Robertson*, 67 L. J. Q.B. 484; [1898] 1 Q.B. 765; 78 L. T. 438—C.A.

Mortgage—Successive Transfers—Absolute Assignment—Death of Second Transferee—Notice of Assignment by Executor.—A solicitor, having advanced money to the defendants, who were his clients, took from them in the name of a nominee a mortgage containing in the body of the deed an acknowledgment of the receipt by the defendants of a sum of 9,200*l.* alleged to have been advanced by the nominee, and a covenant to repay that sum. Having received from another client money to invest on mortgage, the solicitor requested the nominee to transfer the mortgage to that client. The

nominee refused to transfer to the client, but subsequently transferred to the solicitor himself by a deed which recited that the principal sum of 9,200*l.* was still due and owing on the security of the mortgage deed. The solicitor then executed a transfer to the client. Neither the solicitor himself nor the transferee gave the defendants any notice of the assignments. On the death of the transferee, his executors, the plaintiffs, gave to the defendants, under section 25, sub-section 6 of the Judicature Act, 1873, notice of the assignment to their testator. In an action by the plaintiffs on the covenant in the mortgage deed,—*Held*, that there was nothing to prevent them from giving, after the death of their testator, notice in writing under section 25, sub-section 6 of the Judicature Act, 1873, and that they were entitled to sue in their own names. *Bateman v. Hunt*, 73 L. J. K.B. 782; [1904] 2 K.B. 530; 91 L. T. 331; 52 W. R. 609; 20 T. L. R. 628—C.A.

(c) EQUITABLE ASSIGNMENTS.

Debt—Notice to Debtor by Creditor and Assignee.—To constitute a good equitable assignment of a debt all that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person, and if the debtor disregards such notice he does so at his peril. *Brandt v. Dunlop Rubber Co.*, 74 L. J. K.B. 898; [1905] A.C. 454; 93 L. T. 495; 11 Com. Cas. 1; 21 T. L. R. 710—H.L. (E.)

The respondents purchased goods from merchants who were indebted to the appellants. The merchants informed the appellants of the purchase, and sent them a letter which they were to send to the respondents for their signature. The letter was an undertaking on the part of the respondents to remit the value of the goods to the appellants, and was received by the respondents:—*Held*, that there had been a valid equitable assignment of the debt to the appellants. *Ib.*

Banker's Deposit Receipt—Voluntary Gift—Death of Donor—Donee Executor of Donor.—The indorsement and delivery of a banker's deposit receipt (not transferable) is a complete gift where the donor appoints the donee his executor, although no notice is given to the bank by the donor. *Griffin, In re; Griffin v. Griffin*, 68 L. J. Ch. 220; [1899] 1 Ch. 408; 79 L. T. 442—Byrne, J.

Letter Assigning Proceeds of Sale of Goods—Notice to Creditor—Bankruptcy of Assignor—Revocation by Trustee in Bankruptcy—Validity of Assignment.—A firm, being indebted to the plaintiffs for the price of goods sold, shipped a quantity of copper ores to the defendants for sale, and wrote instructing them, after payment of a certain account out of the proceeds, to pay the balance to the plaintiffs. On the same day the firm wrote to the plaintiffs advising them of the shipment of the ores to the defendants, and stating that they had instructed them to pay such balance to the plaintiffs. The firm having become bankrupt, their trustee revoked the instructions contained in their letter to the defendants:—*Held*, that, notwithstanding such revocation, the letters constituted a good equitable assignment to the

plaintiffs of the balance of the proceeds of the goods. *Alexander v. Steinhardt*, 72 L. J. K.B. 490; [1903] 2 K.B. 208; 8 Com. Cas. 209; 10 Manson, 258—Bigham, J.

Order Given by Debtor to His Solicitors to Collect his Debt and Pay Third Party—Subsequent Deed of Assignment for Creditors.—F., being the debtor of C., B. & Co. and the creditor of W. & Sons, instructed his solicitors, who were suing W. & Sons, to hold the proceeds at the disposal of C., B. & Co. Subsequently F. called his creditors together, and a deed of assignment was executed by C., B. & Co. with the other creditors. The solicitors received part of the money due from W. & Sons before the execution of the deed by C., B. & Co., and the remainder afterwards. The deed contained a clause that it was not to prejudice the rights of creditors in respect of securities held against any person but the debtor:—*Held*, that this was a good equitable assignment of the whole of the proceeds of the debt of W. & Sons, and that C., B. & Co. were entitled as against the trustee of the deed. *Palmer v. Culverwell*, 85 L. T. 758—Bruce, J.

Notice—Undertaking to Indorse and Hand over Cheque when Received.—A contract for the sale of flour contained the following:—"I also agree to indorse the cheques from the asylum and hand over to you as received by me in payment of the accounts"—*Held*, that this constituted an equitable assignment of the moneys from the cheques as and when received from the asylum. *West v. Newing*, 82 L. T. 260—Bucknill, J.

Document Ineffectually Purporting to be the Deed of a Firm—Execution by one Partner only—Equitable Assignment.—A document purporting to be a deed of assignment of a debt, falling due to a trading firm consisting of two partners, by the firm to one of their creditors was executed by one partner only:—*Held*, that although it could not be treated as the deed of the partner who did not execute it, nevertheless it was a good assignment; that the ineffectual effort to make it a deed by putting a seal to it, and getting one partner to deliver it as a deed of the firm, did not prevent it operating as an equitable assignment, since section 25, sub-section 6 of the Judicature Act, 1873, rendered a deed unnecessary. *Marchant v. Morton, Down & Co.*, 70 L. J. K.B. 820; [1901] 2 K.B. 829; 85 L. T. 169—Channell, J.

Debentures—Set-off—Floating Security—Appointment of Receiver.—Debentures issued by a company, which are a floating charge on its assets and property, do not take effect as an assignment of the debts owing to the company at the date of their issue, but at the date of the appointment of a receiver on behalf of the debenture-holders; and between those dates a right of set-off against debts owing to the company can be acquired by persons who have become creditors of the company in the ordinary course of business, although with knowledge of the issue of the debentures. *Biggerstaff v. Rowatt's Wharf*, 65 L. J. Ch. 536; [1896] 2 Ch. 93; 74 L. T. 473; 44 W. R. 536—C.A.

(d) PRIORITIES.

Notice—Chose in Action—Erroneous Statement of Date—Validity of Notice.—If a notice

of assignment of a debt, given under section 25, sub-section 6 of the Judicature Act, 1873, states that the assignment was made upon a specified date, upon which in fact no such assignment took place, the notice does not comply with the requirements of the section and is therefore invalid. *Stanley v. English Fibres Industries*, 68 L. J. Q.B. 839—Ridley, J.

Death of Trustees—Appointment of New Trustees—Subsequent Assignment—Priority.—Where notice of an assignment of an equitable interest is given to all the then existing trustees, and, after their death (or retirement) and the appointment of new trustees, a subsequent assignment is made and notice given to the new trustees who have received no notice of the first assignment, the right of the prior assignee prevails as against that of the second assignee. *Timson v. Ramsbottom* (2 Keen, 35) and *Hall, In re*; *Nolan v. O'Brien* (7 L. R. Ir. 180), distinguished. *Wasdale, In re*; *Brittin v. Partidge*, 68 L. J. Ch. 117; [1899] 1 Ch. 163; 79 L. T. 520; 47 W. R. 169—Stirling, J.

An assignee who has given notice to all the existing trustees is not bound to renew the notice on any change of trustees. *Id.*

Fund in Another's Hands—Rights of Assignee of Charge.—Where a person in possession of a fund has received notice of an assignment of his rights by one of several persons entitled to charges on the fund, and nevertheless wrongfully makes payment out of the fund to the assignor, the rights *inter se* of the several persons entitled to the charges to what remains of the fund cannot in any way be affected by such payments. • The mortgagee of a charge on a fund, or his assignee, when notice of the mortgage has been given to the holder of the fund, cannot be affected by transactions between the holder of the fund and the mortgagor unknown to the mortgagee. *Liquidation Estates Purchase Co. v. Willoughby*, 67 L. J. Ch. 251; [1898] A.C. 321; 78 L. T. 329—H.L. (E.)

Equitable Assignment—Reversionary Interest—Stop Order.—A Jewish lady, who was entitled to a reversionary interest in a fund in Court after the death of her mother, married a Moorish Jew in Morocco, and signed a marriage contract under which it was alleged that according to Jewish custom her children became entitled to the fund on her death, to the exclusion of the husband. The children obtained no stop order on the fund. The wife died before her mother; and after her death her husband as her administrator assigned the fund to assignees, who obtained a stop order on the fund in Court with notice of the marriage, but without notice of the title of the children. After the mother's death the assignees claimed the fund:—*Held*, that by obtaining a stop order on the fund from the lady's legal personal representative the assignees became entitled to the fund in priority to the children. *Freshfield's Trust, In re* (11 Ch. D. 198), considered and followed. *Montefiore v. Guedalla* (No. 1), 72 L. J. Ch. 442; [1903] 2 Ch. 26; 88 L. T. 496—C.A.

Equitable Execution—Priority. See EXECUTION.

Reversionary Trust Fund—Notice to Trustees—Priority.—See TRUST.

2. OTHER CASES.

Conflict of Laws.—See INTERNATIONAL LAW.

Copyright, of.—See COPYRIGHT.

Creditors—Deed of Assignment for.—See BANKRUPTCY.

Leases, of.—See LANDLORD AND TENANT.

Mortgage of Separate Fund.—See EXECUTOR AND ADMINISTRATOR.

Stockbroker, by Defaulting, to Official Assignee.—See STOCK EXCHANGE.

Validity—Execution by Assignor only—Subsequent Assent and Execution by Assignee.—See ATTACHMENT.

ATTACHMENT OF DEBTS.

1. *What Attachable*, 59.
2. *Effect of Order*, 60.
3. *Setting Aside Order*, 62.
4. *In other Cases*, 62.

1. WHAT ATTACHABLE.

Rent—Apportionment Act, 1870, s. 2.—Notwithstanding the Apportionment Act, 1870, rent cannot, before it is payable, be attached under a garnishee order as a debt owing or accruing due. *Barnett v. Eastman*, 67 L. J. Q.B. 517—Day, J.

Money Standing at Companies Liquidation Account—Garnishee Order upon Inspector-General in Companies Liquidation.—Money standing at the Companies Liquidation Account at the Bank of England is not attachable under the garnishee procedure at the suit of a judgment creditor of a person entitled, as a shareholder in a company that has been wound up, to money at that account representing surplus assets of the company. There is no relation of debtor and creditor in respect of such money between any person and the judgment debtor. *Spence v. Coleman*, 70 L. J. K.B. 632; [1901] 2 K.B. 199; 84 L. T. 703; 49 W. R. 516—C.A.

Debts Owning or Accruing—Assignment of Choses in Action, Executed by Assignor only, Validated by Subsequent Execution by Assignee.—The fees of a public vaccination officer, under a contract specifying that he shall perform certain ministerial acts prior to becoming entitled to payment, and fees for registering births and deaths under the Registration Act, 1836, which prescribes verification of the account of the fees by the superintendent registrar, are debts accruing due so as to be attachable as soon as the work is performed, and although the time for payment may not have arrived. *Edmunds v. Edmunds*, 73 L. J. P. 97; [1904] P. 362; 91 L. T. 568—Gorell Barnes, J.

An assignment by a judgment debtor may be valid in garnishee proceedings against the claim of the judgment creditor, although at the date of the garnishee proceedings the assignment has not yet been executed by the assignee, provided that he afterwards assents to and executes the same, when its validity relates back to the date of its execution by the assignor. *Ib.*

Assignment of Choses in Action Void against Creditors—13 Eliz. c. 5—Effect of Assignment to Defeat Individual Creditor.—Since choses in action became attachable by sections 60 *et seq.* of the Common Law Procedure Act, 1854, an assignment of them may be void under 13 Eliz. c. 5, as tending to defeat, hinder, or delay creditors. If the effect, not necessarily the object, of the assignment is to defeat, hinder, or delay one particular creditor only, the assignment will be void under the statute. *Ib.*

Right of Garnishee to Make Payment after Notice of Garnishee Order Nisi—Obligation to Stop Payment of Cheque.—A garnishee is not on notice of a garnishee order nisi bound to stop payment of a cheque already given by him to the judgment debtor, but after notice of the order he cannot make payment to the judgment debtor of any moneys in his hands covered by the order, although exceeding the sum attachable. *Ib.*

Judgment against Foreigner Resident Abroad—Debt Due from Foreign Corporation—Lex Fori—Chose in Action Situate Abroad.—A garnishee order should not be made to attach a debt due from the garnishee to the judgment debtor where payment under the order will not be a valid discharge to the garnishee as against the judgment debtor of the amount paid under the order. *Martin v. Nadel*, 75 L. J. K.B. 620; [1906] 2 K.B. 26; 95 L. T. 16; 54 W. R. 525; 22 T. L. R. 561—C.A.

Therefore, where a foreign corporation having its head office abroad and a branch office in London owed a debt contracted abroad to a foreigner resident abroad who became a debtor on a judgment recovered against him in England, *Held*, that a garnishee order should not be made to attach the debt due from the foreign corporation to the judgment debtor; because that debt would still remain due and payable abroad notwithstanding payment in England under a garnishee order—*Per VAUGHAN WILLIAMS, L.J.*, on the ground that garnishee proceedings are a process of execution and part of the *lex fori*, and, as such, not recognised by the law of nations. *Per STIRLING, L.J.*, on the ground that the debt was a chose in action situate abroad. *Ib.*

Gratuity to Employee in Public Service.—See *Timothy v. Day*, [1908] 2 Ir. R. 26—C.A.

2. EFFECT OF ORDER.

Secured Creditor—Service before Winding-up Petition.—The attachment of a debt due to a company by the service of a garnishee order nisi before the filing of a petition to wind up the company constitutes the garnisher a secured creditor, and gives him priority over the liquidator. *National United Investment Corporation, In re*, 70 L. J. Ch. 461; [1901] 1 Ch. 950; 84 L. T. 766—Wright, J.

Judgment Debtor a Company—Appointment of Receiver for Debenture-holders—Right of Judgment Creditor or Receiver to Debt.—A garnishee order does not amount to an assignment, either absolute or by way of security, of the garnished debt. Its effect is to direct the garnishee to pay, not the debt itself, but a sum equivalent to it, to the garnishor. *Combined Weighing and Advertising Machine Co., In re* (59 L. J. Ch. 26; 43 Ch. D. 99), followed. *Watt, In re; Joselyne, ex parte* (47 L. J. Bk. 91;

8 Ch. D. 327), explained. *Geisse v. Taylor* (74 L. J. K.B. 912; [1905] 2 K.B. 658) approved. *Norton v. Yates* (75 L. J. K.B. 252; [1906] 1 K.B. 112; 54 W. R. 183—Warrington, J.

But the debt remains the property of the judgment debtor, and the right of the garnishor is subject to the rights and equities existing over it when the garnishee order is obtained. *Badeley v. Consolidated Bank* (57 L. J. Ch. 463; 38 Ch. D. 238) and *London Pressed Hinge Co., In re; Campbell v. Company* (74 L. J. Ch. 321; [1905] 1 Ch. 576), followed. *Ib.*

Therefore, where a company had issued debentures giving a floating security over all its property, a receiver, who had been appointed in a debenture-holders' action two days after a judgment creditor of the company had served a garnishee order nisi attaching a debt due to the company, was held entitled, as against the garnishor, to payment of moneys which had been paid into Court by the garnishee, under an order, to abide further order. *Robson v. Smith* (64 L. J. Ch. 457; [1895] 2 Ch. 118) distinguished. *Ib.*

A garnishee order attaching a debt due to a company is not within a condition endorsed on debentures (which create a floating security) that "notwithstanding the charge hereby created the company shall be at liberty in the course of its business to deal with all or any part" of the property charged. *Davey v. Williamson & Sons* (67 L. J. Q.B. 699; [1898] 2 Q.B. 194) followed. *Ib.*

Garnishee Order—Judgment Debtor a Company—Appointment of Receiver for Debenture-holder—Right of Garnishor or Debenture-holder to Debt.—Neither a garnishee order nisi nor a garnishee order absolute operates to transfer the garnished debt to the garnishor; the debt remains the property of the judgment debtor, and the right of the garnishor is subject to the rights and equities existing over it when the garnishor obtains the order nisi. Therefore, where a company had issued a debenture giving a floating security over all its property, the debenture-holder, who, under the powers given by his debenture, appointed a receiver of the company's assets some days after a judgment creditor of the company had served a garnishee order absolute requiring the garnishee to pay to him a debt due to the company, was held entitled as against the garnishor to payment of the money which had been attached and which had been brought into Court by the garnishee to abide the trial of an interpleader issue. *Combined Weighing and Advertising Machine Co., In re* (59 L. J. Ch. 26; 43 Ch. D. 99), and *Norton v. Yates* (75 L. J. K.B. 252; [1906] 1 K.B. 112) applied. *Robson v. Smith* (64 L. J. Ch. 457; [1895] 2 Ch. 118) held inapplicable. *Cairney v. Back*, 75 L. J. K.B. 1014; [1906] 2 K.B. 746; 96 L. T. 111; 14 Manson, 58; 22 T. L. R. 776—Walton, J.

Balance in Hands of Garnishee—Right of Assignee of Judgment Debt to Balance as against Creditor in Subsequent Garnishee Summons.—A garnishee summons was served upon the garnishee, who was indebted to the judgment debtor in a sum exceeding that claimed by the summons. Thereafter the judgment debtor assigned to another of his creditors part of the sum due to him from the garnishee, and of this

assignment due notice was given to the latter. Subsequently a second garnishee summons was served upon the garnishee by a third creditor of the judgment debtor. Thereupon the garnishee paid into Court a sum to satisfy the amount claimed by the first garnishee summons, and the balance he paid into Court to satisfy, so far as it would go, the amount claimed by the second garnishee summons:—*Held*, that in so appropriating the fund in his hands and ignoring the rights of the assignee the garnishee acted wrongly, and was therefore liable to the assignee for the balance left after satisfying the amount claimed by the first garnishee summons. *Yates v. Terry*, 71 L. J. K.B. 282; [1902] 1 K.B. 527; 86 L. T. 133; 50 W. R. 293—C.A.

Garnishee Order Nisi—Payment by Garnishee to Judgment Creditor—Bankruptcy of Judgment Debtor—Relation Back of Trustee's Title.—A debtor to a bankrupt who has paid his debt to a judgment creditor of the bankrupt upon the service of a garnishee order nisi made after the act of bankruptcy upon which the adjudication was made, must pay it again to the trustee. *Webster, In re; Official Receiver, ex parte*, 76 L. J. K.B. 380; [1907] 1 K.B. 623; 96 L. T. 332; 14 Manson, 20; 23 T. L. R. 275—D.

3. SETTING ASIDE ORDER.

Setting Aside Garnishee Order Absolute—Mistake.—The Court will, in order to prevent a miscarriage of justice, set aside a garnishee order absolute on proof of a mistake of fact under which the order was obtained. *Marshall v. James*, 74 L. J. Ch. 279; [1905] 1 Ch. 432; 92 L. T. 681; 54 W. R. 363—Joyce, J.

Where a judgment creditor, upon a mistaken allegation that debts were owed by third parties to his debtor personally, obtained a garnishee order absolute against those third parties, and it was subsequently proved that the debts were owing not to the debtor, but to the firm in which the debtor was a partner, the garnishee order was set aside on the application of the debtor's partner. *Moore v. Peachey* (66 L. T. 198) followed. *Ib.*

4. IN OTHER CASES.

"Execution"—Judgments Extension Act.—*See* EXECUTION.

Garnishee Order—Debenture-holders—Priority.—*See* COMPANY.

Garnishee Order—Forfeiture of Bequest.—*See* CONDITION.

Set-off—Costs of Garnishee Proceedings.—*See* COSTS.

ATTACHMENT OF PERSON.

1. *When Ordered*, 62.

2. *Practice*, 63.

3. *In other Cases*, 65.

1. WHEN ORDERED.

Breach of Undertaking to Execute Indenture.—Where defendants committed a breach of their undertaking forthwith to execute an in-

denture.—*Held*, that there ought either to be service in accordance with Order XLI. rule 5 of the Rules of Court, 1883, or a four-day order. An order therefore was made that the defendants should on or before December 5 or subsequently within four days of the service of the order, execute the deed tendered to them by the plaintiff. *Halford v. Hardy*, 81 L. T. 721—Kekewich, J.

Trustee—Non-Receipt of Money—Commission from Purchaser and on Insurance Premiums.—Under the will of B., deceased, persons entitled to possession of the B. estates might sell the heirlooms, but were to replace them out of the proceeds of sale by articles of a similar character. F. was co-trustee with C., the tenant for life of the B. estates, and C. with the consent of F. sold the heirlooms, and received the purchase-money, but did not purchase other articles in their place. The purchaser paid F. 200*l.* in connection with the sale. Before F. (who was a solicitor) was appointed a trustee he received 200*l.* from an insurance company as commission on policies effected through him on C.'s life as security for trust money lent to C. On the death of C. the B. estates passed to A., who commenced an action for the administration of the estate of C., and an order was made directing F. to pay the plaintiff the 200*l.* received in connection with the sale of the heirlooms, and also the 200*l.* received from the insurance company. F. failed to comply with that order, and A. applied for leave to issue a writ of attachment against him:—*Held*, that the payment of the 200*l.* received as commission from the insurance company ought not to be enforced by attachment as the matter was not within the exception in section 4 of the Debtors Act, 1869; but that attachment ought to issue in respect of the 200*l.* paid by the purchaser of the heirlooms. *Berwick, In re; Berwick v. Lane*, 81 L. T. 797—C.A.

2. PRACTICE.

Personal Service—Presence in Court.—The fact that a person is actually in Court when an order is made against him to do some act, or the fact that he is otherwise aware of the order, is no reason for dispensing with personal service as required by Order XLI. rule 5, for the purpose of founding a motion for attachment or sequestration in a case where the person is not evading such service. *Dictum* of Cotton, L.J., in *Hyde v. Hyde* (57 L. J. P. 89; 13 P. D. 166) disapproved. *Truck, In re; Murch v. Loosemore*, 75 L. J. Ch. 497; [1906] 1 Ch. 692; 94 L. T. 597; 22 T. L. R. 425—C.A.

Four-day Order—Insertion of, by Registrar.—In drawing up an order directing a person to do an act within a limited time the Registrar may insert as a matter of course, and without any special instructions, the words "or subsequently within four days after service of the order." *Townend v. Townend* (40 L. J. N.C. 788, 853; W. N. (1905), 158, 178; 93 L. T. 680, 682) explained. *Ib.*

Order of Court to Attend for Examination—Disobedience to Order—Personal Service of Order—Evasion of Service.—Personal service of an order of the Court is not a condition precedent to the making of an order for the issue of a writ of attachment against a person who has

disobeyed the order of the Court, where such person has knowledge that the order has been made and is evading service thereof. The rule laid down by Cotton, L.J., in *Hyde v. Hyde* (57 L. J. P. 89; 13 P. D. 166), as to the practice in the case of a writ of sequestration applied to a writ of attachment for disobedience to an order of the Court. *Kestler v. Tettmar*, 74 L. J. K.B. 1; [1905] 1 K.B. 39; 92 L. T. 36; 53 W. R. 230; 21 T. L. R. 24—C.A.

Motion—Contempt—Service of Order—Two Executors—Service on One.—An order was made against two co-executors that they should "within four days after service of this order" lodge in Court a sum of money appearing to be due from them. The order was duly served upon one of them, but not upon the other, his address being undiscoverable. The order having been disobeyed,—*Held*, on a motion for the issue of a writ of attachment against the executor who had received service of the order, that it was not necessary to have previously served the order on the absent executor. The words "after service" in the order meant "after service" upon the person against whom it was sought to enforce the order. *Ellis, In re; Hardcastle v. Ellis*, 95 L. T. 80; 54 W. R. 526—Buckley, J.

Garnishee Order—Right to Bring Action for Money Due.—Under Order XLII. rule 24, orders as well as judgments can be enforced by action; therefore a judgment creditor, who has obtained a garnishee order absolute directing garnishees to pay to him a debt due by them to the judgment debtor, can, if unable to obtain payment by execution, bring an action against them for the money due. *Pritchett v. English and Colonial Syndicate*, 68 L. J. Q.B. 801; [1899] 2 Q.B. 428; 81 L. T. 206; 47 W. R. 577—C.A.

Enforcing Order against Corporation—Attachment of Director—Service of Order.—An order on a corporation for an affidavit as to the purchase of shares will not be enforced, under Order XLII. rule 31, by the issue of a writ of attachment against its director, until he has been personally served with the order sought to be enforced. *McKewen v. Joint Stock Institute*, 68 L. J. Ch. 390; [1899] 1 Ch. 671; 80 L. T. 641; 6 Manson, 338—North, J.

Failure to Obey Peremptory Mandamus—Intention.—A writ of attachment will issue for failure to obey a peremptory *mandamus* even when such failure is in noway intended to be disrespectful to the Court. *Reg. v. Leicester Guardians*, 81 L. T. 559—D.

Foreign Order—Enrolment—Disobedience—Service in England—Jurisdiction.—Motion for leave to issue a writ of attachment. An order was made by one of the Land Judges of the Chancery Division of the High Court of Ireland upon the respondent A. H. S. to lodge in Court on oath all documents in his custody, power, or procurement relating to certain property in Ireland ordered to be sold (or account for the same on oath) within ten days after service of the said order upon him. By an order made March 26, 1901, the Irish order was ordered to be enrolled in the Chancery Division of the High Court of Justice in England. On April 11, 1901, a copy of the order of March 26, 1901,

was personally served on A. H. S. in London:—*Held*, that as the order to lodge the deeds in Court had not been served on A. H. S. in Ireland, and no leave had been obtained to serve that order on A. H. S. out of the jurisdiction, there had been no disobedience, and the motion for leave to issue a writ of attachment must be refused. *Syngé, In re*, 85 L. T. 736—C.A.

Release from Custody—Judicial Separation—Order to Pay or Secure Wife's Costs—Wife's Costs of Proceedings for Attachment.—Where a husband who has been attached and imprisoned for contempt of Court in failing to obey an order of the Court to pay or secure a sum of money for his wife's costs in a suit brought by her for judicial separation, has afterwards obeyed the order; he is entitled to be released from custody. The Court will order him to pay all his wife's costs incurred with respect to the motions for attachment and release, but will not make the payment of such costs a condition precedent to his release. *Jackson v. Mauby* (45 L. J. Ch. 53; 1 Ch. D. 86) followed. *Ayres v. Ayres*, 71 L. J. P. 18; 85 L. T. 648—Gorell Barnes, J.

3. IN OTHER CASES.

Contempt of Court, for.—*See* CONTEMPT OF COURT.

Debtors Act, under.—*See* DEBTORS ACT.

Injunction, for Breach of.—*See* INJUNCTION.

Married Woman, of.—*See* HUSBAND AND WIFE.

Motion for.—*See supra* and PRACTICE.

Palatine Court, Enforcing Order of.—*See* COURT.

Rates, for Non-payment of.—*See* BANKRUPTCY.

Summary Jurisdiction (Married Women) Act.—*See* HUSBAND AND WIFE.

Trustee, of.—*See* DEBTORS ACT.

Undertaking, for Breach of.—*See* SOLICITOR.

ATTORNEY-GENERAL.

See CROWN.

AUCTIONEER.

Auctioneer Selling by Mistake Property without Authority—Liability to Purchaser.—An auctioneer warrants his authority to sell, and if he sells without authority, although by innocent mistake, he is liable in damages to the purchaser for loss of bargain. The rule applied where a horse was sold by mistake and the purchaser informed of the mistake on the same day (LORD YOUNG dissenting). *Anderson v. Croall*, 6 F. 153—Ct. of Sess.

Personal Liability—Sale Subject to Reserve Price—Acceptance of Bid Less than Reserve Price—Action by Bidder—Breach of Duty—Breach of Warranty of Authority.—At an auction, where by the conditions of sale each lot was to be offered subject to a reserve price, the plaintiff bid for a lot a sum which was less than the reserve price. The auctioneer, thinking by mistake that the reserve price had been

reached, knocked down the lot to the plaintiff. He immediately discovered his mistake and withdrew the lot, and refused, though requested by the plaintiff, to make and sign a memorandum of contract of sale:—*Held*, that, inasmuch as both the bid and the acceptance of the bid at the auction were conditional on the reserve price being reached or exceeded, the plaintiff was not entitled to maintain an action against the auctioneer either for breach of duty or for breach of warranty of authority. *McManus v. Fortescue*, 76 L. J. K.B. 393; [1907] 2 K.B. 1; 96 L. T. 444; 23 T. L. R. 292—C.A. *And see* SALE OF GOODS.

Fraudulent Representation on Sale of Pictures.—*See Hindle v. Brown*, 98 L. T. 44—Pickford, J.

AUDITOR.

Company, of Accounts of.—*See* COMPANY.

Corporation, of.—*See* CORPORATION and LOCAL GOVERNMENT.

Finality of Audit, not aware of, Account.—*See* CONTRACT.

Remuneration.—*See* COMPANY; LOCAL GOVERNMENT.

AUSTRALIA.

See COLONY.

AVERAGE.

See SHIPPING.

AWARD.

See ARBITRATION.

BAILMENT.

Loss—Negligence—Onus of Proof.—Where goods are given into the sole custody of a person and accepted by him as bailee, and they are lost while in his custody, the onus lies upon him to shew circumstances negating negligence on his part. *Phipps v. New Claridge's Hotel, Lim.*, 22 T. L. R. 49—Bray, J.

Gratuitous Bailee—Burden of Proof—Detinue.—The plaintiff left certain engraving plates in the custody of the defendants, under circumstances which imposed upon them the duty of taking as much care of them as a reasonable man would take in the case of his own goods. While in the defendants' custody the plates were taken away by some one and lost. There was no evidence to show how they were taken away, but the defendants proved that the plates were kept in a proper place, and under the charge of proper persons, and that the arrangements for their safe keeping were reasonably sufficient:—*Held*, that the defendants had proved that they had used such care in the custody of the plates as a reasonable man would use in the case of his own property, and that therefore they were not liable. *Powell v. Graves* (2 T. L. R. 663) discussed. *Bullen v. Swan Electric Engraving Co.*, 23 T. L. R. 258—C.A.

Carriage Lent to Bailee—Damage to Carriage by Servant of Bailee not in Course of his Employment—Liability of Bailee for Damage.]—The plaintiff, a coachbuilder, lent the defendant a dogcart whilst he repaired the defendant's carriage. The bailee's servant, not acting in the course of his employment, negligently injured the lent dogcart by driving it into a tramcar:—*Held*, that the bailor could recover damages from the bailee for the injury done to his dogcart. *Coupe Co. v. Maddick* (60 L. J. Q.B. 676; [1891] 2 Q.B. 413) followed. *Saunderson v. Collins*, 89 L. T. 42; 51 W. R. 558—D.

Gratuitous Loan of Chattel—For Beneficial Use by Borrower—Injury to Borrower owing to Defect in Chattel—Liability of Lender—Gross Negligence—Knowledge of Lender of Defect.]—Where a chattel is lent gratuitously for beneficial use by the borrower, it is the duty of the lender to communicate to the borrower any defect in it with reference to the use for which the loan is made, of which the lender is aware, and if he wilfully or by gross negligence omits to do so he is liable for injury resulting from such defect to the borrower while using the chattel. *Blackmore v. Bristol and Exeter Railway* (27 L. J. Q.B. 167; 8 E. & B. 1035) and *MacCarthy v. Young* (30 L. J. Ex. 227; 6 H. & N. 329) approved. *Coughlin v. Gillison*, 68 L. J. Q.B. 147; [1899] 1 Q.B. 145; 79 L. T. 627; 47 W. R. 113—C.A.

Liability of Bailee to Bailor for Tortious Act of Servant Outside the Scope of his Employment.]—The bailee of a chattel for hire is not, in the absence of want of due care on his part, liable to the bailor for damage caused to the chattel by the tortious act of the bailee's servant whilst acting outside the scope of his employment. *Coupe Co. v. Maddick* (60 L. J. Q.B. 676; [1891] 2 Q.B. 413) considered and distinguished. *Sanderson v. Collins*, 73 L. J. K.B. 358; [1904] 1 K.B. 628; 90 L. T. 243; 52 W. R. 354; 20 T. L. R. 249—C.A.

Injury to Chattel Bailed by Negligence of Stranger—Bailee not Liable over to Bailor—Action by Bailee—Measure of Damages.]—In an action against a stranger for loss of goods caused by his negligence, the bailee in possession of the goods can recover their value, although he would have had a good answer to an action by the bailor for damages for the loss of the goods. *Claridge v. South Staffordshire Tramway Co.* (61 L. J. Q.B. 503; [1892] 1 Q.B. 422), overruled. *The Winkfield*, 71 L. J. P. 21; [1902] P. 42; 85 L. T. 668; 50 W. R. 246; 9 Asp. M.C. 259—C.A.

Hiring for a Year—Right to Continue—Three Months' Notice.]—By an agreement the plaintiffs agreed to let and one E. agreed to hire two carriage horses by the year from a certain date at 105l. per annum, payment to be made quarterly. It was also provided: "After the expiration of the first year the hiring can be terminated by either party giving one quarter's written notice from a quarter day":—*Held*, that the hiring was for one year certain, with a right to keep the horses after the end of the year, and then to terminate the contract by a quarter's notice. *Tilling, Lim. v. James*, 94 L. T. 823; 22 T. L. R. 599—D.

Owner's Risk Clause—Act Intentionally Done—No Knowledge that Damage would Result—Liability.]—Cheese was received by the defen-

dants "to be stored at owner's risk," and the defendants were not to be responsible for damage or loss caused by certain specified matters or "from any other cause whatever." The cheese was kept at too low a temperature, and the jury found there was want of skill:—*Held*, that there was nothing to do away with the owner's risk clause, for although the act was intentionally done, that did not amount to wilful misconduct, and so the defendants were not liable. *Cordey v. Cardiff Pure Ice Co.*, 88 L. T. 192—C.A.

OTHER MATTERS.

Carriage of Goods.]—See CARRIER; RAILWAY.

Hire of Goods—Implied Warranty of Fitness.]—See DAMAGES.

Hire-purchase Agreement—Authority of Hirer to Give Lien for Work Done.]—See WORK AND LABOUR.

Servant—Liability of Bailor for Act of.]—See MASTER AND SERVANT.

BAKER.

See SALE OF GOODS.

BANKER.

1. *Account*, 68.
2. *Bills of Exchange*, 70.
3. *Cheques*, 70.
4. *Trust Money*, 72.
5. *Advances*, 72.
6. *Savings Banks*, 73.
7. *Other Matters*, 73.

1. ACCOUNT.

Appropriation — Interest — Principal.]—The rule that payments on account are to be appropriated to interest before principal does not apply where, in the case of bankers' accounts, the interest has, upon making up the account half-yearly, been converted into capital. *Parr's Banking Co. v. Yates*, 67 L. J. Q.B. 861; [1898] 2 Q.B. 460; 47 W. R. 42—C.A.

Separate Account—Trust—Notice.]—Where a customer of a bank receives trust moneys for investment and opens a separate account into which such moneys are paid, and it is not shewn that the bank had notice of the trust, the bank is at liberty to treat such moneys as belonging to the customer and to appropriate them against his overdrawn account. *Union Bank of Australia v. Murray-Aynsley*, 67 L. J. P.C. 123; [1898] A.C. 693—P.C.

Right of Set-off—Customer having Control of Two Accounts—Transfer from One Account to Another.]—In the absence of notice of fraud a banker is entitled to set off what is due to a customer on one account against what is due from him on another, although the former may in fact belong to other persons. *Bank of New South Wales v. Goulburn Valley Butter Factory*, 71 L. J. P.C. 112; [1902] A.C. 543; 87 L. T. 88; 51 W. R. 867—P.C.

A trader carried on his own business in conjunction with that of a company of which he was managing director, and by himself or his nominees held all the shares. The company's

account and the trader's account were in the same bank, and blank cheques were given to the bank manager in respect of each account to be filled in with amounts necessary for the purpose of adjustment of the two accounts. Blank cheques of the company were improperly filled in by the trader with amounts which were credited to his account:—*Held*, that in the absence of notice on the part of the bank of the state of accounts between the trader and the company, the bank was not liable to refund the money. *Ib*.

Right to Set off one Account of Company against another—Voluntary Winding-up.—A bank agreed with the directors of a company which had an overdrawn account to close that account, and open a No. 2 account. This was done for the purpose of winding up the business of the company, which was in difficulties, and the bank was so informed. Moneys were lodged to the No. 2 account and cheques drawn against it. The company afterwards went into voluntary liquidation. The bank declined to allow the liquidator to draw against the No. 2 account, and claimed to set off the credit balance on that account against the debit balance of the No. 1 account:—*Held*, that there was a special arrangement which prevented the bank exercising its ordinary right of setting off one account of a customer against another. *Johnson & Co., In re, [1902] 1 Ir. R. 439—M.R.*

Broker—Several Accounts—Fraudulent Deposit of Securities—General Indebtedness—Debit to Loan Account—Credit to Current Account—Equities between Persons Claiming under Customer.—A firm of brokers kept two accounts with their bankers, a current account and a loan account. The brokers wrongfully deposited bonds of their clients to secure their general indebtedness to the bank, and also paid to the credit of their current account moneys of other clients which they had received to pay for investments. The brokers having been declared defaulters, the bank opened a new liquidation account, to which they transferred 1,362*l.* then standing to the credit of the current account and the amount standing to the debit of the loan account, which largely exceeded the 1,362*l.* The bank never, in fact, appropriated the 1,362*l.* to meet the debit, but satisfied it by sale of a sufficient part of the deposited bonds:—*Held*, that, as against the clients entitled to follow the 1,362*l.*, the owners of the deposited bonds, in calculating the amount for which the bonds were a security, were entitled to have the 1,362*l.* first applied in reduction of the debit. *Mutton v. Peat, 69 L. J. Ch. 484; [1900] 2 Ch. 79; 82 L. T. 440; 48 W. R. 486—C.A.*

Mortgage—Current Account—Closing of Account—Power of Sale.—Where a mortgage to secure an account current with a bank contains a power of sale, to arise on the closing of the account, the account is closed by a letter from the mortgagor to the bank stating that he has agreed to assign all his assets to a trustee for creditors. The fact that an account is in debit does not prevent its being closed by the customer. *Berry v. Halifax Commercial Banking Co., 70 L. J. Ch. 85; [1901] 1 Ch. 188; 83 L. T. 665; 49 W. R. 164—Kekewich, J.*

Joint Account—Husband and Wife—Liability for Overdraft.—*See HUSBAND AND WIFE.*

Overdrawn Account—Interest on Debentures—Subrogation.—*See Wrexham, Mold, and Connaught Quay Railway, In re, post, COMPANY.*

2. BILLS OF EXCHANGE.

Delivery to Bank to be Discounted—Whether Property of Bank or Customer—Bill Receivable—Whether a Book Debt.—Under an agreement for purchase of shares in a company the purchase price was to be ascertained by taking into account book debts due to the company. A bill of exchange had been received by the company in the ordinary course of business, and had been indorsed and handed to the company's bankers for the purpose of being discounted, but it had not been discounted:—*Held*, on the authority of *Stevens, In re; Stevens v. Keily (W. N. 1888, pp. 110, 116)*, that the bill was a book debt, and, following *Giles v. Perkins (9 East, 12)*, and distinguishing *Schofield, Ex parte; Firth, In re (12 Ch. D. 337)*, that it had not become the property of the bank, but remained the property of the company. It must therefore be taken into account, in ascertaining the purchase price, as a book debt due to the company. *Dawson v. Isle, 75 L. J. Ch. 338; [1906] 1 Ch. 633; 95 L. T. 385; 54 W. R. 452—Warrington, J.*

Breach of Contract—Draft Accompanied by Shipping Documents—Frozen Meat Trade—Usual Form of Policy.—The plaintiff carried on business in London as an importer of frozen meat. The defendant bank, at the plaintiff's request, undertook to negotiate, at the bank's option, drafts drawn by the shippers on the plaintiff in respect of consignments of frozen meat, the drafts to be accompanied by shipping documents—that is, bills of lading, invoice, and policy of insurance. The bank negotiated a draft attached to which was a policy containing a clause "To pay a total loss by total loss of vessel only." The usual form of policy in the frozen meat trade is a policy covering all risks. The plaintiff in the usual course of business accepted the draft before he had examined the documents. A partial loss of the consignment took place, which by reason of the clause in the policy the plaintiff could not recover from the underwriters:—*Held*, that the bank had committed a breach of its contract with the plaintiff in negotiating a draft which was not accompanied by a policy of insurance in the proper form, and that the bank was liable to make good the loss to the plaintiff. *Borthwick v. Bank of New Zealand, 6 Com. Cas. 1—Mathew, J. And see BILL OF EXCHANGE.*

3. CHEQUES.

Payment under Mistake of Fact—Certification of Cheque—Estoppel—Notice of Dishonour.—A customer of the respondent bank drew a cheque which the bank certified with its stamp. The effect of the certifying was to shew that it was drawn on sufficient funds. The customer fraudulently altered the cheque into one for a larger amount, and opened an account with the appellant bank, on which he drew. The cheque so altered passed through the clearing-house, and being certified was honoured by the respondents. The latter, discovering the fraud on the following day, at once gave notice to the appellants. In an action by the respondents to recover from the appellants the difference between the original and the altered cheque,—

Held, that the respondents were entitled to recover, as there was no negligence on the respondents' part to induce the appellants to treat the cheque as good; and as there were no indorsers to whom notice of dishonour had to be given and the appellants had not been prejudiced by want of notice, there was no liability on the respondents in consequence of want of notice to the appellants on the day on which the cheque was presented. *Imperial Bank of Canada v. Bank of Hamilton*, 72 L. J. P.C. 1; [1903] A.C. 49; 87 L. T. 457; 51 W. R. 289—P.C.

Payment of Forged Cheque—Negligence of Customer—Estoppel.—Three directors of a limited company, of whom one was the chairman, appointed the son of the chairman as secretary. Some years before, to the knowledge of the chairman, the son had forged his name, but since then, down to the time of his appointment, he had lived apparently a blameless life. With the directors' consent the secretary had charge of all the books of the company, including the cheque-book and pass-book, and, by means of an elaborate system of fraud, not only succeeded in forging a director's name to cheques which were duly honoured by the bank, but for a long period escaped detection. In an action against the bank to recover the amount of the forged cheques honoured and paid,—*Held*, that the limited company was not estopped by negligence from recovering the amount of such forged cheques from the bank. *Leves Sanitary Steam Laundry Co. v. Barclay & Co.*, 95 L. T. 444; 11 Com. Cas. 255; 22 T. L. R. 737—Kennedy, J.

Alteration of Cheque—Extent of Banker's Liability—Negligence.—The customer of a bank who so draws a cheque that a forger is able to insert words and figures increasing the amount is not liable to the bank for the loss sustained in paying the increased amount. *Colonial Bank of Australasia v. Marshall*, 75 L. J. P.C. 76; [1906] A.C. 559; 95 L. T. 310; 22 T. L. R. 746—P.C.

Three executors signed cheques on their bankers. The cheques were drawn by one of them in such a way that he was able by the insertion of words and figures to increase the amounts for which the cheques were originally drawn:—*Held*, that the bankers were only entitled to charge the executors for the amounts for which the cheques were originally drawn, and not for the sums as increased by the forgery. *Ib.*

The principles held in *Scholfield v. Londesborough (Earl)* (65 L. J. Q.B. 593; [1896] A. C. 514) to be applicable as between the acceptor and a subsequent holder of a bill of exchange apply equally as between a customer of a bank and the bank. *Ib.*

Cheque Certified before Delivery as Represented by Assets of the Drawer—Effect of Entry in Pass-Book.—A cheque certified before delivery is subject, as regards its subsequent negotiation, to all the rules applicable to uncertified cheques. *Gaden v. Newfoundland Savings Bank*, 68 L. J. P.C. 57; [1899] A.C. 281; 80 L. T. 329—P.C.

The entry in a pass-book of such a cheque is not conclusive proof of acceptance as cash by the bank issuing the pass-book, and does not exclude evidence of the real nature of the transaction so recorded. *Ib.*

The appellant drew a cheque on a bank, which certified on the face of the cheque that the drawer had assets to meet it. The appellant immediately deposited the cheque with the respondents, who issued to her a pass-book, and credited her therein with the amount of the cheque. If the cheque had been presented by the respondents on the same day it would have been paid. But in the ordinary course of business the appellants paid the cheque to their bank, and before it was presented the bank on which the cheque was drawn became insolvent:—*Held*, that the cheque was accepted by the respondents as the agents of the appellant, and not with the intention of acquiring title to it or gratuitously guaranteeing its payment, and that thus the loss fell on the appellant. *Ib.*

Contract to Honour Outstanding Cheques—Consideration moving from Agent—Evidence of Special Damage.—The deposit of a "store warrant" for sheep with a bank by an agent of a customer is sufficient consideration for a promise to honour outstanding cheques within the rule laid down in *Currie v. Misa* (L. R. 10 Ex. 153), and an action will lie for breach of contract in dishonouring such cheques. It is no answer to such an action to say that the consideration did not move from the plaintiff, but from an agent in his behalf. *But held*, that evidence of special damage by the dishonour of the cheques was not admissible. *Fleming v. Bank of New Zealand*, 69 L. J. P.C. 120; [1900] A.C. 577; 83 L. T. 1—P.C.

Crossed Cheque.—See BILL OF EXCHANGE.

4. TRUST MONEY.

Executor Paying Trust Money into Credit of his Own Account—Liability of Bank.—A lodged to the credit of his private account at a bank moneys which belonged to him and B as executors of C. The bank had notice that the moneys so lodged were trust-moneys, but had no notice that A intended to commit a breach of trust, and placed the moneys to the credit of A's account in the ordinary way. A afterwards became insolvent, and his account was overdrawn. B brought an action against the bank and A to have it declared that the bank were trustees of the moneys so lodged on behalf of B and A as executors of C:—*Held*, that the bank were not liable. *Shields v. Bank of Ireland*, [1901] 1 Ir. R. 222—M.R.

5. ADVANCES.

Credit against Production of Documents—Certificate of Analysis—Fraudulent Misrepresentation.—A bank was authorised to advance a sum against production of documents. The mandate was as follows: "Negotiate drafts of A. O. at sight on D. Bank (Berlin) London agency p. 800l. account B. S. (against) bill of lading, policy of insurance and certificate analysis from Dr. H. (for) 100 tons cobalt ore analysis not less than 5 per cent. protoxide shipped by steamer (to) Europe. Credit expires. . . ." A. O. intended to ship worthless ore, and in the bill of lading it was described as "P.M. 2680 bags containing 100 tons cobalt ore." A policy of insurance was also effected. A sample of sound ore was submitted for analysis, which analysis the bank refused to accept, as the certificate did not

refer to the bill of lading goods. A. O. then marked the sample as the bill of lading quantity was described. The analyst gave a second certificate, which was as follows: "Sample of cobalt ore marked P.M. 2680 bags representing 100 tons received from you on the 12th July gave the following results: 4.14 per cent. cobalt, equal to 5.27 per cent. cobalt protoxide in the dry ore; 9.25 per cent. moisture." On producing the second certificate the bank paid A. O. 800l. Subsequently A. O. was convicted of obtaining that money by fraudulent misrepresentation.—*Held*, that the certificate on its face was regular and came within the meaning of the mandate, and there was no duty on the bank to see to the sampling. The bank was entitled to assume that the analyst had acted skilfully in making the analysis. *Basse v. Bank of Australasia*, 90 L. T. 618; 20 T. L. R. 431—Bigham, J.

Deposit of Deeds—Priority—Debentures—Restrictive Condition—Representation—Constructive Notice.—A banker in dealing with a customer is not fixed with notice of the contents of a document deposited with him as security by another customer. *Valletort Sanitary Laundry Co., In re; Ward v. Valletort Sanitary Laundry Co.*, 72 L. J. Ch. 674; [1903] 2 Ch. 654; 89 L. T. 60—Swinfen Eady, J.

A deposit of title-deeds as a security is a representation that the depositor has power to make a valid deposit, without any express statement to that effect. A banker who takes as security a second debenture which states that it is to rank after first debentures already issued, will not thereby be affected with notice of the conditions contained in the first debentures so as to affect his position in regard to a former transaction with the same customer, although that transaction related to security for overdrafts on a current account and liability was incurred in respect thereof after the second debenture had been issued. *Ib.*

Right to Repayment of Loan—Deed of Assignment.—The respondents were jointly indebted to the appellant bank, and J. F., one of the partners in the respondents' firm, was also separately indebted to the bank. By deed they assigned to the bank certain moneys due to them "as to their said indebtedness," and J. F. assigned his interest "as to his said indebtedness":—*Held*, that it was not necessary that the value of J. F.'s interest in the partnership assets assigned should be ascertained before the bank could repay itself his separate debt out of such asset. *National Bank of Australasia v. Falkingham*, 71 L. J. P.C. 105; [1902] A.C. 585; 87 L. T. 90—P.C.

6. SAVINGS BANKS.

4 Edw. 7 c. 8 is the *Savings Banks Act*, 1904.

7. OTHER MATTERS.

Deposit of Mortgage Debentures—Registration of Banker.—See *Standard Rotary Machine Co., In re—COMPANY*.

Deposit Receipt—Assignment.—See ASSIGNMENT.

Following Trust Money—Appropriation of Payments.—See TRUST.

Letters of Lien—Bankruptcy—Order and Disposition.—See BILLS OF SALE.

Money Paid under Mistake of Fact—Right to Recover.—See MONEY COUNTS.

Sale of Shares by Stockbroker—Obligation to Pay Bank against Delivery of Shares.—See PRINCIPAL AND AGENT.

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1. PERSONS LIABLE TO.

Married Woman—Separate Trading—Petition before Marriage—Receiving Order after Marriage.]

—A receiving order cannot be made against a married woman who is not trading separately from her husband, although the debt and act of bankruptcy are admitted, and the petition has come on for hearing and been adjourned before her marriage. *Debtor, In re; Debtor, ex parte*, 67 L. J. Q.B. 820; [1898] 2 Q.B. 576; 78 L. T. 824; 46 W. R. 675; 5 Manson, 122—C.A.

—Carrying on Trade Separately from Husband—Absenting Herself with Intent to Defeat Creditors.]

—Where a married woman has carried on trade separately from her husband, and there are remaining undischarged debts incurred by her for the purposes of that business, she is subject to the bankruptcy laws in respect of her separate estate under sub-section 5 of section 1 of the Married Women's Property Act, 1882, although she has ceased to carry on business. *Dagnall, In re; Soan & Morley, ex parte* (65 L. J. Q.B. 666; [1896] 2 Q.B. 407), approved. *Worsley, In re; Lambert, ex parte*, 70 L. J. K.B. 93; [1901] 1 K.B. 309; 84 L. T. 100; 49 W. R. 182; 8 Manson, 8—C.A.

Where a business is bought out of the separate property of a married woman, and she accepts bills and incurs debts for the purposes thereof, the mere fact that the business is carried on in part of the house where the husband lives, and that he takes some part in the management, is not sufficient to warrant the conclusion that there was no carrying on of a separate business by the wife. *Ib.*

A married woman who was carrying on a business separately from her husband left her place of business and shut up her shop, leaving no address, and joined her husband where he was living in London. There were trade debts incurred by her remaining undischarged, and there was some evidence that she was attempting to evade service of legal process in London: —*Held*, that she was absenting herself with intent to defeat or delay her creditors within the meaning of sub-section 1 (d) of section 4 of the Bankruptcy Act, 1883, and the fact that she had gone to join her husband was not sufficient to negative that conclusion. *Ib.*

— **Judgment against Firm.]**—A married woman carrying on trade in the name of a firm separately from her husband cannot be made bankrupt for non-compliance with a bankruptcy notice founded on a judgment obtained against her in the name of the firm. *Handford & Co., In re; Handford, ex parte*, 68 L. J. Q.B. 386; [1899] 1 Q.B. 566; 80 L. T. 125; 47 W. R. 391; 6 Manson, 181—C.A.

— **Judgment against—Debtor's Summons.]**—Where a judgment has been obtained against a married woman in accordance with the form laid down in *Scott v. Morley* (57 L. J. Q.B. 43; 20 Q.B. D. 120) the judgment debtor cannot be adjudged a bankrupt on a debtor's summons issued on the judgment. *Elliott, In re*, [1900] 2 Ir. R. 439—Boyd, J.

Lunatic Debtor—Creditor's Petition—Committee in England—Curator Bonis in Scotland

—**Locus Standi of Curator to Appear on Petition.]**—Where a person has been found a lunatic in England, and a committee of his estate has been appointed, the committee is the proper person to act on behalf of the lunatic in bankruptcy proceedings against him in England; and a *curator bonis* to him previously appointed in Scotland on the ground of his inability through physical infirmity to attend to business matters has no *locus standi* to appear in the bankruptcy proceedings. *R. S. A. (a debtor), In re*, 70 L. J. K.B. 475; [1901] 2 K.B. 32; 84 L. T. 477; 8 Manson, 164—C.A.

A committee of a lunatic debtor ought not to consent to an adjudication against him without having first obtained the sanction of the lunacy jurisdiction. *Ib.*

Foreigner "ordinarily resident"—Hotel.]—A foreigner who, for purposes of litigation, has stayed in England at hotels during nine months of the year immediately preceding the date of the presentation of a bankruptcy petition, has "ordinarily resided" within the meaning of the Bankruptcy Act, 1883, s. 6, sub-s. 1. *Bright, In re; Bright, ex parte*, 51 W. R. 342—C.A.

2. ACT OF.

(a) ASSIGNMENT TO DEFEAT CREDITORS.

Sale of Business Effects to Company for Worthless Second Debentures—Hire-purchase Agreement.]

—W., who carried on an extensive business, had been financed by D. In April, 1900, he asked D. for a loan of 1,000L., and it was eventually arranged that D. should purchase part of the plant of his business for 1,000L., and W. should repurchase it under a hire-purchase agreement. In the following July a similar transaction took place under which W. received 2,000L. The hire-purchase agreements contained a licence to seize and sell. On February 6, 1901, W. assigned to the defendant company all his trade assets, including the chattels comprised in the two hire-purchase agreements, but retained book debts of the nominal value of 1,760L., which realised 700L. The consideration for the assignment was 3,700L. in second debentures and 100L. in cash. D. took first debentures of the nominal value of 3,000L. At the date of the assignment to the company W. owed 4,000L., excluding his debt to D. The company went into liquidation, and its assets were insufficient to satisfy the first debentures:—*Held*, first, that the assignment to the company was void as an act of bankruptcy; secondly, that the transactions resulting in the hire-purchase agreements were in reality loans, and were void under the Bills of Sale Acts owing to the power to seize and sell, and that the chattels comprised therein had not passed to D. by a title antecedent to the sale to the company. *Wheatley's Trustee v. Wheatley*, 85 L. T. 491—Wright, J.

Transfer of Business to Company—Consideration for Transfer—Shares and Debentures—Notice to Company—Fraudulent Assignment—Title of Trustee—Rights of Debenture-holders—Purchasers for Value.]—The debtor, a tobacconist, obtained stock to the value of about 10,000L. on credit, and forthwith, on December 22, 1902,

transferred his business, stock-in-trade, contracts, goodwill, and business premises, which comprised the whole of his assets, to a limited company formed for the purpose of acquiring them. The property assigned by the debtor to the company included the benefit of a contract with M., another tobacconist, for the sale of his business to the debtor. The capital of the company was 25,000*l.*, divided into 25,000 shares of 1*l.* each. The board of five directors consisted of M., the debtor, and three nominees of the debtor. The purchase-price of the debtor's property was a small sum of cash, 23,139 fully paid shares, and one hundred 100*l.* debentures, secured by a floating charge on the assets of the company. The shares were allotted to the debtor, and were unrealisable. Thirty debentures were allotted to M. as consideration for the sale of his business, and the remaining debentures were allotted to the debtor or his nominees as follows: 18 to the debtor, who subsequently charged them in favour of the company; 30 to N. (the nominal vendor to the company and one of the debtor's dummy directors), in respect of alleged promotion money; 7 to B., and 15 to Z., in respect of alleged debts for corresponding amounts due to them from the debtor. No provision whatever was made for the discharge by the company of the debtor's trade liabilities, and the result of the transfer to the company was to divest him of all his assets and leave him nothing wherewith to satisfy trade debts amounting to about 13,000*l.* On February 20, 1903, a receiving order was made against the debtor, and on March 11, 1903, he was adjudicated bankrupt. After the date of the receiving order B. sold his debentures to P. B., and Z. sold his to H. L., for amounts below half their face value. Both P. B. and H. L. knew of the bankruptcy. On a motion by the trustee in bankruptcy for a declaration that the transfer to the company was fraudulent, and that he was entitled to the property free from any incumbrances,—*Held*, that the transfer by the debtor was fraudulent and an act of bankruptcy, and that the company had notice of and was party to the fraud and act of bankruptcy, and that as against the trustee the transfer was void. *Slobodinsky, In re; Moore, ex parte*, 72 L. J. K.B. 883; [1903] 2 K.B. 517; 89 L. T. 190; 52 W. R. 156; 10 Manson, 341—Wright, J.

Held, further, that M. took his debentures without notice of the act of bankruptcy, and in good faith, and that the debtor's property recovered by the trustee was subject to a charge for any deficiency which M. might be unable to recover from the company's assets; that N. took his debentures after and with knowledge of the fraudulent transfer, and without valuable consideration, and consequently had no good charge upon the property recovered by the trustee; and that, as P. B. and H. L. bought from tainted persons after the date of the receiving order and with knowledge of the bankruptcy, they also had no good charge on the property. *Ib.*

Semble, that in a case where an assignment of a bankrupt's property is avoided as fraudulent under section 44 of the Bankruptcy Act, 1883, it is right that subsequent *bona fide* purchasers or incumbrancers for value should now be protected in equity, notwithstanding the operation of section 43 of the Bankruptcy Act,

1883. Yet under no circumstances could such purchaser or incumbrancer, even though *bona fide*, be protected on equitable grounds beyond the real value of what he had given as the consideration for his purchase or incumbrance. *Ib.*

Transfer of Whole of Assets—Arrangement for Payment of some Creditors Only—Relation Back of Trustee's Title.—In December, 1899, S., a publican, owed about 3000*l.* to trade creditors; his trade premises were mortgaged to W. & Co., his lessors, and he was insolvent. It was agreed that S. should surrender his lease, that W. & Co. should release the mortgage and should take over the stock-in-trade, being the whole of S.'s assets, for 2,800*l.*; this sum was the total amount of a list of his debts furnished by S. and stated to be a complete list; a cheque for 2,800*l.* was handed by W. & Co. to S., who, according to the arrangement, immediately indorsed and delivered it to the respondents, who proceeded to pay all the debts set out in the said list furnished by S. This list did not in fact contain all the creditors. The arrangement was entered into honestly and without any fraudulent motive. A receiving order having been made against S. within three months of this transaction, the trustee sought to recover the sum of 2,800*l.* from the respondents:—*Held*, that the transfer by S. was an act of bankruptcy as necessarily tending to defeat the creditors omitted from the list, and as substituting for the administration of the estate in bankruptcy a different mode of administration. *Sharp, In re; Gundry, ex parte*, 83 L. T. 416—Wright, J.

Held also, that section 49 of the Bankruptcy Act, 1883, does not protect payments made, not in the ordinary course of business, but for the purpose of doing that which in law constitutes an act of bankruptcy, and that the present transaction was therefore not protected by that section. *Ib.*

Assignment by Partnership of Firm's Assets for Benefit of Trade Creditors.—A deed of assignment by a partnership firm of its partnership assets for the benefit of its trade creditors only is not an assignment of an individual partner's property for the benefit of "his creditors generally" within the meaning of section 4, sub-section 1 (a) of the Bankruptcy Act, 1883, so as to constitute an act of bankruptcy which will support a bankruptcy petition against him. *Phillips, In re; Phillips, ex parte*, 69 L. J. Q.B. 604; [1900] 2 Q.B. 329; 82 L. T. 691; 49 W. R. 16; 7 Manson, 277—D.

But, *quære*, whether such an assignment is not an act of bankruptcy on his part as a fraudulent conveyance or transfer within sub-section 1 (b). *Ib.*

Assignment to Creditor of Chose in Action in Good Faith without Notice—Protected Transaction.—On December 1, 1904, a bankruptcy petition was presented against the debtors, and on December 5 they assigned by deed to a creditor as security for the debt a sum of money due to them. The assignment was made in good faith and the creditor had no notice of the petition. On December 10 the receiving order was made against the debtors:—*Held*, that the assignment was a protected

transaction within section 49 of the Bankruptcy Act, 1883, and was good as against the trustee in bankruptcy. *Badham, In re; Palmer, ex parte* (10 Morrell, 252), distinguished. *Dunkley, In re; Waller, ex parte*, 74 L. J. K.B. 963; [1905] 2 K.B. 683; 93 L. T. 248; 21 T. L. R. 707—Bigham, J.

Alleged Acquiescence by Petitioning Creditor—Order by Trustee under the Deed for Goods—Execution of Order on Receipt of Cash—Notice of Execution of Deed.—The debtors called a meeting of creditors at which the petitioning creditors were represented. Their representative refused to have anything to do with a deed of assignment for the benefit of creditors. After he left the meeting the deed was executed. On the same day the trustee under the deed sent a small order to the petitioning creditors "as trustee of the estate," which was received on the following day. By return post an invoice was sent to the trustee saying that the goods were "ready awaiting remittance." In exchange for the invoice the trustee sent a cheque, and on the same day as the cheque was received the petitioning creditors received a specific notice of the execution of the deed, after which they dispatched the goods. *Held*—first, that the order did not necessarily convey to the petitioning creditors that a deed had been executed; and secondly, that the transaction was complete, although the goods had not been sent off before the specific notice was received, and that the petitioning creditors were not estopped from relying on the execution of the deed as an act of bankruptcy. *Crow, In re; Collier, ex parte*, 97 L. T. 140; 14 Manson, 279—D.

(b) EXECUTION.

Seizure and Holding of Goods for Twenty-one Days.—The act of bankruptcy committed by the debtor in such a case under section 1 of the Bankruptcy Act, 1890, by the seizure of his goods and the holding of them by the sheriff for twenty-one days, does not, if no step is taken upon it, affect the position of the sheriff. Such an act of bankruptcy is constituted by the seizure and the holding for twenty-one days together, and any petition grounded on it must be presented within three months of the completion of that twenty-one days. If, therefore, the sheriff remains in possession for a period extending over twenty-one days, there is not a succession of acts of bankruptcy at the expiration of every period of twenty-one days, nor is there a continued act of bankruptcy extending over the whole period of the possession. *Beeston, In re; Board of Trade, ex parte*, 68 L. J. Q.B. 344; [1899] 1 Q.B. 626; 80 L. T. 66; 47 W. R. 475; 6 Manson, 27—C.A.

(c) BANKRUPTCY NOTICE.

Equitable Assignment of Judgment Debt—Right of Judgment Creditor.—A merely equitable assignment of the judgment debt by a judgment creditor does not deprive him of the right to issue a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883. *Palmer, In re; Brims, ex parte*, 67 L. J. Q.B. 316; [1898] 1 Q.B. 419; 77 L. T. 709; 46 W. R. 342; 5 Manson, 50—C.A.

Judgment Creditor Adjudicated Bankrupt—Right of Trustee in his Bankruptcy to Issue Bankruptcy Notice.—The trustee in the bankruptcy of a judgment creditor is not, although he has been made a party to the action in which the judgment was obtained, a "person who is for the time being entitled to enforce a final judgment" within the Bankruptcy Act, 1890, s. 1, unless he has obtained leave to issue execution under Order XLII. rule 23, and therefore, till such leave, is not entitled to issue a bankruptcy notice in respect of the judgment debt. *Clements, In re; Davis, ex parte*, 70 L. J. K.B. 58; [1901] 1 K.B. 260; 83 L. T. 464; 49 W. R. 176; 8 Manson, 27—D.

Address of Creditor in Bankruptcy Notice.—The address of the creditor in a bankruptcy notice should be of a place where he is to be found during the seven days within which the judgment debt is to be paid or secured, and this is so whether that address is of his residence or place of business. Occasional absence from such place, even for a whole day, will not render the bankruptcy notice inefficient unless the absence is such as to deprive the debtor of a reasonable opportunity of paying or securing the debt. It matters not that the address is the temporary home of the creditor, who happens to have no permanent home, or that his occasional absence occurs on the last of the seven days. On the other hand, if the creditor, after service of the notice, abandons his place of address, so that it ceases to be such a place as above described, the bankruptcy notice will cease to be efficient. *Stogdon, In re; Leigh, ex parte* (65 L. J. Q.B. 47; [1895] 2 Q.B. 534), considered. *Beauchamp, In re; Beauchamp, ex parte*, 73 L. J. K.B. 311; [1904] 1 K.B. 572; 90 L. T. 594; 52 W. R. 345; 11 Manson, 5; 20 T. L. R. 269—C.A.

"Final judgment"—Order made on Petition for Revocation of a Patent.—An order made on a petition in the Chancery Division of the High Court of Justice, revoking a patent, and ordering the respondent to pay the costs of the petition, under section 26 of the Patents, Designs, and Trade Marks Act, 1883, is not a "final judgment" within the meaning of the Bankruptcy Act, 1883, s. 4, sub-s. 1 (g), and therefore a bankruptcy notice cannot be founded on such an order. *Binstead, In re; Dale, ex parte* (62 L. J. Q.B. 207; [1893] 1 Q.B. 199), and *Bankruptcy Notice, In re; Official Receiver, ex parte* (64 L. J. Q.B. 429; [1895] 1 Q.B. 609), applied. *Owen, In re; Peters, ex parte*, 70 L. J. K.B. 92; 83 L. T. 572; 49 W. R. 379; 8 Manson, 24—D.

Final Judgment in High Court—Judgment Summons in County Court—Order on Judgment Summons to Pay by Instalments—No Default.—A judgment summons was issued in the County Court on a final judgment in the High Court, and on October 17, 1903, a bankruptcy notice was served, which was not complied with. On November 2 an order to pay by instalments was made on the judgment summons. On November 3 a bankruptcy petition was presented by another creditor, founded on the non-compliance with the bankruptcy notice:—*Held*, that the petitioning creditor was entitled to a receiving order, the debtor having committed an act of bankruptcy before the making of the order on the judgment summons, which any

creditor could take advantage of. *Montgomery v. De Bulmes* (67 L. J. Q.B. 768; [1898] 2 Q.B. 420) distinguished. *Debtor, In re; Rock Red Brick Co., ex parte*, 90 L. T. 64; 52 W. R. 302—D.

Submission to Arbitration—Order that Award be Enforced and Judgment Entered in Accordance therewith—Judgment based on Order—Jurisdiction.—Where an order is made under the Arbitration Act, 1889, that an award be enforced and that judgment be entered in accordance therewith, a judgment based on such order is not a “final judgment” in an action upon which a bankruptcy notice can be founded within the Bankruptcy Act, 1883, s. 4, sub-s. 1 (g). Such a judgment is bad on the face of it for want of jurisdiction, inasmuch as the Arbitration Act, 1889, s. 12, which provides for the enforcement by leave of the Court of an award on a submission in the same manner as a judgment to the same effect, gives no power to turn the award into a judgment. *Bankruptcy Notice, In re* (No. 1), 76 L. J. K.B. 171; [1907] 1 K.B. 478; 96 L. T. 131; 14 Manson, 1; 23 T. L. R. 214—C.A.

An application for a bankruptcy notice is not a method of enforcing the award within section 12—*per* FLETCHER MOULTON, L.J. *Ib.*

Joinder of Several Judgment Debts—Amount Recovered on Claim and Counterclaim—Additional Parties to Counterclaim.—An action was brought by A and B against C to recover 100l. for money lent. The statement of defence alleged that the loan was not a personal one, but the money was provided for the purpose of a building scheme, and C counterclaimed against A, B, D, and E for damages for fraudulent conspiracy. The action was settled on the terms of C consenting to judgment being entered for A and B for the 100l. and costs, and for A, B, D, and E for the costs of the counterclaim. A bankruptcy notice was afterwards served on C requiring him to pay A and B a certain sum, and to D and E a further sum, being the amounts claimed by them respectively as due on the judgment:—*Held*, that the bankruptcy notice was bad, as it included two judgment debts due to different persons. *Low, In re* (60 L. J. Q.B. 265; [1891] 1 Q.B. 147), followed. *Bankruptcy Notice, In re* (No. 2), 96 L. T. 133; 14 Manson, 133; 23 T. L. R. 169—C.A.

Judgment in Detinue—Non-compliance with Notice—Act of Bankruptcy—Petition—Return of Detained Chattel—Election to Abandon Property in the Chattel.—A plaintiff who has obtained a judgment in *detinue* is deemed to have abandoned his property in the detained chattel if he issues a bankruptcy notice on his judgment and founds a bankruptcy petition on the non-compliance therewith. The return of the chattel after the completion of the act of bankruptcy does not deprive him of his right to a receiving order. *Debtor, In re; Creditor, ex parte*, 97 L. T. 140; 14 Manson, 198; 23 T. L. R. 618—D.

Scotch Judgment Registered in England.—A creditor who has obtained a judgment in Scotland is not entitled to issue a bankruptcy notice to the debtor under section 4, sub-section

1 (g) of the Bankruptcy Act, 1883, in England, although the Scotch judgment has been registered in England under section 3 of the Judgments Extension Act, 1868. *Watson, In re; Johnston, ex parte* (62 L. J. Q.B. 85; [1893] 1 Q.B. 21), followed. *Low, In re; Brand v. Low* (63 L. J. Ch. 60; [1894] 1 Ch. 147), explained. *Bankruptcy Notice, In re*, 67 L. J. Q.B. 308; [1898] 1 Q.B. 383; 77 L. T. 710; 46 W. R. 325; 5 Manson, 7—C.A.

Notice Requiring Payment of Judgment Debt not “in accordance with the terms of the judgment”—Notice Requiring Payment of Part only of Debt.—A bankruptcy notice under sub-section 1 (g) of section 4 of the Bankruptcy Act, 1883, is bad if it requires payment of part only of the judgment debt, and does not make it clear that no more is claimed as due on the judgment, but leaves any balance that may be due to be subsequently ascertained and claimed. *H. B., In re*, 73 L. J. K.B. 1; [1904] 1 K.B. 94; 89 L. T. 592; 52 W. R. 178; 10 Manson, 361; 20 T. L. R. 32—C.A.

An agreement was entered into between the creditor and the debtor for the stay of certain litigation between them on the terms (*inter alia*) that the debtor should pay to the creditor 2,700l. by five instalments, and should consent to judgment being signed against him for that sum. Judgment was signed against the debtor for 2,700l. There was no provision in the agreement that the whole debt should become payable on default in payment of any of the instalments, and there was no provision for successive executions on the judgment. Default was made in payment of three instalments, and the creditor issued a bankruptcy notice claiming payment of the amount due in respect of the three overdue instalments, after giving credit for an amount attached under a garnishee order *nisi*, proceedings under which were still pending, the amount so arrived at being described as the debt due under the judgment:—*Held*, that the bankruptcy notice did not require payment in accordance with the terms of the judgment, but in accordance with the terms of the judgment as modified by a collateral agreement, and it did not comply with the provisions of sub-section 1 (g) of section 4 of the Bankruptcy Act, 1883, and was consequently bad. *Feast, In re; Feast, ex parte* (4 Morrell, 87), distinguished. *Ib.*

Notice Requiring Payment of Judgment Debt without Costs.—“In accordance with terms of the judgment.”—Where a creditor has obtained final judgment for a certain sum and costs to be taxed, a bankruptcy notice served on the debtor is not invalid because it is issued in respect of the sum for which judgment was obtained without mentioning the costs, inasmuch as a separate writ of execution can, under Order XLII. rule 18, be issued for the recovery of the sum apart from the costs. The bankruptcy notice is therefore “in accordance with the terms of the judgment” as required by section 4, sub-section 1 (g) of the Bankruptcy Act, 1883. *H. B., In re* (73 L. J. K.B. 1; [1904] 1 K.B. 94), distinguished. *G. J., In re*, 74 L. J. K.B. 932; [1905] 2 K.B. 678; 93 L. T. 193; 12 Manson, 354; 21 T. L. R. 698—C.A.

Insertion of more than one Judgment Debt in

Same Notice—Amendment of Notice.]—A bankruptcy notice was defective by reason of its being based upon two judgment debts:—*Held*, that the Court ought not to allow the notice to be amended. Decision of CAVE, J., in *Collier, In re; Dan Rylands, ex parte* (8 Morrell, 80, 83), followed and applied. *O. C. S., In re*, 73 L. J. K.B. 585; [1904] 2 K.B. 161; 91 L. T. 224; 52 W. R. 595; 11 Manson, 122—C.A.

Partnership—Writ against Firm after Dissolution—Bankruptcy Petition against late Partner.]—Judgment in default of appearance was recovered in an action against a firm commenced after dissolution of the firm in respect of a cause of action which accrued before the dissolution, the writ being served on the late partners individually. A bankruptcy notice, following the judgment, was issued against the firm, and served on each partner personally. The notice not being complied with, bankruptcy petitions were presented against the late partners individually:—*Held*, that under Order XLVIIIa, rule 1, the action was properly constituted against the firm, though dissolved; that under rule 8 (c) execution on the judgment might have issued, without leave, against the late partners individually; and that if the bankruptcy notice, by reason of its being addressed to the firm, was not good against the late partners individually, the irregularity was one which could be remedied under section 143 of the Bankruptcy Act, 1883, so that a receiving order could be made against a late partner founded on the notice. *Wenham, In re; Battams, ex parte*, 69 L. J. Q.B. 803; [1900] 2 Q.B. 698; 83 L. T. 94; 48 W. R. 627; 7 Manson, 309—C.A.

Held, by LORD ALVERSTONE, M.R., and RIGBY, L.J. (*dubitante* COLLINS, L.J.), that there was no irregularity in the proceedings. *Ib.*

Per LORD ALVERSTONE, M.R. — “Persons being partners” in section 115 of the Bankruptcy Act, 1883, means persons who have carried on business in partnership for the purpose of the liability sought to be enforced, and there is nothing in rule 262 of the Bankruptcy Rules, 1886, 1890, which cuts down that meaning. Consequently, persons who were partners at the time of a partnership debt being incurred can be proceeded against under the Act as partners after the dissolution of the partnership. *Ib.*

Per RIGBY, L.J.—Order XLVIIIa only recognised the principle of law that partners cannot by a dissolution alter their relations in substance to their creditors, and, though not applicable *qua* rule in bankruptcy proceedings, the principle which underlay it could be applied, and there was no reason why the bankruptcy notice founded on the judgment which operated to charge the late partners separately should be invalid as regards them individually. *Ib.*

Per COLLINS, L.J.—The machinery provided by section 115 and rule 262 for proceedings in bankruptcy against partners appears to contemplate proceedings only against persons who are partners at the time of the proceedings. *Ib.*

Company in Liquidation—Set-off—Want of

Mutuality.]—Where a company in liquidation has obtained a judgment for unpaid calls against a shareholder who has a claim against the company for a sum exceeding the judgment debt, which was not available as a set-off against the company's claim on account of want of mutuality according to the rule expressed in *Sankey Brook Coal Co. v. Marsh* (40 L. J. Ex. 125; L. R. 6 Ex. 185), and the company has issued a bankruptcy notice against the debtor in respect of the judgment debt under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, the debtor is not entitled to have the bankruptcy notice set aside, notwithstanding that after adjudication he would be able under section 38 of the Act to set off his claim upon the company against their judgment debt, so as to satisfy it. *G. E. B., In re*, 72 L. J. K.B. 712; [1903] 2 K.B. 340; 89 L. T. 245; 51 W. R. 675; 10 Manson, 243—C.A.

Writ of Fi. fa.—Sheriff Withdrawing without Return—No Stay of Execution.]—Where the sheriff under a writ of *fi. fa.* seizes only the goods of a stranger and then by the instructions of the judgment creditor withdraws from possession without making any return, this does not amount to a stay of execution so as to prevent the judgment creditor from serving a bankruptcy notice under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (g). *Debtor, In re; Judgment Creditor, ex parte*, 71 L. J. K.B. 664; [1902] 2 K.B. 260; 87 L. T. 314; 50 W. R. 609; 9 Manson, 243—C.A.

Security to Satisfaction of Creditor—Agreement that Judgment is to Remain in Full Force—Continuance of Security—Fresh Bankruptcy Notice.]—Where a bankruptcy notice has been complied with by the debtor giving security for the judgment debt to the satisfaction of the creditor, which security by its terms is not to be realised till a future day, the creditor cannot issue a fresh bankruptcy notice in respect of the same judgment debt during the pendency of the security, notwithstanding a term providing that the judgment is still to be in full force. *Smith, In re; Durban, ex parte*, 72 L. J. K.B. 30; [1903] 1 K.B. 33; 87 L. T. 586; 51 W. R. 118; 9 Manson, 341—C.A.

Adjournment of Hearing—In what Cases Allowed.]—The hearing of a bankruptcy notice ought not to be adjourned unless the circumstances are such as would justify the Court in setting aside the notice on some one of the grounds mentioned in section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, and rules 138 (2) and 139, and Form 8 of the Bankruptcy Rules, 1886 and 1890. *Cole, In re; Attenborough, ex parte*, 67 L. J. Q.B. 302; [1898] 1 Q.B. 290; 78 L. T. 23; 46 W. R. 352; 5 Manson, 19—D.

Application to Set Aside Bankruptcy Notice—Petition in Bankruptcy—Costs—Set-off.]—It is not the practice in bankruptcy to set off costs which form part of the petitioning creditor's debt against a debt due from the petitioning creditor to the debtor, even though the latter happen to be in the nature of costs. *S., In re; Peak Hill Goldfield, Lim., ex parte*, 76 L. J. K.B. 1144; [1907] 2 K.B. 896; 97 L. T. 644—Bigham, J.

(d) NOTICE OF SUSPENSION.

Notice of Suspension of Payment.—A statement by a debtor at a meeting of his principal creditors that he could not meet his engagements, *held* (Lord MACNAGHTEN dissenting) not to be a notice, within the meaning of section 4, sub-section 1 (h) of the Bankruptcy Act, 1883, that the debtor had suspended or was about to suspend payment of his debts. *Clough v. Samuel*, 74 L. J. K.B. 918; [1905] A.C. 442; 93 L. T. 491; 54 W. R. 114; 21 T. L. R. 702; 12 Manson, 347—H.L. (E.). Affirming, 11 Manson, 229—C.A. See *infra*.

—The debtor, an outside broker, informed each of his Stock Exchange creditors that he would have difficulty in meeting his payments on pay day, and gave each of them permission to close his account earlier than he could otherwise have done. The debtor had other creditors, to whom no reference was made:—*Held*, that the debtor had not given notice of suspension amounting to an act of bankruptcy within the Bankruptcy Act, 1883, s. 4, sub-s. 1 (h). The rule laid down in *Crook v. Morley* (61 L. J. Q.B. 97; [1891] A.C. 316) applied; and *Scott, In re*; *Scott, ex parte* (65 L. J. Q.B. 465; [1896] 1 Q.B. 619), and *Hill's Trustee v. Rowlands* (65 L. J. Q.B. 542; [1896] 2 Q.B. 124) approved. *Reis, In re*; *Clough, ex parte*, 73 L. J. K.B. 929; [1904] 2 K.B. 769; 91 L. T. 592; 53 W. R. 122; 11 Manson, 229; 20 T. L. R. 547—C.A.

—**Verbal Notice.**—A verbal statement by a debtor to a creditor that the debtor could not pay anything, and that he has lost everything, is a good notice of suspension of payment of his debts by the debtor so as to constitute an act of bankruptcy within sub-section 1 (h) of section 4 of the Bankruptcy Act, 1883—*per* LORD ALVERSTONE, C.J. *Miller, In re*, 70 L. J. K.B. 1; [1901] 1 K.B. 51; 83 L. T. 545; 49 W. R. 65; 8 Manson, 1—C.A.

Advance to Debtor in View of Future Partnership—Agreement to Repay in Future Event.

—The petitioner advanced to the debtor a sum of 2,000*l.* with a view to entering into partnership with the debtor at or before a certain date, the money to be used as part of the capital of the debtor's business in the meantime, and to bear interest. It was agreed that if the debtor should use the money provided by him for the business otherwise than as working capital for his business, the petitioner should have the option of cancelling the agreement and drawing out the 2,000*l.*; and a similar provision was made for the event of the petitioner not entering into partnership with the debtor within the time fixed. Before that time had expired the debtor failed in his business. He informed the petitioner verbally that he could not pay anybody and had lost everything:—*Held*, that at that time the petitioner's remedy was in damages, and there was not any liquidated sum payable to him either immediately or at any certain future time; consequently there was no debt due to him on which to found a petition, and the statement made by the debtor was not an act of bankruptcy. *Id.*

(e) PROOF OF.

Evidence of Debtor—Books of Debtor.—Upon the hearing of a bankruptcy petition the books

of a debtor are admissible to prove the act of bankruptcy, and the debtor may himself be called for the same purpose. *X. Y., In re*; *Haes, ex parte*, 71 L. J. K.B. 102; [1902] 1 K.B. 98; 85 L. T. 564; 50 W. R. 182; 9 Manson, 5—C.A.

3. THE PETITION.

(a) CREDITOR'S PETITION.

Attestation—Amendment.—A bankruptcy petition not properly attested under Bankruptcy Rule 146 ought, if possible, to be amended at the hearing. *Debtor, In re*; *Creditor, ex parte*, 86 L. T. 688—D.

Petitioning Debt—Stock Exchange—"Cessio bonorum"—Judgment Recovered by Stock Exchange Creditor—Right to take Proceedings in Bankruptcy.—The *cessio bonorum* constituted by the rules of the Stock Exchange does not prevent a Stock Exchange creditor, who has come in and received a dividend on his debt in the Stock Exchange liquidation, from serving a bankruptcy notice and making the debtor a bankrupt on a judgment recovered for the balance of the same debt. *Ward, In re* (51 L. J. Ch. 752; 20 Ch. D. 356), and *Ward, In re* (52 L. J. Ch. 78; 22 Ch. D. 132), followed. *Whitmore v. Turquand* (80 L. J. Ch. 345; 3 De G. F. & J. 107) distinguished. *Tynte, In re* (15 Ch. D. 125), doubted. *Mendelssohn, In re*; *Mendelssohn, ex parte*, 72 L. J. K.B. 106; [1903] 1 K.B. 216; 87 L. T. 721; 10 Manson, 9—C.A.

Judgment—Power of Court to go Behind.—The power of the Court in bankruptcy to go behind a judgment is a power to enquire into the consideration and not into the form of the judgment, and the judgment is conclusive unless the consideration can be questioned. *Beauchamp, In re*; *Beauchamp, ex parte*, 73 L. J. K.B. 311; [1904] 1 K.B. 572; 90 L. T. 594; 52 W. R. 545; 11 Manson, 5; 20 T. L. R. 269—C.A.

—Receiver in Action in Chancery Division—Independent Cause of Action—Judgment Debt Assigned to Receiver.

—A receiver in an action in the Chancery Division is entitled to present a bankruptcy petition against a debtor to his estate, if the state of things is such that he has an independent cause of action against the debtor. Consequently, a receiver in a partnership action to whom a judgment debt due to the partnership has been assigned is a good petitioning creditor against the judgment debtor, although the money when recovered is recovered for the purpose of being dealt with in the action. *Sacker, In re* (58 L. J. Q.B. 4; 22 Q.B. D. 179), explained and distinguished. *Macoun, In re*, 73 L. J. K.B. 892; [1904] 2 K.B. 700; 91 L. T. 276; 53 W. R. 197; 11 Manson, 264—C.A.

Acceptance by Judgment Creditor of Bill.—See *Debtor, In re*; *Debtor, ex parte*, 77 L. J. K.B. 409; [1908] 1 K.B. 344—C.A.

Petition by Limited Company—Officer—Clerk Authorised under Seal to Take Proceedings in Bankruptcy.—Any person in the employment of a company incorporated under the Companies Acts, *bona fide* chosen by the company, and duly appointed under seal to take proceedings in bankruptcy on behalf of the company, becomes thereby sufficiently an officer of the company within section 148 of the Bankruptcy

Act, 1883, to take such proceedings, although he was not before his appointment in any ordinary sense an officer of the company. Consequently a petition in bankruptcy presented by a limited company and signed for the company by a clerk of the company duly authorised under the seal of the company, is a good petition. *Tomkins (J. G.) & Co., In re*, 70 L. J. K.B. 223; [1901] 1 K.B. 476; 84 L. T. 341; 49 W. R. 294; 8 Manson, 132—C.A.

Secured Creditor—Estimate of Security in Petition—How Far Creditor Bound by Estimate—Duty of Court as to Enquiring into Correctness of Estimate.]—Under sub-section 2 of section 6 of the Bankruptcy Act, 1883, where a petitioning creditor is a secured creditor, and he does not give up his security for the benefit of the creditors, it is his duty to give an estimate of the value of his security. He makes the estimate at his own risk, and if it is a real estimate and not a mere sham the Court is under no obligation to go into the question of the real value of his security. *Button, In re*; *Voss, ex parte*, 74 L. J. K.B. 403; [1905] 1 K.B. 602; 92 L. T. 250; 53 W. R. 437; 12 Manson, 111—C.A.

The petitioning creditor is bound by the estimate which he gives of his security in his petition in the sense that, if he comes in to prove, he cannot take any benefit in the administration in bankruptcy except on the basis of the estimate which he has made, although he may not be bound in the sense that the trustee is entitled to redeem the security at that value in the event of the creditor, after obtaining an adjudication, taking no further step in the bankruptcy and holding his security. *Taylor, Ex parte*; *Lacey, in re* (13 Q.B. D. 128), and *Vauntin, In re*; *Saffery, ex parte* (68 L. J. Q.B. 971; [1899] 2 Q.B. 549), discussed. *Id.*

Stock Exchange—Default of Broker—Liquidation by Official Assignee of Stock Exchange—Receipt of Dividend by Creditor—Right of Creditor to Present Petition for Balance of Debt.]—Where the assets of a defaulting member of the Stock Exchange are distributed by the official assignee of the Stock Exchange, a member being a creditor who has received a dividend in such distribution is not thereby precluded from suing the defaulter for the balance of his debt or from presenting a petition in bankruptcy against him in respect of such balance. *Mendelssohn v. Ratcliff*, 73 L. J. K.B. 1027; [1904] A.C. 456; 91 L. T. 204; 53 W. R. 240; 10 Com. Cas. 14; 20 T. L. R. 670—H.L. (E.)

Petition to Avoid Judgment Summons—Abuse of Process.]—Judgment having been obtained against the debtor for 100l. damages for breach of promise of marriage with costs, a judgment summons was taken out against him under the Debtors Act, 1869. Before the hearing of the summons the debtor filed his own petition in bankruptcy and was adjudicated bankrupt. The judgment creditor was the sole creditor, and there were some assets. The creditor applied to set aside the adjudication as an abuse of the process of the Court:—*Held*, that the petition was not an abuse of the process of the Court,

and the adjudication would not be set aside. *Painter, ex parte* (64 L. J. Q.B. 22; [1895] 1 Q.B. 85), followed. *Archer, In re*; *Archer, ex parte*, 20 T. L. R. 390—D.

Dismissal of Petition by Consent—Bill for Increased Amount to Petitioning Creditor—Fresh Petition Founded on New Debt—Extortion—Abuse of Process of Court.]—An arrangement between a petitioning creditor and the debtor, under which the creditor receives a bill for a larger amount than he could have recovered in the bankruptcy, and thereupon consents to the dismissal of the petition, is not invalid in the absence of actual extortion or undue pressure by the creditor; and the debt arising under such an arrangement would be a good debt to support a fresh petition in bankruptcy. *Bebro, In re*; *Bebro, ex parte*, 69 L. J. Q.B. 618; [1900] 2 Q.B. 316; 82 L. T. 773; 48 W. R. 561; 7 Manson, 234—C.A.

Per WEBSTER, M.R.—The better practice would be that the Court should not give leave for the withdrawal of a petition under sub-section 7 of section 7 of the Bankruptcy Act, 1883, without exercising its judgment as to whether the case is a proper one in which to allow withdrawal. *Id.*

Registrar's Judgment.]—The Registrar has no jurisdiction except to grant or to dismiss a creditor's petition for sequestration, and his decision does not constitute *res judicata*. Consequently, the reasons by which he was influenced are immaterial and inadmissible as evidence. *Vitoria, Ex parte* (63 L. J. Q.B. 161; [1894] 2 Q.B. 387), approved. *King v. Henderson*, 67 L. J. P.C. 134; [1898] A.C. 720; 79 L. T. 37; 47 W. R. 157; 5 Manson, 308—P.C.

Indirect Motive of Petitioning Creditor.]—Mere motive on the part of a petitioning creditor, however reprehensible, does not affect the validity of the proceedings or make them an abuse of the powers of the Court, unless it is shown that the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others. *Wilbran, Ex parte* (5 Madd. 1), approved. *Lister v. Perryman* (39 L. J. Ex. 177; 11 R. 4 H.L. 521) distinguished. *Id.*

(b) DEBTOR'S PETITION.

Contract for Sewage Works—Payment upon Certificate of Engineer—Power to Engineer to Direct Payment to Firms Supplying Machinery upon Contractors "unduly delaying payment" for the same.]—Under a contract for sewage works made by a contractor with an urban district council it was provided that the requisite machinery was to be supplied to the contractor by certain named firms, and also (by clause 54) that if the engineer should have "reasonable cause to believe that the contractor is unduly delaying proper payment" to the firms supplying the machinery he should have power, if he thought fit, to direct payment to them, and deduct it from the next certificate. The contractor was subsequently adjudicated bankrupt upon his own petition, and at the date of his bankruptcy a sum of 836l. 8s. 9d. was due to

the various machinery firms. The engineer having made orders directing payment of this sum direct to these firms pursuant to clause 54,—*Held*, that the power given by the clause in question to the engineer was not annulled by the bankruptcy of the contractor, and was properly exercised, as the contractor, by presenting his own petition, was “unduly delaying proper payment” to the firms supplying the machinery, within the meaning of the clause. *Wilkinson, In re; Fowler, ex parte*, 74 L. J. K.B. 969; [1905] 2 K.B. 713; 54 W. R. 157; 12 Manson, 377—Bigham, J.

4. INTERIM RECEIVER.

Special Manager—Dismissal of Petition—Disbursements of Special Manager—Jurisdiction.—Where a Court has jurisdiction over the subject-matter in respect to which it makes an order, but has not, as is ultimately shewn, jurisdiction in the particular case owing to the position of the person concerned, the order, though erroneous, is not without jurisdiction altogether, and anything done under it before it is set aside is valid. *A. B. & Co., In re* (No. 2), 69 L. J. Q.B. 568; [1900] 2 Q.B. 429; 82 L. T. 544; 48 W. R. 485; 7 Manson, 268—C.A.

Where the Bankruptcy Court on the presentation of a petition against an alleged debtor appoints an interim receiver of his business, and the petition is afterwards dismissed on the ground that the alleged debtor is not a debtor within the meaning of section 4 of the Bankruptcy Act, 1883, the interim receiver is not a trespasser or wrongdoer; and he, and the special manager, if he appoints one, are entitled, in passing their accounts, to all just allowances for disbursements made and liabilities incurred while carrying on the business. *Ib.*

Per LINDLEY, M.R., and RIGBY, L.J.—Rules 172 and 173 of the Bankruptcy Rules, 1886 to 1890, do not apply to special managers. They apply to interim receivers, but the Court would not disallow, in the accounts of an interim receiver, expenses properly incurred by him over and above the amount deposited for his expenses under those rules, and leave him to recover the excess from the persons at whose instance he was appointed. *Ib.*

Official Receiver as—Power to Appoint Special Manager of Business.—The power to appoint a special manager of the business of a debtor conferred on the official receiver by sub-section 1 of section 12 of the Bankruptcy Act, 1883, can be exercised by him while acting as interim receiver under sub-section 1 of section 10 of the Act. *Bankruptcy Petition, In re*, 69 L. J. Q.B. 222; 81 L. T. 798; 7 Manson, 132—C.A.

5. RECEIVING ORDER.

“Sufficient cause” for Declining to Make—Antecedent Proposed Fraud by Petitioning Creditor—Motive of Spite.—On July 23, 1900, S., being in difficulties, called a meeting of his creditors, at which it was resolved by them to accept a composition of 10s. in the pound. A few days subsequently G., a creditor who had not been present, called on S. and said that he

would not assent to the composition unless S. gave him a promissory note for the balance of the debt due to him, and on August 1 he sent to S. a promissory note for half the amount of the debt, requesting S. to accept it. S. declined to accede to this suggestion. The proposed composition having fallen through, S., on August 4, executed a deed of assignment of all his property to trustees for the benefit of his creditors generally. On August 28 G. and another creditor, who was in no way connected with the proposed secret arrangement, presented a petition in bankruptcy against S., the debt of neither of them alone being 50*l.*:—*Held*, that there was “sufficient cause” for declining to make a receiving order within the Bankruptcy Act, 1883, s. 7, sub-s. (3). *Shaw, In re; Gill, ex parte*, 83 L. T. 754; 49 W. R. 264—C.A.

—On April 19, 1904, the debtor committed an act of bankruptcy by the execution of a deed of assignment of all his property for the benefit of his creditors. The petitioning creditors refused to assent to the deed, and threatened to present a bankruptcy petition unless they either recovered 60*l.* or bills for the difference between the amount to be paid under the deed and the amount of his debt. These bills they required to be indorsed by the debtor's father-in-law. As neither of the proposals were accepted, they presented a petition on which a receiving order was made:—*Held*, that there was “sufficient cause” for declining to make a receiving order within the Bankruptcy Act, 1883, s. 7, sub-s. 3. *Debtor, In re; Debtor, ex parte* (No. 2), 91 L. T. 664; 53 W. R. 223—D.

Antecedent Threat.—A debtor who had assigned the whole of his property to a trustee for the benefit of his creditors, called a meeting of his creditors, who agreed to accept an offer by the debtor and his relatives to pay 10s. in the pound. Subsequently the debtor informed them that he could not arrange to carry out the composition of 10s., but that his relatives offered to purchase his estate for a sum sufficient to pay 7*s.* 6*d.* in the pound. The majority of the creditors accepted this, but one creditor wrote demanding an immediate cash payment of 7*s.* 6*d.* in the pound and bills for 2*s.* 6*d.* indorsed by a relative of the debtor, and said that if this were not done he would present a bankruptcy petition. These terms were declined, and a bankruptcy petition was presented:—*Held*, upon the authority of *Shaw, In re* (83 L. T. 754), that, as the petitioning creditor had endeavoured to obtain a secret advantage over the other creditors, with a threat, if the debtor did not concede it, to present a bankruptcy petition, there was “sufficient cause” for declining to make a receiving order within section 7, sub-section 3 of the Bankruptcy Act, 1883. *Goldberg, In re*, 21 T. L. R. 139—C.A.

Adjournment—Discretion.—Upon the day appointed for the hearing of a bankruptcy petition the debtor made an offer to settle the debts and costs. The local solicitor, who appeared for the petitioning creditor, said that the offer was a reasonable one, but he would not accept it without communicating with his principals. Both sides asked for an adjournment to enable the solicitor to get instructions. The Registrar

refused, and made a receiving order:—*Held*, that the Registrar had exercised his discretion wrongly in refusing to allow an adjournment, and that the receiving order must be rescinded. *Farleigh, In re*, 21 T. L. R. 198—D.

Power to make Receiving Order in Lieu of Committal Order—Judgment Summons—No Evidence of Means.—A Judge upon the hearing of a judgment summons has no jurisdiction, in the absence of evidence as to the debtor's means to pay the debt, to make a receiving order in lieu of a committal order. *Reg. v. Sussex County Court Judge* (59 L. T. 32) distinguished. *Debtor, In re; Baker, ex parte*, 91 L. T. 321; 53 W. R. 29—D.

—The Court has no jurisdiction to make a receiving order in bankruptcy under section 103, sub-section 5 of the Bankruptcy Act, 1883, unless it has before it evidence as to means on which it might exercise its jurisdiction under section 5 of the Debtors Act, 1869. *Reg. v. Sussex County Court Judge* (59 L. T. 32) distinguished. *Debtor, In re; Debtor, ex parte* (No. 1), 74 L. J. K.B. 362; [1905] 1 K.B. 374; 91 L. T. 321; 53 W. R. 29; 12 Manson, 17—D.

Application for Committal—Debtor having Foreign Domicil—Non-residence in England.—Where, under section 5 of the Debtors Act, 1869, application is made by a judgment creditor to a Court having bankruptcy jurisdiction for the committal of a judgment debtor, and the judgment debtor is present before the Court, the Court may, under section 103, sub-section 5 of the Bankruptcy Act, 1883, make a receiving order against the debtor, although he is not domiciled in England, and has not within a year before the date of the application ordinarily resided or had a dwelling-house or place of business in England. *Clark, In re; Clark, ex parte*, 66 L. J. Q.B. 875; [1898] 1 Q. B. 20; 77 L. T. 417; 46 W. R. 103; 4 Manson, 231—C.A.

Stay of Advertisement—Assent of Creditors.—Where a receiving order has been made against a debtor, and he subsequently applies, under section 109 of the Bankruptcy Act, 1883, for an order staying advertisements and all proceedings under the receiving order, the Court ought not, in the exercise of its discretion, to accede to the application simply because the petitioning creditor and the other creditors assent thereto, but, taking into consideration all the circumstances of the case, must have regard to the larger and higher view to be taken of the matter—namely, the interests of the public of which the Board of Trade is the guardian. *Debtor, In re; Official Receiver, ex parte*, 84 L. T. 666—C.A.

Receiving Order Made on Judgment Summons—No Formal Order Drawn up—Staying Subsequent Action against Debtor.—Upon the hearing of a judgment summons under section 5 of the Debtors Act, 1869, Cave, J., in lieu of an order of committal, made a receiving order against the debtor under section 103 (5) of the Bankruptcy Act, 1883. The Judge wrote upon the summons "Receiving Order," and signed this with his initials, but no formal order was ever drawn up and nothing further was done:—*Held*, that a receiving order had been made, within the meaning of section 9 (1) of the

Bankruptcy Act, 1883, when the order was made by the Judge, and that thereafter a creditor could not bring an action against the debtor in respect of a debt provable in bankruptcy. *Blount v. Whitely*, 79 L. T. 635; 6 Manson, 48—C.A.

Rescission of Order—Undischarged Bankrupt—Repeated Bankruptcies—Committal Orders—Filing Own Petition—Abuse of Process of Court.—The Court will rescind a receiving order made against an undischarged bankrupt on his own petition, where it appears that he is in the habit of getting credit and then of systematically abusing the process of the Court by filing his own petition in order to avoid imprisonment under committal orders obtained against him by his creditors. *Betts, In re; Official Receiver, ex parte*, 70 L. J. K.B. 511; [1901] 2 K.B. 39; 84 L. T. 427; 49 W. R. 447; 8 Manson, 227—D.

Rescission before Public Examination—Jurisdiction—Payment of Composition—Release of Debts.—Although by section 35 of the Bankruptcy Act, 1883, an adjudication of bankruptcy can only be annulled where a debtor ought not to have been adjudged bankrupt or where the debts of the bankrupt are paid in full, the Court has jurisdiction under section 104 to rescind a receiving order upon other grounds, even before the public examination of the debtor, and consequently without any scheme of arrangement under section 3 of the Bankruptcy Act, 1890, but the jurisdiction will only be exercised in exceptional circumstances. *Isod, In re; Official Receiver, ex parte*, 67 L. J. Q.B. 111; [1898] 1 Q.B. 241; 77 L. T. 640; 46 W. R. 304; 4 Manson, 343—C.A.

A receiving order having been made against a retail trader on his own petition, his father paid the creditors a composition of 10s. in the pound, which was more than could have been realized in the bankruptcy, in consideration of which the creditors released their debts and withdrew their proofs. The debtor then applied for a rescission of the receiving order with the consent of the official receiver, who, after holding a preliminary investigation, came to the conclusion that there had been no delinquency on the part of the debtor, and did not desire a public examination. The Registrar rescinded the receiving order on the ground that the circumstances were exceptional:—*Held* (RIGBY, L.J., *dissentiente*), that the Registrar had jurisdiction to rescind the receiving order, and that in the circumstances his discretion had been rightly exercised. *Ib.*

Receiving Order against Trustee—Effect of Rescission.—Where a receiving order is made against a trustee in bankruptcy, in consequence of which he vacates his office of trustee under section 85 of the Bankruptcy Act, 1883, but the order is subsequently rescinded by the Court on the ground that it ought never to have been made, the trustee is thereupon restored to his original office subject to any new rights which may have arisen in the interval. *Newman, In re; Official Receiver, ex parte*, 68 L. J. Q.B. 961; [1899] 2 Q.B. 587; 81 L. T. 527; 48 W. R. 94; 6 Manson, 381—Wright, J.

Attachment for Non-payment of Rates—Puni-

tive Order—Power to Release Debtor from Prison.]

—An order made by a magistrate under section 2 of the Distress for Rates Act, 1849, committing a person to prison for non-payment of rates, is a punitive order, and the Court in bankruptcy has no jurisdiction to give relief against it under sub-section 2 of section 10 of the Bankruptcy Act, 1883. *Middleton v. Chichester* (40 L. J. Ch. 237, 239; L. R. 6 Ch. 152, 157) and *Smith, In re; Hands v. Andrews* (62 L. J. Ch. 386, 340; [1893] 2 Ch. 1, 17), followed. The observations of MELLISH, L.J., in *Cobham v. Dalton* (44 L. J. Ch. 702, 704; L. R. 10 Ch. 655, 657) are not to be regarded as good law. *Edgcome, In re*, 71 L. J. K.B. 722; [1902] 2 K.B. 403; 87 L. T. 108; 50 W. R. 678; 9 Manson, 227—C.A.

Official Receiver's Report—Publication.]—See CONTEMPT OF COURT.

6. STAY OF PROCEEDINGS.

Power of County Court to stay Proceedings in High Court.]—The power given to the Bankruptcy Court under section 10, sub-section 2 of the Bankruptcy Act, 1883, to stay proceedings against a debtor, ought not to be exercised by the County Court where the High Court has with knowledge of bankruptcy proceedings allowed the matter to proceed. *Quære*, whether the power of the County Court under sub-section 2 is not limited to proceedings pending in it. *Richardson, In re; Grime, ex parte*, 86 L. T. 690—D.

7. SCHEME OF ARRANGEMENT.

Sanction of Court—Corrupt Bargain—Release of Debts.]—A number of unsecured creditors released their claims against the debtor's estate in order to enable 7s. 6d. in the pound to be paid under a scheme of arrangement on the rest of the unsecured debts. The debtor's brother, without the knowledge or sanction of the debtor, made a declaration of trust conferring a possible pecuniary benefit upon two of the creditors so releasing their claims; but on exception being taken to the scheme of arrangement on this ground, these two creditors gave up this benefit:—*Held*, that the declaration of trust so made was, under the circumstances, no reason for the Court refusing to sanction the scheme of arrangement. *E. A. B., In re*, 71 L. J. K.B. 356; [1902] 1 K.B. 457; 85 L. T. 773; 50 W. R. 229; 9 Manson, 105—C.A.

Debts Provable.]—The words "debts provable" in the Bankruptcy Act, 1890, s. 3, sub-s. 9, mean debts provable at the time when the scheme of arrangement comes on for approval, and not debts provable at the date of the receiving order which have been since withdrawn. *Ib.*

Conduct of Debtor—Rash and Hazardous Speculations.]—The Court will not refuse to approve a scheme of arrangement on the ground of a debtor's misconduct, except in cases of a gross character. The mere fact that a debtor has contributed to his bankruptcy by rash and hazardous speculations within the meaning of the Bankruptcy Act, 1890, s. 8, sub-s. 3 (f), is not sufficient reason for refusing

to approve a scheme which complies with the conditions of section 3, sub-section 9. *Ib.*

Reasonably Security for Payment of not Less than 7s. 6d. in the Pound—Approval by Court—Building Speculation.]—The Court is bound to refuse its sanction to a scheme of arrangement in a case within section 3, sub-section 9 of the Bankruptcy Act, 1890, unless the scheme provides reasonable security for payment of not less than 7s. 6d. in the pound on all the unsecured debts provable against the debtor's estate, and will not consider a scheme under which the debtors, through their trustee, propose to carry on building speculations similar to those which led to their bankruptcy as providing such security, even though all the unsecured creditors are in favour of the scheme. *Flew, In re; Flew, ex parte*, 74 L. J. K.B. 280; [1905] 1 K.B. 278; 92 L. T. 333; 53 W. R. 438; 12 Manson, 1; 21 T. L. R. 150—C.A.

Debts Released by Deeds delivered as Escrows pending Approval of Scheme by Court—Debts Provable—Voting.]—In the absence of fraud the security required by the Bankruptcy Act, 1890, s. 3, sub-s. 9, need not extend to debts, releases for which have been executed and delivered as escrows, to take effect on the approval of the scheme by the Court; but the creditors who have executed such releases have no interest entitling them to vote upon the scheme. *Baines, In re; Board of Trade, ex parte*, 86 L. T. 691—D.

Annulment of Adjudication—Discretion of Court.]—The Court, upon approving a composition or scheme under section 23 of the Bankruptcy Act, 1883, after the debtor had been adjudged bankrupt, will not as a matter of course annul the bankruptcy. The Court has a discretion in such a case. *Sullivan and Hughes, In re*, 20 T. L. R. 393—D.

8. ADJUDICATION.

Rejection of Scheme by Creditors—Notice to Debtor.]—Though the Court has jurisdiction to adjudicate a debtor bankrupt after a resolution of the creditors to that effect under the Bankruptcy Act, 1883, s. 20, sub-s. 1, without any notice being given to the debtor, the proper practice, as well in the County Court as in the High Court, is that notice should be given to the debtor unless there is some special reason to the contrary. *Ponsford, In re; Ponsford, ex parte*, 73 L. J. K.B. 913; [1904] 2 K.B. 704; 91 L. T. 510; 53 W. R. 120; 11 Manson, 342—C.A.

Immediate Adjudication.]—Where the Court refuses to approve a scheme an immediate adjudication of bankruptcy will only be made against the debtor under very exceptional circumstances. *Flew, In re; Flew, ex parte*, 74 L. J. K.B. 280; [1905] 1 K.B. 278; 92 L. T. 333; 53 W. R. 438; 12 Manson, 1; 21 T. L. R. 150—C.A.

Foreigner Resident out of Jurisdiction of the Court—Conveyance of Property in England.]—The Court has no jurisdiction to make an adjudication in bankruptcy against a foreigner domiciled and resident abroad, though the petitioning creditor's debt was incurred by the foreigner in carrying on business through a manager in England, and though the alleged act

of bankruptcy is one of the class of voluntary acts such as an assignment of property in trust for creditors. *Pearson, In re; Pearson, ex parte* (61 L. J. Q.B. 585; [1892] 2 Q.B. 263), followed. *A. B. & Co., In re* (No. 1), 69 L. J. Q.B. 375; [1900] 1 Q.B. 541; 82 L. T. 169; 48 W. R. 424; 7 Manson, 134—C.A.

9. ANNULMENT OF ADJUDICATION.

Debts Paid in Full—Releases by Creditors.]—Under sub-section 1 of section 35 of the Bankruptcy Act, 1883, one of the grounds on which an adjudication in bankruptcy may be annulled is where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full. This means that all the debts which have been rightly proved have been discharged by payment in full in money. Debts which have been merely released by the creditors voluntarily, or in consideration of a small money payment, are not paid in full within the meaning of the section. *Keet, In re; Official Receiver, ex parte*, 74 L. J. K.B. 694; [1905] 2 K.B. 666; 93 L. T. 259; 54 W. R. 20; 12 Manson, 235; 21 T. L. R. 615—C.A.

Per STIRLING, L.J.—The discretionary power of the Court to make an order for annulment under section 35 ought not, in the absence of special circumstances, to be made in a case in which, if the bankrupt were applying for an order of discharge, the order would not be granted. *Id.*

Debtor's Petition—Committal Orders—Abuse of Process of Court—Annulment of Adjudication.]—Judgment creditors obtained an order against the debtor for payment of the judgment debt by monthly instalments of 4*l.*, in respect of which they also obtained committal orders. While the last committal order was in force the debtor was adjudicated bankrupt on his own petition. The debtor was personally earning about 300*l.* a year. There were no other creditors and no assets. On an application by the creditors to annul the adjudication, *Held*, that the adjudication was properly made, and could not be treated as an abuse of the process of the Court, since by reason of the adjudication the bankrupt's future earnings would under section 44 of the Bankruptcy Act, 1883, be available for payment of the creditors' debt, except to the extent necessary for the support of the bankrupt and his family, according to the rule stated in *Roberts, In re; Roberts, ex parte* (69 L. J. Q.B. 19; [1900] 1 Q.B. 122). *Hancock, In re; Hillearys, ex parte*, 73 L. J. K.B. 245; [1904] 1 K.B. 585; 90 L. T. 389; 52 W. R. 547; 11 Manson, 1—C.A.

Payment of Debts in Full—Discretionary Power—Debtor's Misconduct—Concealment of Assets—Postponement.]—The annulment of a debtor's adjudication under section 35 of the Bankruptcy Act, 1883, does not follow as a matter of course upon proof that all the debts have been paid in full. The power to annul adjudications given to the Court by that section is discretionary, and the Court will, by refusing, or at any rate postponing, the annulment, punish a debtor who has been guilty of grave offences against the law of bankruptcy. *Taylor, In re;*

Taylor, ex parte, 70 L. J. K.B. 531; [1901] 1 K.B. 744; 84 L. T. 426; 49 W. R. 510; 8 Manson, 230—D.

Misconduct—Discharge—Scheme.]—On an application under the Bankruptcy Act, 1883, s. 23, by a bankrupt after his discharge for the approval of a composition providing for the payment of 10*s.* in the pound to the creditors, but conditional on the annulment of the bankruptcy, the Court will have regard to the interest of the public and commercial morality, and will refuse to approve the proposal if the bankrupt's conduct has been such that the bankruptcy ought not to be annulled. *Beer, In re; Beer, ex parte*, 72 L. J. K.B. 366; [1903] 1 K.B. 628; 88 L. T. 334; 51 W. R. 422; 10 Manson, 136—C.A.

10. CONTRACT, EFFECT OF BANKRUPTCY ON.

Contract for Sewage Works—Payment upon Certificate of Engineer—Power to Engineer to Direct Payment to Firms Supplying Machinery upon Contractors "unduly delaying payment" for the same.]—Under a contract for sewage works made by a contractor with an urban district council it was provided that the requisite machinery was to be supplied to the contractor by certain named firms, and also (by clause 54) that if the engineer should have "reasonable cause to believe that the contractor is unduly delaying proper payment" to the firms supplying the machinery he should have power, if he thought fit, to direct payment to them, and deduct it from the next certificate. The contractor was subsequently adjudicated bankrupt upon his own petition, and at the date of his bankruptcy a sum of 836*l.* 8*s.* 9*d.* was due to the various machinery firms. The engineer having made orders directing payment of this sum direct to these firms pursuant to clause 54, *Held*, that the power given by the clause in question to the engineer was not annulled by the bankruptcy of the contractor, and was properly exercised, as the contractor, by presenting his own petition, was "unduly delaying proper payment" to the firms supplying the machinery, within the meaning of the clause. *Wilkinson, In re; Fowler, ex parte*, 74 L. J. K.B. 969; [1905] 2 K.B. 713; 54 W. R. 157.—Bigham, J.

Mortgage by Debtor—Act of Bankruptcy—Knowledge of Mortgagee—Redemption of Security—Relation Back of Title of Trustee in Bankruptcy—Liability of Mortgagee.]—A secured creditor who has notice of an act of bankruptcy by his debtor within three months is not entitled before the expiration of that period to receive payment of the debt from his debtor, and consequently the debtor cannot make a good tender to the creditor and *Held*, that he must give up his securities to the trustee for payment of the amount due. *Lawrence, In re; Nichols, ex parte* (71 L. J. K.B. 786; [1902] 2 K.B. 445), overruled in *London & Co. v. Union* on restg. [1906] *Smiths Bank*, 75 L. J. Ch. 71 new R. 812 (C.A. 444; 95 L. T. 333; 22 T. L. R. 117).

ex parte, April, 1906, du Stockbrokers were in; 81 L. T. Exchange, and an defaulters on the Stock Wright according to the r assignee was appointed. They had deposited the Stock Exchange for Non-pa

the defendants certain securities to secure a loan. The official assignee tendered the amount due in respect of the loan and called on the defendants to hand over the securities. They refused on the ground that, having notice of an act of bankruptcy by the stockbrokers—namely, the assignment to the official assignee—within three months, they would not be safe in handing over the securities till the expiration of three months, for if bankruptcy proceedings were taken within that period the title of the trustee in bankruptcy would relate back. The stockbrokers and official assignee then sued for delivery up of the securities on payment of the amount due:—*Held*, that the plaintiffs could not require the defendants to give up the securities. *Ib.*

Per CURIAM.—If the official assignee were prepared to pay the money due on the securities and to undertake to hold them until bankruptcy proceedings were taken or the period of three months had expired, an order should be made empowering him so to do. If he were not, no immediate judgment should be given in the action, but it should be directed to stand over until it could be seen who was the person entitled to redeem. *Ib.*

11. THE TRUSTEE.

(a) POWERS AND DUTIES OF.

Application by Trustee for Directions—Compromise of Claims—Complicated Circumstances—Discretion of Court—Duty of Trustee to Determine Matter.—On an application to the Court by a trustee in bankruptcy, under subsection 3 of section 89 of the Bankruptcy Act, 1883, for directions in relation to a particular matter arising under the bankruptcy, there is no obligation on the Court to give directions. Where the circumstances are complicated the trustee ought to deal with the matter himself, with the assistance of the committee of inspection, and ought not to apply to the Court to relieve him from the obligation of forming his own judgment in the matter placed upon him by the Bankruptcy Act. *Pilling, In re; Salamman, ex parte*, 75 L. J. K.B. 739; [1906] 2 K.B. 644; 95 L. T. 362; 13 Manson, 229—Bigham, J.

Permission to Trustee to Employ Solicitor.—Under the Bankruptcy Act, 1883, s. 57, sub-s. 3, the permission of the committee of inspection for the employment of a solicitor by the trustee, to take proceedings or do business sanctioned by the committee, need not be in any particular form, but, although it may be so framed as to cover several proceedings or pieces of business, it must in some way or other specify them. Accordingly, a resolution of the committee that a solicitor be employed by the trustee "where necessary" is too vague to satisfy the section. *Vavasour, In re*, 69 L. J. Q.B. 685; [1900] 2 Q.B. 309; 82 L. T. 322; 48 W. R. 543; 7 Manson, 262—Wright, J.

Pledge of Share Certificates with Bankrupt—Disappearance of Pledgor—Power of Sale by Trustee in Bankruptcy—Directions as to Advertisement.—Where certain share certificates had been pledged with a firm which afterwards became bankrupt, and the pledgor had disappeared without repaying the loan, the trustee in bankruptcy was given permission to sell the

shares after advertising for the pledgor as directed by the Court. *Harrison, In re; Whinney, ex parte*, 54 W. R. 203; 14 Manson, 132—Bigham, J.

Record Book kept by Trustee—Minutes of Meetings of Committee of Inspection—Right of Debtor to Inspect.—A debtor has no right to inspect the "record book" kept by the trustee in his bankruptcy in pursuance of section 80 of the Bankruptcy Act, 1883, and rule 285 of the Bankruptcy Rules, 1886, and the Court has no power to make any order giving him leave to do so. *Solomons, In re; Solomons, ex parte*, 73 L. J. K.B. 1029; [1904] 2 K.B. 917; 91 L. T. 512; 53 W. R. 49; 11 Manson, 345; 21 T. L. R. 48—C.A.

Right to Books—Bankruptcy of Underwriter—Insurance—Underwriting—"Names."—Prior to his bankruptcy the debtor carried on business as an underwriter at Lloyd's on his own account and as agent for five other persons or "names." By agreement with each of the "names" it was provided that proper underwriting and account books should be provided and kept, and be always open to the inspection of the "name," and the "name" should pay to the debtor an annual sum as a remuneration for his services in conducting the business, for keeping and providing books and papers, and for providing an office and clerks, and other outgoings. The debtor kept ledgers in which was a separate column for the transactions done for each "name," and another for his own transactions in respect of the same matters. At the date of the bankruptcy the books were in the hands of a firm of accountants who, on instructions from the "names," declined to deliver them up to the trustee in the bankruptcy:—*Held*, that the inference from the agreements was that the debtor and the "names" were all interested in the books, and the debtor's agency having come to an end he had no greater right to the books than the "names," and his trustee had no right to the exclusive possession of them; but that the "names" must undertake to give the trustee such inspection of the books and facilities for making extracts from them as might be reasonably required. *Burmand, In re; Wilson, ex parte*, 73 L. J. K.B. 413; [1904] 2 K.B. 68; 91 L. T. 46; 52 W. R. 437; 11 Manson, 113; 20 T. L. R. 377—C.A.

Sequestration of Ecclesiastical Benefice—Offer of Sum for Withdrawal of Sequestration—Acceptance of Offer by Trustee.—A beneficed clergyman was adjudicated bankrupt, and a sequestrator of the profits of the benefice was appointed under section 52 of the Bankruptcy Act, 1883, and the bishop of the diocese appointed a curate for the performance of the services of the church under the Sequestration Act, 1871, during the continuance of the sequestration. The stipend of the curate and a claim for dilapidations more than swallowed up the income from the benefice. An offer of 300*l.* was made to the official receiver on behalf of the debtor on condition that he would consent to the relaxation or withdrawal of the sequestration. This offer was supported by three creditors, but was opposed by the other creditor (there being only four creditors), whose proof largely exceeded the proofs of the other three. The

Registrar authorised the official receiver to accept the offer:—*Held*, that the official receiver could agree to the relaxation or withdrawal of the sequestration in consideration of the payment of a sufficient sum, and that the Registrar had rightly exercised his discretion in authorising him to accept the offer. *Barratt, In re*, 22 T. L. R. 427—D.

Action against—Rescission of Contract to take Shares in Company—Bankrupt Director.]—A shareholder bringing an action for rescission of his contract to take shares against the company, cannot add as defendant to the action the trustee in bankruptcy of a director of the company against whom he claims damages for deceit under the Companies Act, 1867, s. 38, or under the Directors' Liability Act, 1890. *Greenwood v. Humber & Co.*, 6 Manson, 42—Romer, J.

Proceedings against Trustee—Costs against Creditor—Right to Retain Sufficient out of the Dividend to Meet the Costs.]—Where the creditor of a bankrupt has costs given against him in proceedings brought by him against the trustee in bankruptcy, the trustee is entitled to retain sufficient out of the dividend due to the creditor on the amount he has proved for against the bankrupt's estate to meet those costs. *Mayne, In re; Official Receiver, ex parte*, 76 L. J. K.B. 1086; [1907] 2 K.B. 899; 23 T. L. R. 758—Bigham, J.

Improper Retainer of Money by Trustee—Penal Interest—Estate or Treasury Entitled.]—The penal interest of 20L. per cent. imposed by section 74 of the Bankruptcy Act, 1883, on sums over 50L. retained by a trustee in bankruptcy in his hands for more than ten days, is in the nature of a debt due from the trustee to the bankrupt's estate, and should therefore be paid into the Bankruptcy Estates Account, and not to the Treasury. Accordingly a trustee is entitled to set off against such interest any sum which is due to him from the estate. *Sims, In re; Board of Trade, ex parte*, 76 L. J. K.B. 849; [1907] 2 K.B. 36; 96 L. T. 713; 14 Manson, 169—Bigham, J.

Receiving Order against Trustee—Effect of Rescission.]—Where a receiving order is made against a trustee in bankruptcy, in consequence of which he vacates his office of trustee under section 85 of the Bankruptcy Act, 1883, but the order is subsequently rescinded by the Court on the ground that it ought never to have been made, the trustee is thereupon restored to his original office subject to any new rights which may have arisen in the interval. *Newman, In re; Official Receiver, ex parte*, 68 L. J. Q.B. 961; [1899] 2 Q.B. 587; 81 L. T. 527; 48 W. R. 94—Wright, J.

Trade Fixtures.]—See *Lambourn v. McLellan*, *post*, LANDLORD AND TENANT.

Water Rate—Recovery of Payment.]—See WATER.

(b) REMUNERATION.

Remuneration of Trustee—Fund for Composition Provided by Father of Debtor.]—A trustee in bankruptcy is not entitled to the remuneration provided for by section 72 of the Bankruptcy

Act, 1883, as amended by section 15 of the Bankruptcy Act, 1890, where the only assets are provided by a relative of the debtor to enable him to pay a composition to his creditors. *Christie, In re; Christie, ex parte*, 69 L. J. Q.B. 31; [1900] 1 Q.B. 5; 81 L. T. 528; 48 W. R. 94; 7 Manson, 1—Wright, J.

The words "the amount realised" in section 72 of the Act of 1883, apart from section 15 of the Act of 1890, mean "the amount realised by the trustee." *Ib.*

Semble, the words "distributed in dividend," in the same section, mean "distributed in dividend out of assets realised by the trustee." *Ib.*

Composition—Resolution of Creditors—Ultra Vires.]—A resolution passed by the creditors of a debtor that; the remuneration of the trustee of a composition scheme shall be a commission of "5 per cent. on all amounts brought to credit, and 5 per cent. on all amounts distributed," is not in accordance with the language of subsection 1 of section 72, and is therefore *ultra vires*. *Ib.*

(c) THE TRUSTEE'S SOLICITOR.

Lien for Costs—Recovery of Assets in Bankruptcy by.]—A solicitor to a trustee in bankruptcy has no lien for his costs upon property of the bankrupt recovered by him for the trustee as such solicitor. *Wood, In re; Fanshawe, ex parte* (66 L. J. Q.B. 69; [1897] 1 Q.B. 314), considered. *Humphreys, In re; Lloyd-George, ex parte*, 67 L. J. Q.B. 412; [1898] 1 Q.B. 520; 78 L. T. 182; 46 W. R. 322; 5 Manson, 11—C.A.

Charging Order — Jurisdiction.]—*Semble*, where property is recovered or preserved in the course of proceedings in bankruptcy, the Judge in bankruptcy would have jurisdiction to make a charging order for costs. Opinion of VAUGHAN WILLIAMS, J., to the contrary, in *Wood, In re; Fanshawe, ex parte* (66 L. J. Q.B. 69; [1897] 1 Q.B. 314), doubted. *Deakin, In re; Daniell, ex parte*, 69 L. J. Q.B. 725; [1900] 2 Q.B. 489; 82 L. T. 776; 48 W. R. 678; 7 Manson, 302—C.A.

Property Recovered in Chancery Division—Absence of Client Creditor.]—A Court exercising bankruptcy jurisdiction has no power under section 28 of the Solicitors Act, 1860, to make a charging order on property recovered in a Chancery action because it is represented by a dividend in bankruptcy. Nor has the Court any power under section 102 of the Bankruptcy Act, 1883, in the absence of the creditor, to direct payment of the dividend to the creditor's solicitor on the ground that such dividend represents property recovered by him even on an indemnity. *Cook, In re; Cripps, ex parte*, 68 L. J. Q.B. 597; [1899] 1 Q.B. 863; 80 L. T. 495; 47 W. R. 524; 6 Manson, 185—D.

Costs—Sale by Trustee of Mortgaged Property—Proceeds of Sale—Duty of Taxing Officer.]—In a taxation of a solicitor's costs under rule 2 of the General Regulations in Part II. of the Appendix to the Bankruptcy Rules, 1886,

the Taxing Master in bankruptcy is not concerned to determine out of what fund the taxed costs are to be paid. His duty is to tax the bill in accordance with the General Order under the Solicitors' Remuneration Act, 1881, and he should then direct by his *allocatur* that the amount of the bill as taxed is to be paid in accordance with the above-mentioned rule. It will be for the parties to determine out of what fund the costs are to be paid. *Garner, In re; Pedley, ex parte*, 75 L. J. K.B. 584; [1906] 2 K.B. 213; 95 L. T. 60; 54 W. R. 627; 13 Manson, 204; 22 T. L. R. 597—Bigham, J.

Semble.—Where mortgaged property is sold, the words "proceeds of sale" in the proviso of the above-mentioned rule means the net proceeds of sale after the charges on the property have been paid off. *Ib.*

— **Taxation—Retainers to Counsel—Discretion of Master.**—On the taxation in bankruptcy of the bill of costs of a solicitor to a trustee in bankruptcy, the Taxing Master has a discretion to allow retainers to counsel; but, as a general rule, such retainers will not be allowed. *Nordmann, In re; Hasluck, ex parte*, 67 L. J. Q.B. 996; 47 W. R. 151; 5 Manson, 327—Wright, J.

(d) RELEASE OF TRUSTEE.

Revocation of Order—"Suppression or concealment of material fact."—Section 82, sub-section 3 of the Bankruptcy Act, 1883, enacts that an order of the Board of Trade releasing a trustee "shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the bankrupt, or otherwise in relation to his conduct as trustee, but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact":—*Held*, that the words "by fraud or by suppression or concealment of any material fact" must be construed as meaning such suppression or concealment as has in it some element of fraud or wrongfulness. *Harris, In re; Hasluck, ex parte*, 68 L. J. Q.B. 769; [1899] 2 Q.B. 97; 80 L. T. 499; 47 W. R. 544; 6 Manson, 259—Wright, J.

12. PROPERTY.

(a) PROPERTY PASSING TO TRUSTEE.

Goods—Sale of—Completed Whole—Appropriation of Parts—Bankruptcy of Manufacturer—Rights of Trustee in Bankruptcy and of Purchaser.—The respondents, shipowners, entered into a contract with a firm of shipbuilders for the construction of a ship at a given price. The ship was to be built under the superintendence of the respondents, and the contract contained the following clause: "The vessel as she is constructed, and all her engines, boilers and machinery, and all materials from time to time intended for her or them, whether in the ship-building yard, workshop, river or elsewhere, shall immediately as the same proceeds become the property of the purchasers, and shall not be within the ownership, control or disposition of the builders, but the builders shall at all times have a lien thereon for their unpaid purchase money." Before the vessel was com-

pleted the shipbuilders became bankrupt. Materials for the ship, marked with the ship's number and the place in the ship which they were intended to occupy, were lying at the railway station for delivery:—*Held*, that as the contract was for a complete ship, and these materials had not been incorporated into the vessel, the property in them did not vest in the shipowner, but in the trustee of the sequestrated estate of the builders. *Seath v. Moore* (55 L. J. P.C. 54; 11 App. Cas. 350) followed. *Reid v. Macbeth*, 73 L. J. P.C. 57; [1904] A.C. 223; 90 L. T. 422; 20 T. L. R. 316—H.L. (Sc.)

— **Trader's Business Carried on by Trustee for Creditors—Goods Seized in Execution—Trustee's Rights.**—A trader with the consent of his creditors assigned his trading estate to a trustee to carry on the business, to pay a certain dividend in the pound to the creditors out of the profits, and to stand possessed of any further profits for the trader himself. The assignee carried on the business in accordance with the trust, but became bankrupt, and a trustee in bankruptcy was appointed. A creditor who had given credit to the assignee whilst carrying on the business obtained judgment against him, and goods which belonged to the trader's estate were seized to satisfy the judgment. The trustee in the assignee's bankruptcy claimed the goods, and the sheriff interpleaded:—*Held*, that the trustee in the bankruptcy had an equitable lien or right of indemnity in respect of the goods which was sufficient to entitle him to them, as against the execution creditor. *Held*, also, that the onus of proving that the *prima facie* equitable lien or right of indemnity had ceased to exist by reason of some default on the part of the assignee lay on those who alleged that such right might have ceased to exist. *Jennings v. Mather*, 70 L. J. K.B. 1032; [1902] 1 K.B. 1; 85 L. T. 396; 50 W. R. 52; 8 Manson, 329—C.A.

Land—Land in Middlesex—"Conveyance"—Registration—Vendor and Purchaser.—An order of adjudication in bankruptcy coupled with an order that the debtor's estate be administered under section 121 of the Bankruptcy Act, 1883, whereby the official receiver becomes the trustee in the bankruptcy, does not amount to a "conveyance" to the official receiver within the meaning of the Middlesex Registry Act, and there is therefore nothing of which a memorial can be registered under the Act. The title of the official receiver to land in Middlesex belonging to the bankrupt will consequently not be postponed to that of a subsequent mortgagee from the bankrupt himself, whose mortgage has been duly registered. *Calcott and Elvin's Contract, In re*, 67 L. J. Ch. 553; [1898] 2 Ch. 460; 78 L. T. 826; 46 W. R. 673; 5 Manson, 208—C.A.

— **Building Agreement—Chattels Brought on Premises Deemed "annexed to freehold"—Freeholder—Mortgage of Building Agreement—Power to Re-enter if Mortgagor "become bankrupt."**—An agreement between a freeholder and a builder provided that all materials and plant brought on to the land should be deemed to be annexed to the freehold. The builder assigned the benefit of this agreement to a mortgagee to secure advances, and under this deed the mortgagee was entitled to take possession if the builder should "become bankrupt." On August 17, 1901, a

receiving order was made against the builder, and on the same day the mortgagee took possession. Up to that time there had been no default by the builder under the agreement or the mortgage. On August 30, 1901, the builder was adjudicated bankrupt:—*Held*, that the provision in the mortgage-deed must be construed strictly, and that the mortgagee had no right to take possession until the builder had been adjudicated bankrupt. The building materials upon the land at the date of the receiving order were therefore the property of the trustee in bankruptcy as goods in the order and disposition of the bankrupt, with the consent of the freeholder, the true owner. *Ginger, In re; London and Universal Bank, ex parte* (66 L. J. Q.B. 777; [1897] 2 Q.B. 461), followed. *Weibking, In re; Ward, ex parte*, 71 L. J. K.B. 389; [1902] 1 K.B. 713; 86 L. T. 455; 50 W. R. 460; 9 Manson, 131—Wright, J. *And see WORK AND LABOUR.*

Trading under Assumed Name—Mortgage of Freehold Property—Second Bankruptcy—Rights of Trustees and Mortgagees—Vesting Order.]

—An undischarged bankrupt started business under an assumed name, acquired freehold property, and mortgaged it in that name. A second receiving order was made, the assets being the equity of redemption of the property and personal property, which realised 113*l.* Subsequently the identity of the bankrupt was discovered. On motion it was ordered that the mortgaged property should vest in the mortgagees upon the Registrar being satisfied that all the debts in the first bankruptcy, with all costs and expenses, had been paid in full; the 113*l.* to be applied towards payment of the debts. *Adie, In re; Rushforth, ex parte*, 84 L. T. 508—Wright, J.

Chose in Action—Equitable Deposit—Notice—Priority.]—A husband deposited a policy of life assurance with his wife for valuable consideration. The wife gave no notice of the deposit to the insurance society. The husband subsequently became bankrupt, and the official receiver gave notice of the receiving order to the insurance society and claimed the surrender value of the policy:—*Held*, that the trustee obtained no right to the policy by his priority of notice. *Wallis, In re; Jenks, ex parte*, 71 L. J. K.B. 465; [1902] 1 K.B. 719; 86 L. T. 237; 50 W. R. 430; 9 Manson, 136—Wright, J.

—Mortgage—Life Policies—Payment of Premiums by Third Party—Bankruptcy of Mortgagor—Policy Moneys—Duty of Trustee as Officer of Court—Repayment of Premiums by Trustee.]—The decisions of the COURT OF APPEAL in *James, Ex parte; Condon, in re* (43 L. J. Bk. 107; L. R. 9 Ch. 609), and *Rivett-Carnac, In re; Simmonds, ex parte* (55 L. J. Q.B. 74; 16 Q.B. D. 308), lay down a broad and general principle—namely, that in the administration of a bankrupt's estate the trustee, as an officer of the Court, will be ordered to do what the Court considers to be morally right and honest, even in a case in which no claim can be sustained against him at law or in equity. Where, therefore, to the knowledge of the trustee the wife of the bankrupt continued, out of her own moneys, to pay the premiums on certain policies upon the bankrupt's life, the Court on the bankrupt's death ordered the trustee to

repay out of the policy moneys the amount so paid by the wife independently of the question whether she was or was not entitled to any equitable lien. *Tyler, In re; Official Receiver, ex parte*, 76 L. J. K.B. 541; [1907] 1 K.B. 865; 97 L. T. 30; 14 Manson, 73; 23 T. L. R. 328—C.A.

Money Paid into Court under Order XIV. for Leave to Defend Action—Bankruptcy of Defendant before Trial.]—Money paid into Court under the Rules of the Supreme Court, 1883, Order XIV., for leave to defend, must be treated as money paid in to abide the event, and is a security to the plaintiff for the sum for which he may obtain judgment at the trial; and if the defendant becomes bankrupt before the trial, the money must remain in Court until "the event" is decided by the trial of the action, if that is to be tried, or by adjudication upon a proof by the plaintiff in the bankruptcy. *Ford, In re; MacLister, ex parte*, 69 L. J. Q.B. 690; [1900] 2 Q.B. 211; 82 L. T. 625; 48 W. R. 688; 7 Manson, 281—Wright, J.

Payment by Third Person on Behalf of Bankrupt—Notice of Act of Bankruptcy—Benefit to Estate—Ignorance of Law—Right of Trustee.]

—The doctrine in *James, Ex parte; Condon, in re* (43 L. J. Bk. 107; L. R. 9 Ch. 609), approved by this Court in *Tyler, In re; Official Receiver, ex parte* (76 L. J. K.B. 541), does not apply to a case where, without any act of commission or omission on the part of the trustee, a person pays money on behalf of the bankrupt, after notice of facts constituting an available act of bankruptcy, though in ignorance of the effect of the bankruptcy law. Where, therefore, after such notice, certain mortgagees, in ignorance of the effect of the bankruptcy law, paid out of their own moneys a composition of 4*s.* in the pound to the majority of the bankrupt's creditors, in discharge of their debts, and, bankruptcy supervening, realised their security, which left a surplus in their hands slightly less than the amount which they had paid in respect of the composition, the Court refused to allow the mortgagees to retain such surplus, and ordered them to pay it to the trustee as part of the bankrupt's estate. *Hall, In re; Official Receiver, ex parte*, 76 L. J. K.B. 546; [1907] 1 K.B. 875; 97 L. T. 33; 14 Manson, 82; 23 T. L. R. 327—C.A.

Trust—Money Paid to Banker for Remittance to a Third Person—Right to Follow.]—The bankrupts were bankers carrying on business in London and India. Two sums of money were paid to them in London to be remitted through their Bombay branch to a third person about to proceed to India. Neither the person who paid the money nor the person to whom it was to be remitted were customers of the bankrupts. The receiving order was made before the arrival at Bombay of the person to whom the money was to be remitted:—*Held*—first, that no trust was constituted, and that the person who paid the money had no right to be paid in full in priority to the other creditors; and secondly, that the ordinary relationship of debtor and creditor was established between the bankrupt and the person to whom the money was to have been remitted. *Watson & Co., In re; Lloyd, ex parte*, 91 L. T. 665—Bigham, J.

Power of Appointment—Appointment of Fund by Bankrupt's Will—Debts Incurred Subsequently to Receiving Order.]—Under a settlement the testator had a general power of appointment by will. In 1892 he made his will, whereby he appointed the fund to the plaintiff and appointed him executor. In 1900 a receiving order was made against the testator, and on October 1, 1900, he was adjudicated bankrupt. In 1904 he died without having obtained his discharge, and also indebted to various persons for debts incurred since the date of the receiving order:—*Held*, that the appointed fund was not part of the bankrupt's property divisible amongst the creditors in bankruptcy; that the trustee in bankruptcy was not entitled to receive the fund; and that the fund should be paid to the plaintiff as executor for the benefit of the subsequent creditors. *Guedalla, In re; Lee v. Guedalla's Trustee*, 75 L. J. Ch. 52; [1905] 2 Ch. 331; 94 L. T. 94; 54 W. R. 77; 12 Manson, 392—Warrington, J.

Limited Power—Right of Trustee to Release—"Power in Respect of Property."]—The right of the donee of a power of appointment to release that power, whether inherent or given him by section 52, sub-section 1 of the Conveyancing Act, 1881, is not a "power in or over or in respect of property" within the meaning of section 44 of the Bankruptcy Act, 1883, and cannot accordingly be exercised by virtue of that section by his trustee in bankruptcy. *Rose, In re; Hasluck v. Rose*, 73 L. J. Ch. 726; [1904] 2 Ch. 348; 91 L. T. 254—Farwell, J. Order discharged by consent, 74 L. J. Ch. 22; [1905] 1 Ch. 94; 91 L. T. 821; 11 Manson, 347—C.A.

Property of Prisoner pending Extradition—Retention of Property by Police.]—When a fugitive offender, arrested in England on an extradition warrant for offences committed in a foreign State, becomes bankrupt in England pending the hearing of the charge, the property found on him at the date of his arrest vests in his trustee in bankruptcy, subject to this—that it may on his committal be ordered to be delivered up with him to be used as evidence of the crime at the trial; and in such a case the Secretary of State, in making the extradition order, should stipulate that, when the criminal proceedings in the foreign State are concluded, the property shall be restored to the jurisdiction of the English Bankruptcy Court. *Borovsky, In re; Salaman, ex parte*, 71 L. J. K.B. 992; [1902] 2 K.B. 312; 87 L. T. 184; 51 W. R. 48; 9 Manson, 346—Wright, J.

In such a case the competent authority in the first instance to decide what property found on the prisoner will serve as proof of the crime is the Court which hears the charge and makes the committal order. *Ib.*

Pension—Arrears of Alimony—Arrangement between Wife and Trustee in Bankruptcy.]—Where a husband—a retired Government official, who had failed to comply with an order for payment of alimony—had become bankrupt, the Court under section 53 of the Bankruptcy Act, 1883, on the application of the trustee in bankruptcy, directed payment of 100*l.* a year to the trustee out of the debtor's pension (347*l.*) to be applied—under an agreement between the trustee and the wife—as to 50*l.* a year for the benefit of the wife, and as

to 50*l.* for the general creditors in the bankruptcy—the wife undertaking by the agreement not to enforce the order for alimony. *Young, In re; Haydon, ex parte*, 5 Manson, 85—C.A.

Defaulting Broker on Stock Exchange—Official Assignee—Liabilities Outside the Stock Exchange—Title of Trustee.]—W., a broker on the London Stock Exchange, was declared a defaulter on the Exchange, and in accordance with the rules of the Exchange the official assignee of the Exchange closed all W.'s transactions on that day (which happened to be "ticket" day), and received and paid the debts due to and from W. and distributed them in the Stock Exchange liquidation. W. had liabilities outside the Stock Exchange. The official assignee when he collected the moneys knew of the act of bankruptcy. The official assignee had received among other sums 1,262*l.* 15*s.* 2*d.* due to W. from jobbers on the Exchange, and 117*l.* 15*s.* 2*d.* from W.'s outside clients. The official assignee refused to hand these amounts over to the trustee in W.'s bankruptcy, but was willing to hand over 650*l.*, the amount of the surplus remaining in his hands:—*Held*, that the trustee was not entitled to so much of the 1,262*l.* 15*s.* 2*d.* as represented the artificial "making-up" price on the "ticket" day, but that he was entitled to the balance together with the sum of 117*l.* 15*s.* 2*d.* *Woodd, In re; King, ex parte*, 82 L. T. 504—Wright, J.

Causes of Action—Contract of Employment made before Bankruptcy—Dismissal after Commencement of Bankruptcy—Right of Undischarged Bankrupt to Sue—Non-intervention of Trustee.]—An undischarged bankrupt, employed under a contract of service—for example, as a traveller—made before the bankruptcy, is entitled, if the trustee in the bankruptcy has not intervened, to maintain an action against his employers for a wrongful dismissal occurring after the commencement of the bankruptcy. *Bailey v. Thurston*, 72 L. J. K.B. 36; [1903] 1 K.B. 137; 88 L. T. 43; 51 W. R. 162; 10 Manson, 1—C.A.

Lease—Assignment—Covenant to Indemnify Lessee—Bankruptcy of Assignee—Assignment of Chose in Action by Trustee in Bankruptcy.]—The right to sue on a covenant for indemnity in an assignment of leaseholds is an asset which the trustee in bankruptcy of the assignor can assign. *Perkins, In re; Poyser v. Beyfus*, 67 L. J. Ch. 454; [1898] 2 Ch. 182; 78 L. T. 666; 46 W. R. 595; 5 Manson, 193—C.A.

Where a lessee has assigned the lease and taken a covenant of indemnity from the assignee, and the assignee has similarly assigned it to a third party, the trustee in bankruptcy of the assignee has power to compromise the lessee's claim against the bankrupt's estate on the covenant, upon the terms that the lessee shall have all the trustee's rights against the third party, but shall withdraw his proof against the bankrupt's estate and release that estate from all his claims under the bankrupt's covenant; and the release will be held not to exonerate the third party. *Ib.*

Action for Trespass—Personal Annoyance—Bankruptcy of Plaintiff—Divisibility.]—Where

an action is brought by a plaintiff (who afterwards becomes bankrupt) claiming damages for trespass to premises and goods in which the only substantial damage claimed is for the personal annoyance caused to the plaintiff, such cause of action does not vest in the trustee in bankruptcy, and the action can be continued by the plaintiff notwithstanding the bankruptcy. *Rose v. Buckett*, 70 L. J. K.B. 736; [1901] 2 K.B. 449; 84 L. T. 670; 50 W. R. 8; 8 Manson, 259—C.A.

Examination of Witnesses as to.—See *Weinberg, In re*; *Official Receiver, ex parte*, 14 Manson, 277; 96 L. T. 790—Bigham, J., col. 112.

(b) AFTER-ACQUIRED PROPERTY.

Death of Bankrupt Undischarged.—Distribution of After-acquired Property among Next-of-kin—No Notice of Bankruptcy—No Intervention by Trustee—Right of Trustee to Recover Property.—The principles laid down in *Herbert v. Sayer* (13 L. J. Q.B. 209; 5 Q.B. 965) and *Cohen v. Mitchell* (59 L. J. Q.B. 409; 25 Q.B. D. 262) with regard to the validity against the trustee of transactions by a bankrupt with persons dealing with him in respect of property acquired by him since his bankruptcy until the trustee intervenes, apply only to transactions for value. *Bennett, In re*; *Official Receiver, ex parte*, 76 L. J. K.B. 134; [1907] 1 K.B. 149; 95 L. T. 887; 14 Manson, 6; 23 T. L. R. 99—Bigham, J.

The bankrupt is an agent of the trustee to deal with after-acquired property, not to give it away. He cannot defeat the operation of section 44 of the Bankruptcy Act, 1883, by giving away after-acquired property; nor can his next-of-kin retain against the trustee shares in such property, even though received by them in good faith without notice of the bankruptcy on their part or that of the administrator. *Ball, In re* ([1899] 2 Ir. R. 313), distinguished. *Ib.*

Equitable Chose in Action—Assignment by Bankrupt—Bona Fides—Rights of Trustee.—When a bankrupt who has not obtained his discharge enters into transactions in respect of property consisting of an equitable chose in action accrued to him after his bankruptcy, such transactions are, until the trustee in bankruptcy intervenes, valid as against the trustee if made bona fide by the person dealing with the bankrupt, and they may be held to be bona fide although the person dealing with the bankrupt knew of the bankruptcy and knew that the trustee in bankruptcy was not aware of the accrual of the property. On this point the Australian bankruptcy law is the same as the English. *Cohen v. Mitchell* (59 L. J. Q.B. 409; 25 Q.B. D. 262) followed. *Hunt v. Fripp*, 67 L. J. Ch. 377; [1898] 1 Ch. 675; 77 L. T. 516; 46 W. R. 125; 5 Manson, 105—Byrne, J.

Assignment of Chose in Action—Title of Trustee—Priority—Notice.—By virtue of section 50, sub-section 5 of the Bankruptcy Act, 1883, the trustee in the bankruptcy becomes the general assignee of the bankrupt's choses in action, other than "personal earnings," as and whenever they arise, subject only to rights acquired by a bona fide assignee for value, whether with or without

notice of the bankruptcy before the trustee intervenes. If that particular assignee has not perfected his title by notice to the holder of the fund—where such notice is required—or by a stop order, the trustee as general assignee can by intervening and claiming the fund from the bankrupt and giving notice to the holder of the fund, or by stop order if the fund is in Court, perfect his title first, to the exclusion of the particular assignee. *Mercer v. Vans Colina*, 67 L. J. Q.B. 424; 78 L. T. 21; 4 Manson, 363—Wright, J.

Where, therefore, an undischarged bankrupt had assigned his share of his interest in a commission on the sale of a public-house, earned by him since the date of the bankruptcy, and his trustee had given notice of his claim before the assignee,—*Held*, that the trustee had thereby acquired priority over the assignee. *Ib.*

"Personal earnings."—The commission so earned by the bankrupt was not "personal earnings" as distinguished from income earned by him in his trade or profession, notwithstanding that the bankrupt at the time had no office or clerk, but merely passed his time in endeavouring to negotiate such sales. *Ib.*

Title of Trustee in Bankruptcy to After-acquired Real Property of Bankrupt—Bona fide Purchaser for Value.—The principle laid down in *Cohen v. Mitchell* (59 L. J. Q.B. 409; 25 Q.B. D. 262)—that is, that until the trustee in bankruptcy intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him bona fide and for value in respect of his after-acquired property, and whether with or without knowledge of the bankruptcy, are valid as against the trustee—does not apply to real estate. *London and County Contracts, Lim. v. Tallack*, 51 W. R. 408—Kekewich, J.

Assignment of Costs—Chose in Action—Trustee—Priority—Notice.—Where an undischarged bankrupt who is a solicitor assigns for value the amount of his taxed costs due to him, his trustee, by giving notice of his claim to the person by whom such costs are payable before the assignee, acquires priority over such assignee. *Mercer v. Vans Colina* (67 L. J. Q.B. 424) followed. *Beall, In re*; *Official Receiver, ex parte*, 68 L. J. Q.B. 462; [1899] 1 Q.B. 688; 80 L. T. 267; 6 Manson, 163—Wright, J.

After-acquired Equitable Real Estate—Equitable Mortgage—Intervention by Trustee in Bankruptcy.—An undischarged bankrupt cannot, even before the intervention of his trustee in bankruptcy, deal with real estate acquired after his bankruptcy, so as to give the person with whom he deals, even though a bona fide purchaser for value without knowledge of the bankruptcy, a good title as against the trustee. *Preston's Trustee v. Cooke*, 75 L. J. Ch. 757; [1906] 9 Ch. 661; 13 Manson, 337—Neville, J.

In this respect it makes no difference whether the interest of the bankrupt in the after-acquired real estate be equitable or legal. Decision of CHITTY, J., in the case of legal real estate in *New Land Development Association and Gray's Contract, In re* (61 L. J. Ch. 323; *sub nom. New Land Development*

Association and Gray, In re, [1892] 2 Ch. 138), followed in the case of equitable real estate. *Ib.*

Money Deposited with Stakeholder to Abide Result of Billiard Match.—A bankrupt and one D. entered into an agreement to play a billiard match for 100*l.* a side, and deposited 100*l.* each with stakeholders to abide the result of the match. The bankrupt won the match, and the 200*l.* was claimed both by him and by his trustee in bankruptcy. D. made no claim to the stakes or any part thereof:—*Held*, that the trustee was entitled to the 100*l.* deposited by the bankrupt. *Held, also*, that under the circumstances D., or the stakeholders with his assent, must be taken to have paid his deposit to the bankrupt or his assigns, and that the trustee was entitled to this deposit also. *Shoolbred v. Roberts*, 69 L. J. Q.B. 800; [1900] 2 Q.B. 497; 83 L. T. 37; 7 Manson, 388—C.A.

Undischarged Bankrupt Carrying on Business—Knowledge of the Trustee—Second Adjudication—Profits of Business—Right of Trustee in Second Bankruptcy.—Where an undischarged bankrupt carries on business with the knowledge of the trustee for the time being, and subsequently while still undischarged is again adjudicated a bankrupt, the present trustee in the first bankruptcy (though not aware of the trading) is not entitled to the proceeds of the business carried on with the knowledge of his predecessor, against the trustee in the second bankruptcy. *Troughton v. Gitley* (Amb. 629) and *Tucker v. Hernaman* (4 De G. M. & G. 395) followed. *Burr, In re; Pannell, ex parte*, 84 L. T. 327—Wright, J.

The fund in dispute having been acquired under circumstances which themselves necessitated investigation, the costs of both trustees ordered to be paid thereout. *Ib.*

Legacy—No Intervention of Trustee.—An undischarged bankrupt can give a valid receipt for a legacy to which he becomes entitled after his adjudication and before the trustee in bankruptcy has intervened, where the executor paying such legacy does so *bona fide* and without knowledge of the bankruptcy. The trustee cannot therefore compel the executor to pay over again the amount of such legacy to him. *Ball, In re*, [1899] 2 Ir. R. 313—C.A.

Property Acquired by Bankrupt before Discharge—Personal Earnings—Right of Trustee to—Maintenance of Bankrupt and His Family.—Whatever property a bankrupt acquires before his discharge belongs to his trustee, except only what is necessary for the support of himself and his wife and family. He may sue for and recover his earnings if his trustee does not interfere, but what he recovers he recovers, except to the extent mentioned, for the benefit of his creditors. *Chippendall v. Tomlinson* (4 Dougl. 318; 1 Cooke's Bk. Laws (8th ed.), p. 428) explained and distinguished. *Roberts, In re; Roberts, ex parte*, 69 L. J. Q.B. 19; [1900] 1 Q.B. 122; 81 L. T. 467; 48 W. R. 132; 7 Manson, 5—C.A.

Bonus Paid under Agreement.—Whether a bonus paid to a professional billiard player under an agreement in consideration of his

playing with balls made by a certain firm—but which agreement does not impose any obligation on him to play, or otherwise exert himself—can be considered as personal earnings in the event of the bankruptcy of the billiard player, *quære. Ib.*

(c) RELATION BACK OF TRUSTEE'S TITLE.

Money Advanced by Bankrupt's Solicitors to Obtain Dismissal of Petition against Client—Charge on Bankrupt's Property to Secure Advance.—Where after a petition in bankruptcy had been presented the debtor's solicitors offered the petitioning creditor's solicitor 300*l.* on condition that the petition was dismissed, they stating that the debtor had no money and that they should have to find the money and the creditor's solicitor had accepted the 300*l.* believing that it was not the debtor's money, and the petition was consequently dismissed, but the debtor was subsequently adjudicated bankrupt on a later petition, when it appeared that the bankrupt's solicitors had themselves advanced the 300*l.* to the creditor's solicitor and had taken a charge on the bankrupt's property contemporaneously with the advance of the 300*l.* to secure the same, it was held that as the 300*l.* had been advanced for the express purpose of obtaining the dismissal of the petition, and had never come into the hands of the bankrupt, it did not form part of his general assets, and could not be recovered by his trustee from the creditor. *Rogers, In re; Holland and Hannen, ex parte* (8 Morrell, 243), followed. *Drucker, In re; Basden, ex parte* (No. 1), 71 L. J. K.B. 686; [1902] 2 K.B. 237; 86 L. T. 785; 9 Manson, 237—C.A. Affirming 50 W. R. 543—Wright, J.

Assignment for Benefit of Creditors—Act of Bankruptcy—Payment of Debt to Assignee—Bankruptcy Petition—Right of Trustee to Payment of Debt—Receipt of Balance from Assignee—Election—Following Debt into Hands of Trustee.—Where a debtor pays to an assignee under a deed of assignment for the benefit of creditors generally a debt thereby assigned, and subsequently a petition in bankruptcy is presented and a receiving order made upon the act of bankruptcy committed in the execution of the deed, the trustee in bankruptcy may claim repayment from the debtor of the debt so paid to the assignee, unless the debtor can show that the money paid by him, or some part thereof, has come into the hands of the trustee in bankruptcy. *Davis v. Petrie*, 75 L. J. K.B. 992; [1906] 2 K.B. 786; 95 L. T. 239; 22 T. L. R. 771—C.A.

Payment by Bankrupt Before Receiving Order, but After Act of Bankruptcy—Payment of Lost Bets—Right of Trustee to Recover from Payee.—B. made bets upon a racecourse with the defendant, a bookmaker, and lost 500*l.*, which he then paid. B. had previously committed an act of bankruptcy, upon which a receiving order was subsequently made against him. The defendant received payment of the 500*l.* *bona fide* and without notice of the act of bankruptcy:—*Held*, that the payment of the 500*l.* was not protected by section 49 of the Bankruptcy Act, 1883, and that the plaintiff, as trustee in bankruptcy, was entitled to recover the 500*l.* from

the defendant. *Ward v. Fry*, 85 L. T. 394; 50 W. R. 72—C.A.

Mortgage by Debtor—Act of Bankruptcy—Knowledge of Mortgagee—Redemption of Security—Relation Back of Title of Trustee in Bankruptcy—Liability of Mortgagee.—A secured creditor who has notice of an act of bankruptcy by his debtor within three months is not entitled before the expiration of that period to receive payment of the debt from his debtor, and consequently the debtor cannot make a good tender to the creditor and require him to give up his securities to the debtor on payment of the amount due. *Lawford and Lawrence, In re; Nichols, ex parte* (71 L. J. K.B. 786; [1902] 2 K.B. 445), overruled. *Ponsford, Baker & Co. v. Union of London and Smiths Bank*, 75 L. J. Ch. 724; [1906] 2 Ch. 444; 95 L. T. 333; 13 Manson, 321; 22 T. L. R. 812—C.A.

Stockbrokers were in April, 1906, declared defaulters on the Stock Exchange, and an official assignee was appointed according to the rules of the Stock Exchange. They had deposited with the defendants certain securities to secure a loan. The official assignee tendered the amount due in respect of the loan and called on the defendants to hand over the securities. They refused on the ground that, having notice of an act of bankruptcy by the stockbrokers—namely, the assignment to the official assignee—within three months, they would not be safe in handing over the securities till the expiration of three months, for if bankruptcy proceedings were taken within that period the title of the trustee in bankruptcy would relate back. The stockbrokers and official assignee then sued for delivery up of the securities on payment of the amount due:—*Held*, that the plaintiffs could not require the defendants to give up the securities. *Ib.*

Per CURIAM.—If the official assignee were prepared to pay the money due on the securities and to undertake to hold them until bankruptcy proceedings were taken or the period of three months had expired, an order should be made empowering him so to do. If he were not, no immediate judgment should be given in the action, but it should be directed to stand over until it could be seen who was the person entitled to redeem. *Ib.*

Pledge by Debtor—Loan to Debtor—Notice of Act of Bankruptcy—Payment of Loan—Delivery of Goods Pledged.—On September 14 and 27, 1900, respectively, L. pledged chattels to W. and received loans against them. On October 6 he committed an act of bankruptcy. On October 26 W., with notice of the act of bankruptcy, being repaid the loan of September 14, re-delivered the chattels pledged against it. On January 9, 1901, a receiving order was made on the act of bankruptcy, and L. was subsequently adjudicated bankrupt. On January 11 W., being repaid the loan of September 27, re-delivered the rest of the chattels:—*Held*, that, though the title of the trustee in L.'s bankruptcy related back to October 6, he took subject to the pledge, and could not recover from W. the value of the chattels less the amount of the loans. *Lawford and Lawrence, In re; Nichols, ex parte*, 71 L. J. K.B. 786;

[1902] 2 K.B. 445; 86 L. T. 693; 50 W. R. 592; 9 Manson, 254—Wright, J.

Verbal Contract with Solicitor to Act in the Bankruptcy—Payment of Lump Sum—Repayment.—A solicitor received from a client a lump sum under a verbal contract to act for him in his bankruptcy proceedings:—*Held*, that the amount so paid must be repaid to the trustee, less costs incurred to the date of the receiving order. *Mander, In re; Official Receiver, ex parte*, 86 L. T. 234—Wright, J.

(d) DISCOVERY OF DEBTOR'S PROPERTY.

Delivery—Order against Agent.—The Court has no jurisdiction under section 27 (5) of the Bankruptcy Act, 1883, to make an order for the delivery of the goods of the bankrupt in the possession of a person as agent for another. *Quere*, whether such order could be made if the principal were made a respondent to the application. *Davis, In re; Goodman, ex parte*, 5 Manson, 329—D.

Enforcing Attendance of Witness for Private Examination.—Personal service of a summons for the examination of a witness under section 27 of the Bankruptcy Act, 1883, is not necessary; it may be sent by registered post. The "reasonable sum" which is to be tendered to the witness is conduct money, and is to be measured by the distance the witness has to travel, and it must be sent with the summons in cash or postal orders. The form of warrant to be altered so as to enable an officer who arrests a witness in order to bring him up for examination to detain him in prison for such a reasonable period as may be necessary to ensure his attendance at the examination. *Weinberg, In re; Official Receiver, ex parte*, 96 L. T. 790; 14 Manson, 277—Bigham, J.

Examination of Witness Abroad—"Any other place out of England"—Jurisdiction.—The words "any other place out of England" in section 27, sub-section 6 of the Bankruptcy Act, 1883, providing that "the Court may, if it think fit, order that any person who if in England would be liable to be brought before it under this section shall be examined in Scotland or Ireland, or in any other place out of England," must be construed as limited to a place within the British dominions. The sub-section gives the Court no power to order a person to be examined in Switzerland, for example, even though such person is a naturalised British subject. *Drucker, In re; Basden, ex parte* (No. 2), 71 L. J. K.B. 688; [1902] 2 K.B. 210; 86 L. T. 692; 50 W. R. 592; 9 Manson, 241—Wright, J.

Form of Order.—An order for examination under the section cannot be made in an optional form—for example, that the person should be examined "if he think fit to submit." *Ib.*

Examination of Bankrupt.—Either party is entitled to elicit from a bankrupt any previous account he has given of a matter, without regard to who calls him. *Cunningham, In re; Official Receiver, ex parte*, 80 L. T. 503; 6 Manson, 199—Wright, J.

(e) SURPLUS ASSETS.

Charge—Contract to Purchase Real Estate—Assignment—Mortgagee's Lien—Second Bankruptcy—Rights of Second Trustee.—Although a bankrupt cannot interfere with the administration of his estate by his trustee, he nevertheless has a right during the pendency of the bankruptcy to the surplus assets, and can dispose of them by deed or will, even before they are ascertained, and charges validly created by the bankrupt upon such surplus assets will be good as against his trustee in a subsequent bankruptcy which occurs before he has obtained his discharge under his first bankruptcy. *Bird v. Philpott*, 69 L. J. Ch. 487; [1900] 1 Ch. 822; 82 L. T. 110; 7 Manson, 251—Farwell J.

Where a man takes up and retains an undischarged bankrupt's contract to purchase real estate, and subsequently pays both the deposit and the balance of the purchase-money, receiving and retaining on completion the conveyance to the bankrupt of the land, he will be entitled as against the bankrupt's trustee to a charge upon the land to the extent of the money so paid. *Meux v. Smith* (10 L. J. Ch. 225; 11 Sim. 410) applied. *Id.*

13. REPUTED OWNERSHIP.

Bill of Sale—Registration—"Consent and permission of true owner."—Goods comprised in a bill of sale may be in the order and disposition of the grantor "by the consent and permission of the true owner," within the reputed ownership clause (section 44, sub-s. iii.) of the Bankruptcy Act, 1883, although the consent of the grantee—as the true owner—was involuntary by reason of his being prohibited from seizing the goods prior to the bankruptcy by section 7 of the Bills of Sale Act, 1882. *Ginger, In re; London and Universal Bank, ex parte*, 66 L. J. Q.B. 777; [1897] 2 Q.B. 461; 76 L. T. 808; 46 W. R. 144; 4 Manson, 149—D.

— "Consent and permission of true owner."—Where a person is in possession of certain chattels of which he has executed a bill of sale, and is subsequently adjudicated a bankrupt before making any default in payment of the sum thereby secured, such chattels are to be deemed to be in the order and disposition of the bankrupt with the consent of the true owner within the reputed ownership clause of the Bankruptcy Act. *Ginger, In re; London and Universal Bank, ex parte* (66 L. J. Q.B. 777; [1897] 2 Q.B. 461), followed. *Hayes, In re*, [1899] 2 Ir. R. 206—Boyd, J.

— **Grantor Licensed Victualler—Mortgages in Possession of Premises—Goods in Possession of Debtor in His Trade or Business.**—A debtor was lessee of three public-houses; the licence of one was in his name, that of the other two in the names of nominees of his. He granted a bill of sale over trade utensils and equipment in and upon the three public-houses. At the commencement of the bankruptcy the mortgagees of the houses had entered and had appointed managers, who were carrying on the business, but they allowed the debtor to reside at the house of which he held the licence. The goods in the bill of sale remained on the pre-

misses; there was no default under the bill of sale:—*Held*, that the goods at all three houses were at the commencement of the bankruptcy in the possession of the bankrupt in his trade or business within section 44 of the Bankruptcy Act, and that they passed to the trustee as part of the bankrupt's property divisible amongst his creditors. *Elliott, In re; Trustee, ex parte*, 84 L. T. 325—Wright, J.

"In his trade or business"—Reputed Ownership—Stands for Display of Goods used by Bankrupt with Consent of True Owner.—Section 44 (iii.) of the Bankruptcy Act, 1883, applies to goods the reputed property of a bankrupt, if they be in the possession, order, or disposition of the bankrupt in his trade or business by the consent and permission of the true owner; although they neither originally belonged to the bankrupt, nor could they have lawfully been pledged or sold by him, nor were they in his disposition in the sense that they were such things as he sold in his trade. Accordingly, stands or models for the display of mantles used by a mantle dealer in her business with the consent and knowledge of the true owner will upon an adjudication of bankruptcy pass to the trustee. *Sharman v. Mason*, 69 L. J. Q.B. 3; [1899] 2 Q.B. 679; 81 L. T. 485; 48 W. R. 142; 7 Manson, 19—D.

Articles Displayed by Bankrupts in Show-cases with Consent of True Owners—Principal and Agent.—Before goods of another person can be taken to pay the debts of a bankrupt, by reason of the reputed ownership of the bankrupt, it is essential that the true owner of the goods should have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must arise. *Watson & Co., In re; Atkin, ex parte*, 73 L. J. K.B. 854; [1904] 2 K.B. 753; 11 Manson, 256; 20 T. L. R. 727—C.A.

W. & Co., who had carried on business as bankers and agents, had been in the habit of introducing their customers to wholesale firms for the purchase of various articles, and amongst them to A. & Co. W. & Co. received from A. & Co. certain silver and electro-plated articles as samples, with a consignment note giving particulars of the articles and their prices, and the correspondence between the parties shewed that they were only received by W. & Co. as samples, and were to be put into their show-cases as such, and were to remain at the risk of A. & Co., and there was nothing to authorise W. & Co. to take upon themselves the order and disposition of the goods. W. & Co. also dealt in goods of the same kind on their own account, but the samples of A. & Co. were generally dealt with by them in a different way from the way in which they dealt with their own goods. The samples of A. & Co. were in the possession of W. & Co. at the date of their bankruptcy:—*Held*, that A. & Co. had not acquiesced in the bankrupts so dealing with the goods as to allow them to hold themselves out as the owners of the goods, or to induce customers to presume such ownership; and the articles were not in the order and disposition of the bankrupts under such circumstances that

they were the reputed owners thereof within the meaning of sub-section 2 (iii.) of section 44 of the Bankruptcy Act, 1883. *Sharman v. Mason* (69 L. J. Q.B. 3; [1899] 2 Q.B. 679) explained. *Id.*

Building Agreement—Lien of Building Owner on Builder's Plant and Materials on Premises—Forfeiture by Builder after Bankruptcy—Reputed Owner.]—A building contract between a firm of builders and a school board provided (by clause 10) that all plant and materials brought on to the ground by the builders for the purposes of the building should be considered to be the property of the board, and should not be removed by the builders or any other person without the licence of the architect, but that the board should not be answerable for any loss or damage which might happen to them; and (by clause 20) that if the builders should delay the performance of their contract, the board might give the builders notice to proceed with the work, and that, in the event of their not doing so within seven days, the plant and materials should be forfeited to the board. The builders having become bankrupt, the board subsequently to the commencement of the bankruptcy gave to the builders and to their trustee notice under clause 20 to proceed with the work, and, upon non-compliance with the notice, the board claimed that the plant and materials upon the premises were forfeited:—*Held*, that clause 10 of the contract did not vest the ownership of the goods in the board, and that they were therefore not in the order and disposition of the debtors by the consent of the "true owner" within the meaning of section 44 of the Bankruptcy Act, 1883, and did not pass to the trustee as being in their reputed ownership. Further, that the board's right to issue the notice under clause 20 was unaffected by the bankruptcy, and that the forfeiture determined the title of the trustee, although the goods were the property of the debtors at the commencement of the bankruptcy. *Wallworth, In re; Shuttlesworth v. Hernaman* (26 L. J. Bk. 61; 1 De G. & J. 322), distinguished. *Keen, In re; Collins, ex parte*, 71 L. J. K.B. 487; [1902] 1 K.B. 555; 86 L. T. 235; 50 W. R. 334; 9 Manson, 145—D.

True Owner—Dissolution of Partnership—Equitable Assignment of Debt—Bankruptcy of Continuing Partner.]—C. and S. traded in partnership, and in the course of business lent money to R. In 1894 the partnership was dissolved by deed, whereby the assets of the partnership were assigned to C., who agreed to pay over to S. one fifth part of any money which he might receive from R. in respect of R.'s debt to the firm. In 1898 C. became bankrupt. S. gave no notice to R. of his interest in the debt due from R. to the firm under his agreement with C. In 1900 the trustee in C.'s bankruptcy received from R. 150*l.* in settlement of R.'s debt. S. now claimed to recover one-fifth of this sum from the trustee:—*Held*, that the agreement between C. and S. amounted to a valid equitable assignment to S., but that S. was the "true owner" of the share assigned to him, which, however, was in the order or disposition of the bankrupt with his consent, within section 44 of the Bankruptcy Act, 1883, and that he therefore could not recover from

the trustee. *Crouch, In re; Smith, ex parte*, 83 L. T. 746—Wright, J.

Shares—Deposit by Owner with Bank—Notice of Act of Bankruptcy—Subsequent Adjudication—Order and Disposition.]—Where an owner of shares in certain companies deposited the scrip with a bank to secure an advance, without any memorandum in writing or duly executed transfer, and the bank, before adjudication, served notice of such assignment on the companies, with knowledge, however, of an act of bankruptcy committed by the owner:—*Held*, that where the certificates contained a proviso that they must be produced on registration of the transfer, such shares were not in the order and disposition of the bankrupt; but that where the certificates contained no such proviso the shares were in the order and disposition of the bankrupt, the notice of transfer not having been served upon the companies by the bank before becoming aware of the act of bankruptcy. *Butler, In re*, [1900] 2 Ir. R. 153—Boyd, J.

Agreement to Assign Bills when Completed—Assignment of Debt by Bankrupt—Notice of the Assignment—Order and Disposition.]—D. carried on business as a coal exporter. In January, 1900, he sold a cargo of coal to a company carrying on business at Athens. D. shipped the coal to the purchasers and forwarded them bills of exchange for the price, to be accepted by them and returned. D., being in want of funds to meet cheques falling due, on February 3 arranged with the N. E. Bank that they should pay these cheques on their being presented, and he agreed in writing that these payments should be against the bills to be accepted, and he thereby "undertook to hand to the N. E. Bank the above-mentioned bills immediately on receipt." On March 3, the bills not having arrived, D. gave to the N. E. Bank a letter addressed by him to the company in Athens, requesting them to "hand the bills on demand to the N. E. Bank." This letter the bank on March 3 forwarded to the company, enclosed in one from themselves, to the following effect: "We shall be glad if you will post direct to us the four bills in accordance with the enclosed instructions." D. committed an act of bankruptcy on March 3, before giving the letter to the bank, but the bank had no notice of an act of bankruptcy till March 6. A receiving order was subsequently made against D., and his trustee in bankruptcy moved for a declaration that he was entitled to the proceeds of the bills as being property in the order and disposition of the bankrupt within section 44 of the Bankruptcy Act, 1883:—*Held*, that, even if the document of February 3 only amounted to an assignment of the debt and not of the bills, yet the letters of March 3 constituted a sufficient notice of the assignment to prevent the operation of section 44. *Dixon, In re; Trustee, ex parte*, 83 L. T. 433—Wright, J.

Debts Due or Accruing Due to Bankrupt in Course of Business—Bill Drawn by Bankrupt on Debtor and Indorsed to Holder for Value—Bill not Accepted or Presented for Acceptance—No Notice of Assignment.]—The bankrupts prior to the commission of an act of bankruptcy deposited with their bankers as security for

advances bills of exchange drawn by them upon debtors, from whom debts were growing due to them in the course of their business. At the date of the act of bankruptcy the bills of exchange had not been accepted by or presented for acceptance to the debtors, nor had notice been given to them of the assignment by the bankrupts to the bankers of the debts due by them:—*Held*, that at the date of the act of bankruptcy the debts were due or growing due to the bankrupts in the course of their business, and were in the possession, order, and disposition of the bankrupts with the consent of the true owners, so as to vest in the trustee in bankruptcy under section 44 (iii.) of the Bankruptcy Act, 1883. *Goetz, Jonas & Co., In re; Trustee, ex parte*, 67 L. J. Q.B. 577; [1898] 1 Q.B. 787; 78 L. T. 399; 46 W. R. 469; 5 Manson, 76—C.A.

Custom of Trade.—In order that a custom in the bankrupt's trade that he should have in his possession goods belonging to other persons may exclude the provisions of the Bankruptcy Act as to reputed ownership, the custom must be known to traders generally, and not merely to persons engaged in the particular trade. *Ib.*

14. DISCLAIMER BY TRUSTEE.

Onerous Property—Time.—“First appointment of a trustee.”—Under sub-section 1 of section 55 of the Bankruptcy Act, 1883, as amended by section 13 of the Bankruptcy Act, 1890, the trustee of the bankrupt's estate may disclaim onerous property within twelve months “after the first appointment of a trustee.” This refers to an appointment of a trustee under section 21 of the Act of 1883, either by the creditors under sub-section 1 or by the Board of Trade under sub-section 6, and does not refer to the official receiver becoming trustee under sub-section 1 of section 54, on the debtor being adjudged bankrupt, until a trustee is appointed. The period of twelve months therefore runs from the date of the certificate of the first appointment of a trustee, and not from the date of the order of adjudication. *Cohen, In re; Trustee, ex parte*, 74 L. J. K.B. 864; [1905] 2 K.B. 704; 93 L. T. 659; 54 W. R. 83; 12 Manson, 358; 21 T. L. R. 725—C.A.

The official receiver, whilst acting as trustee under section 54, may exercise the power of disclaimer without being subject to the limitation of time provided in the case of a trustee; but he may be called upon under sub-section 4 of section 55, by a person interested in the property in question, to decide whether he will disclaim or not. *Ib.*

Leaseholds—Vendor and Purchaser—Specific Performance against Trustee.—A trustee in bankruptcy cannot disclaim a bankrupt vendor's contract for the sale of leaseholds without disclaiming the lease. Specific performance of such a contract will be ordered against the trustee notwithstanding an attempted disclaimer. *Holloway v. York* (25 W. R. 627) applies only to the case of a bankrupt purchaser. *Pearce v. Bastable's Trustee*, 70 L. J. Ch. 446; [1901] 2 Ch. 122; 84 L. T. 525; 8 Manson, 287—Cozens-Hardy, J.

—Guarantee of Rent—Rent Accruing after Disclaimer—Liability of Guarantor.—Where the trustee in bankruptcy of a lessee for a term of years disclaims the lease under section 55 of the Bankruptcy Act, 1883, and no underlease or assignment has been made, a guarantor of the payment of such “rent as may be from time to time in arrear” under the lease is not liable under the guarantee for rent accruing due after the date of the disclaimer. *Stacey v. Hill*, 70 L. J. K.B. 435; [1901] 1 K.B. 660; 84 L. T. 410; 49 W. R. 390; 8 Manson, 169—C.A.

—Bankrupt Assignee of Lease—Mortgage by Sub-demise—Original Lessee Solvent—Application by Lessor—Vesting Order—Exclusion.—Where the assignee of a lease becomes bankrupt and his trustee disclaims the lease, the original lessor can, under the Bankruptcy Act, 1883, s. 55, sub-s. 6, apply for an order excluding a sub-lessee of the bankrupt from all interest in the property unless he elects to take a vesting order, notwithstanding that the original lessee remains liable on the covenants in the lease, and has not been served with notice of the application. *Cock, In re; Shilson, ex parte* (57 L. J. Q.B. 169; 20 Q.B. D. 343); *Finley, In re; Clothworkers' Co., ex parte* (57 L. J. Q.B. 626; 21 Q.B. D. 475); and *Morgan, In re; Morgan, ex parte* (58 L. J. Q.B. 295; 22 Q.B. D. 592), followed and applied. *Baker, In re; Lupton, ex parte*, 70 L. J. K.B. 856; [1901] 2 K.B. 628; 85 L. T. 33; 49 W. R. 691; 8 Manson, 279—C.A.

Mortgage by Sub-demise—Disclaimer—Vesting Order.—On March 1, 1904, the Coopers' Co. granted to Carter & Ellis seven leases of seven houses for, in each case, ninety-nine years from September 29, 1903, at a low ground-rent. Any assignment of a lease was to be registered with the clerk of the lessor company, but, apart from that, there was no restriction on the right of the lessees to assign. On March 1, 1904, the lessees mortgaged the property comprised in the several leases to Savill Brothers, by way of sub-demise, to secure £864l. 11s. 1d. and interest. On March 24, 1904, a petition in bankruptcy against Carter & Ellis was filed, and on April 19 they were adjudicated bankrupts. The trustee in the bankruptcy disclaimed all interest in the leases. The mortgagees declined to accept an order vesting the property in them, and making them subject to the same liabilities as the bankrupts were subject to under the leases at the time of the filing of the petition. The houses were new houses, and the rents had been paid, and the covenants of the leases duly performed:—*Held*, that this was a case in which the discretionary power given to the Court by section 13 of the Bankruptcy Act, 1890, ought to be exercised, and an order made vesting the property in the mortgagees, and making them subject only to the same liabilities and obligations as if the lease had been assigned to them at the date when the bankruptcy petition was filed. *Carter & Ellis, In re*, 74 L. J. K.B. 442; [1905] 1 K.B. 735; 92 L. T. 523; 53 W. R. 433; 12 Manson, 118; 21 T. L. R. 334—C.A.

The official receiver, whilst acting as trustee under section 54, may exercise the power of disclaimer without being subject to the limitation of time provided in the case of a trustee; but he may be called upon under sub-section 4 of

section 55, by a person interested in the property in question, to decide whether he will disclaim or not. *Ib.*

Vesting Order—Judicial Discretion.]—A Court of bankruptcy is entitled to exercise a judicial discretion, and does not merely act ministerially, in dealing with applications for vesting orders under the provisions of section 55, sub-section 6 of the Bankruptcy Act, 1883. *Lea v. Thursby*, 73 L. J. Ch. 518; [1904] 2 Ch. 57; 90 L. T. 667; 11 Manson, 151; 20 T. L. R. 470—Swinfen Eady, J.

Disclaimer of Lease—Mortgage by Sub-demise—Merger—County Court—Jurisdiction.]—The lessee of certain freeholds mortgaged his term to the plaintiff by way of sub-demise to secure certain advances. He subsequently acquired the fee-simple of the premises, and ultimately sold it to the defendant. Afterwards the lessee became bankrupt, and his trustee duly disclaimed the lease under the provisions of section 55 of the Bankruptcy Act, 1883. The defendant thereupon moved the County Court in the bankruptcy, under the provisions of sub-section 6 of section 55, for an order that the mortgagee should take a vesting order of the lease; or that, on the failure of the mortgagee to take such vesting order, the mortgagee should be excluded from all security upon the lease, and that the lease should thereupon be vested in the defendant freed from all incumbrances. The mortgagee declined to accept a vesting order, on the ground that the lease had merged in the fee-simple on the conveyance of the fee-simple to the lessee, and that it was not, accordingly, any longer subsisting, and could not therefore be the subject of a vesting order. The Registrar decided on the particular facts of the case that the lease was still subsisting, and he made an order excluding the mortgagee from all interest in the said lease, and vesting it in the defendant freed from all incumbrances. The mortgagee had not appealed from this order. The mortgagee claimed in the present action that he was entitled to the incumbrance upon the lease created by his mortgage by way of sub-demise:—*Held*, that the County Court possessed jurisdiction, under section 102, sub-section 1 of the Bankruptcy Act, 1883, to adjudicate upon the question of merger; that, the County Court having already so adjudicated, the question was now *res judicata*, and could not be re-opened; and that the mortgagee had accordingly lost his security. *Held*, also, on the particular facts of the case, that there had been no merger. *Ib.*

Assignment of Lease for Benefit of Creditors—Act of Bankruptcy by Lessee—Rent Accruing Due before Adjudication—Disclaimer of Lease by Trustee in Bankruptcy—Liability of Assignee for Rent.]—The lessee of certain houses of which the plaintiffs were lessors assigned the leases thereof, together with other property, to the defendant in trust for the benefit of her creditors, by a deed, which was an act of bankruptcy on her part. After the assignment a quarter's rent accrued due under the leases and the lessors obtained judgment against the defendant for this rent. Before the bankruptcy of the lessee a second quarter's rent accrued due, in respect of which the lessors issued a writ against the defendant. Before the action

came on for trial the lessee was adjudicated bankrupt, and the trustee in bankruptcy disclaimed the leases:—*Held*, that the defendant was liable for the rent, inasmuch as the bankruptcy which followed on the act of bankruptcy had not the effect of releasing the liability for the rent as between the lessors and the defendant existing at the time when the writ was issued. *Stein v. Pope*, 71 L. J. K.B. 322; [1902] 1 K.B. 595; 86 L. T. 283; 50 W. R. 374; 9 Manson, 125—C.A.

Contract for Sale of Leasehold Property before Bankruptcy—Disclaimer of Contract by Trustee—Vendor and Purchaser.]—The trustee in bankruptcy of a vendor of leasehold property has no power under section 55 of the Bankruptcy Act, 1883, to disclaim the contract for sale and retain the leasehold property as part of the bankrupt's estate. *Bastable, In re; Trustee, ex parte*, 70 L. J. K.B. 784; [1901] 2 K.B. 518; 84 L. T. 825; 49 W. R. 561; 8 Manson, 239—C.A.

Disclaimer of Lease by Assignees of Bankrupt—Apportionment of Rent.]—Upon the disclaimer by the assignees of a bankrupt of his interest in a lease, the lessor is entitled to prove in the bankruptcy for an apportioned part of the rent which has accrued due between the last quarter day and the date of adjudication. *Leeks, In re*, [1902] 2 Ir. R. 339—C.A.

15. EXECUTIONS.

Completion—Title of Trustee.]—An execution is not completed by payment direct to an execution creditor. *Pollock, In re; Wilson, ex parte*, 87 L. T. 238—D.

Sequestration—Secured Creditor.]—Payment of money into Court to the separate account of sequestrators does not amount to completion of execution by the creditor at whose instance the writ of sequestration issued. *Hastings, In re; Brown, ex parte* (61 L. J. Q.B. 654; 9 Morrell, 234), approved. *Pollard, In re; Pollard, ex parte*, 72 L. J. K.B. 509; [1903] 2 K.B. 41; 88 L. T. 652; 51 W. R. 483; 10 Manson, 152—C.A.

Observations by ROMER, L.J., on the nature and effect of sequestration. *Ib.*

Payment to Creditor—Withdrawal by Sheriff—Bankruptcy of Debtor—Completion of Execution—Title of Trustee.]—On July 22, 1903, the sheriff levied on the goods of the debtor at the Alexandra and Adelphi Hotels. On July 27 he withdrew, on the instructions of the judgment creditor, from the Alexandra Hotel on part payment. On July 28 the debtor sold to the execution creditor goods at the Alexandra Hotel which had been seized, and on July 29 he also sold to the execution creditor goods at the same place which had not been seized. On the same day an arrangement was made by which the debtor received credit for the amount in the hands of the sheriff and for the goods sold, and he paid the balance direct to the execution creditor. The sheriff withdrew, and on August 12 he paid over the amount in his hands to the execution creditor, having received no notice of a bankruptcy petition. On August 20

a receiving order was made against the debtor on his own petition:—*Held*, that the trustee in bankruptcy had no title against the execution creditor to the money or the goods. *Pollock, In re; Wilson, ex parte* (87 L. T. 238), distinguished. *Ford, In re; Official Receiver, ex parte* (69 L. J. Q.B. 74; [1900] 1 Q.B. 264), applied. *Jenkins, In re; Trustee, ex parte*, 90 L. T. 65; 20 T. L. R. 187—D.

Part Payment to Creditor of Judgment Debt—Withdrawal of Sheriff with Authority to Re-enter—Receiving Order against Debtor—Title of Trustee.—Execution was levied on the goods of a judgment debtor, who thereupon paid a portion of the debt to the execution creditor; and the sheriff, by arrangement between the parties, withdrew from possession with an authority from the execution debtor to re-enter. Before payment of the balance of the judgment debt or re-entry by the sheriff in default, a receiving order was made against the debtor:—*Held*, that the trustee in bankruptcy was entitled under section 45 of the Bankruptcy Act, 1883, to the money paid on account to the execution creditor. *Ford, In re; Official Receiver, ex parte*, 69 L. J. Q.B. 74; [1900] 1 Q.B. 264; 81 L. T. 648; 48 W. R. 173; 7 Manson, 14—D.

Sum Exceeding 20*l.*—Sale by Sheriff—Retainer of Proceeds—Notice of Bankruptcy Petition—Death of Judgment Debtor—Administration Order.—Under an execution for a sum exceeding 20*l.* the sheriff seized and sold the goods of the judgment debtor. Before the expiration of the fourteen days limited by section 11, sub-section 2 of the Bankruptcy Act, 1890, the sheriff received notice of a bankruptcy petition presented against the debtor. The debtor shortly afterwards died. After the expiration of the fourteen days the sheriff received notice of a petition for an administration order under section 125 of the Bankruptcy Act, 1883, upon which an order was ultimately made:—*Held*, that under the circumstances the money in the hands of the sheriff was not part of the deceased debtor's estate, but belonged to the execution creditor. *Watkins v. Barnard*, 66 L. J. Q.B. 771; [1897] 2 Q.B. 521; 46 W. R. 156; 4 Manson, 221—Vaughan Williams, J. See *Hasluck v. Clark, post*.

Sheriff—Notice of Receiving Order and Request for Delivery of Goods before Sale—“Costs of execution”—“Poundage.”—Where a receiving order is made against a judgment debtor after seizure but before sale by the sheriff under a writ of *fi. fa.*, and the sheriff receives from the official receiver, under section 11, sub-section 1 of the Bankruptcy Act, 1890, notice of the receiving order having been made against the debtor, and a request to deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, the sale is stopped at the instance of the official receiver, and such of the sheriff's fees as have been earned up to that time must be paid out of the debtor's estate; but the sheriff is not entitled to any fees for poundage, as no money is obtained by anything that he has done. *Woolford (Trustee of) v. Levy* (61 L. J. Q.B. 546; [1892] 1 Q.B. 772), applied. *Thomas, In re; Middlesex (Sheriff), ex parte*, 68 L. J. Q.B. 245; [1899] 1 Q.B. 460; 80 L. T. 62; 47 W. R. 259; 6 Manson, 1—C.A.

—Notice to Sheriff—Service after Two o'clock on Saturday.—Rule 90 of the Bankruptcy Rules, 1886, which provides that service of notices and other proceedings shall be effected before the hour of two in the afternoon on Saturdays, does not apply to service upon the sheriff, who has taken goods in execution for a sum exceeding 20*l.*, of a notice that a receiving order has been made against the debtor; and therefore, where the fourteen days limited by section 11, sub-section 2 of the Bankruptcy Act, 1890, during which the sheriff is required to hold the proceeds of an execution for a sum exceeding 20*l.* in his hands, expire on a Saturday, notice of a receiving order may be served upon the sheriff after two in the afternoon on that day, so as to entitle the official receiver to the proceeds of the execution as against the execution creditor. *Jole v. Betteridge* 67 L. J. Q.B. 215; [1898] 1 Q.B. 256; 77 L. T. 548; 46 W. R. 161; 5 Manson, 1—C.A.

—Tools and Implements of Debtor's Trade Excepted—Non-intervention of Official Receiver.—Where the goods of a debtor have been taken in execution by the sheriff, and before the sale notice is served on him that a receiving order has been made against the debtor, but the official receiver does not intervene under section 11 of the Bankruptcy Act, 1890, the sheriff is bound to proceed with the sale. In such a case section 8 of the Small Debts Act, 1845, applies, and the sheriff is only required to reserve to the debtor the tools and implements of his trade not exceeding in the whole the value of 5*l.*, notwithstanding the provisions of section 44 of the Bankruptcy Act, 1883, by which such value is limited to 20*l.* *Dawson, In re; Dawson, ex parte*, 68 L. J. Q.B. 668; [1899] 2 Q.B. 54; 80 L. T. 498; 47 W. R. 524; 6 Manson, 200—Wright, J.

Landlord's Claim for Rent—Promise to Pay—Receiving Order—No Notice to Official Receiver.—A sheriff, who had levied on goods under a writ of *fi. facias*, received notice of the landlord's claim for rent. Before sale he promised to pay the rent, and a portion of the goods were sold with the assent of the landlord. On the following day a bankruptcy petition was presented against the debtor of which the sheriff had notice. After the making of a receiving order, of which the sheriff also had notice, the sale was completed on account of the official receiver. The official receiver had no notice of the claim for rent:—*Held*, that the sheriff must account to the official receiver for the whole net proceeds of the sale without deducting the landlord's rent. The sheriff might have protected himself and the landlord by giving notice, as in *Cocker v. Musgrove* (9 Q.B. 223), but having obtained the leave of the official receiver to complete the execution of his account, without giving any intimation of the landlord's claim, he could only sell on the terms on which he obtained the official receiver's leave to sell—that is, on the account of the official receiver. *Driver, In re; Official Receiver, ex parte*, 80 L. T. 840—D.

Sale by Sheriff—Bankruptcy of Debtor—Landlord's Claim for Rent—Title of Trustee in Bankruptcy to Proceeds of Sale.—Under an execution in respect of a judgment for a sum exceeding 20*l.*, the sheriff having notice of an

available act of bankruptcy sold the goods, and within fourteen days received notice of a bankruptcy petition. The sheriff afterwards received notice of the landlord's claim for a quarter's rent. A receiving order was made, and the debtor adjudicated bankrupt. The sheriff then paid the landlord his quarter's rent out of the proceeds of the execution, and paid the balance to the trustee:—*Held*, that the sheriff was right in deducting the amount of the landlord's rent out of the proceeds of the execution, and was only accountable to the trustee for the balance. *Mackenzie, In re; Herefordshire (Sheriff), ex parte*, 68 L. J. Q.B. 1003; [1899] 2 Q.B. 566; 81 L. T. 214—C.A.

The right of a landlord under the Landlord and Tenant Act, 1709, s. 1, as explained by decisions, is not interfered with by the Bankruptcy Act, 1890, s. 11, sub-s. 2. *McCarthy, In re* (7 L. R. Ir. 473), followed. *Ib.*

"Costs of execution"—Possession Retained by Sheriff by Consent of Creditor and Debtor—Act of Bankruptcy—Possession—Money after Twenty-one Days.—On March 13, 1902, a sheriff levied execution on the goods of a debtor, and, by the direction of the judgment creditor, and with the consent of the debtor, remained in possession for seventy-eight days. On May 16, 1902, a receiving order was made against the debtor, notice of which was given to the sheriff, but he was not required by the official receiver to withdraw from possession until May 29, 1902:—*Held*, that, as against the trustee in bankruptcy, the sheriff was not entitled to the costs of possession beyond the period of twenty-one days, when an act of bankruptcy was completed under section 1 of the Bankruptcy Act, 1890, and such additional costs were not "costs of the execution" within section 11 of the Act, and did not operate as a charge upon the goods. The remedy of the sheriff, if any, was against the execution creditor. *English and Ayling, In re*, 72 L. J. K.B. 248; [1903] 1 K.B. 680; 88 L. T. 127; 10 Manson, 34—Wright, J.

— Possession - Money—Possession Retained by Sheriff without Selling at Request of Debtor with Assent of Execution Creditor—Unreasonable Time.—Where a sheriff seizes goods of a judgment debtor, and at the request of the debtor and with the assent of the execution creditor remains in possession for some time without selling, he will be entitled to possession-money down to the time of his selling or delivering up possession to the official receiver in the bankruptcy of the debtor, as the case may be, as costs of the execution under section 11 of the Bankruptcy Act, 1890, unless, in the case of a bankruptcy, the trustee could impeach the arrangement on some ground that the debtor could not. *Hurley, In re* (10 Morr. 120), applied. *Beeston, In re; Board of Trade, ex parte*, 68 L. J. Q.B. 344; [1899] 1 Q.B. 626; 80 L. T. 66; 47 W. R. 475; 6 Manson, 27—C.A.

— Appeal—Taxation of Costs.—*Semble*, per WRIGHT, J.: An appeal to the Judge in Bankruptcy lies from a decision of the Taxing Master on a question as to the fees to which the sheriff is entitled where the question is one of principle and not of amount. *Townend v. Yorkshire (Sheriff)* (59 L. J. Q.B. 156; 24 Q.B. D. 621) distinguished. *Beeston, In re; Board of Trade, ex parte, supra.*

Effect of, on Execution for Sum exceeding 20*l.*—See *Watkins v. Barnard, ante.*

16. FRAUDULENT TRANSFERS.

Transfer of Bankrupt's Business to Limited Company—Fraudulent Conveyance.—A trader being in difficulties, transferred his assets to a company, in the *bona fide* hope of thereby benefiting his creditors. His assets were estimated at 2,000*l.* and his debts at 1,000*l.* The consideration for the transfer was an undertaking by the company to pay his debts and the allotment of ninety-four shares and debentures of the nominal value of 1,000*l.* The debentures could not be enforced until interest was two months overdue—that is, eight months from their issue—or until execution was put in against the company:—*Held*, that this transfer did not necessarily tend to defeat or delay creditors, was not a fraudulent conveyance within section 4, sub-section 1 (b) of the Bankruptcy Act, 1893, and should not be set aside as void against the trustee in bankruptcy. *Harris, In re; Trustee, ex parte*, 14 Manson, 127; 50 W. R. 460—D.

— Setting Aside—Business of Company Controlled by Vendor—Winding-up of Company—Right of Trustee in Bankruptcy.—The bankrupt, with the intention of defeating and delaying his creditors, sold his business to a limited company. The consideration for the sale was the issue of 2,000 fully paid *l.* shares to his nominee, and the taking over by the company of the debts of the business. The bankrupt was chairman, sole director, and secretary of the company, and the other members held only one share each. On the same day that a receiving order was made against the bankrupt the company passed a resolution to go into voluntary liquidation, and a liquidator was appointed. The company had paid off some of the debts in existence when it took over the business, and had incurred fresh liabilities:—*Held*, that the doctrine of agency acted on in *Carey, In re; Jeffreys, ex parte* ([1895] 2 Q.B. 624), is not since *Salomon v. Salomon* ([1897] A.C. 22) law to its full extent, and that in the present case the difficulties were so great as to prevent the order being made. *Semble*, that there may be cases in which such relief can be given. *Hirth, In re; Official Receiver, ex parte*, 79 L. T. 391—Wright, J.

Insolvent Trader—Sale of Business to Company for his own Benefit—Winding up of Company—Rights of Trustee in Bankruptcy.—A trader, being in financial difficulties, sold his business to a limited liability company. The subscribers to the memorandum of association of the company were either his relatives or employees. No cash was paid by the company for the business, and no shares were issued to the public, and all the shares that were issued were issued as fully paid up. The trader was appointed the managing director of the company. Some months afterwards a receiving order was made against the trader, and the same day the company passed resolutions for a voluntary winding-up:—*Held*, that the business and assets of the company formed part of the property of the bankrupt divisible among his creditors, subject to a first charge thereon in favour of the *bona fide* creditors of the company. *Carey, In re; Jeffreys, ex parte*, [1895] 2 Q.B. 624; 73 L. T.

221; 43 W. R. 605; 2 Manson, 198—Vaughan Williams, J. Affirmed, [1895] 2 Q.B. 627 *n*; 44 W. R. 59—C.A.

Fraudulent Conveyance—Insolvent Trader—Void or Voidable—Sale of Business to Limited Company—Voluntary Winding-up of Company—Bankruptcy of Trader—Relation Back—Right of Trustee in Bankruptcy to Set Aside Conveyance.—A fraudulent conveyance by a debtor to which the title of the trustee in his bankruptcy, founded on another act of bankruptcy, relates back, may, where the fraudulent conveyance was made to a company and not ratified by the company till some days afterwards, be set aside on the application of the trustee, although it was voidable only and not void, and the company has gone into voluntary liquidation before the receiving order was made. *Hirth, In re; Official Receiver, ex parte*, 68 L. J. Q.B. 287; [1899] 1 Q.B. 612; 80 L. T. 63; 47 W. R. 243; 6 Manson, 10—C.A.

Fraudulent Transfer of Property by Debtor—Transfer set Aside—Personal Liability of Transferees.—When a sale by a bankrupt to a company is set aside on the ground of fraud, the directors, in the absence of *mala fides*, are only liable to account for the bankrupt's property remaining in their hands. They cannot be called to personally account for all the proceeds of the business that have passed through their hands. *Ely, In re; Trustee, ex parte*, 82 L. T. 501—D. Affirmed, 48 W. R. 693—C.A.

Substantial Assignment of Whole Property—Implements of Trade.—R., a retail trader, within three months of the making of a receiving order against him, assigned to V., a trade creditor, in consideration of a past debt of 174l. 6s. 6d. and a money payment of 2l. 13s. 6d. the goodwill of his business, which was of very small value, together with the trade fixtures, three horses, and a cart and van, and also his household furniture. At the date of the assignment R. was the owner, in addition to the property comprised in the assignment, of two life policies which produced 46l. 6s. 3d., and of three leases which were very heavily mortgaged, two of which the trustee disclaimed:—*Held*, that, as the property of the bankrupt consisted chiefly in the implements of his trade, the assignment which rendered him incapable of carrying on his trade was in substance an assignment of all his property and void as against his trustee. *Rayment, In re; Trustee, ex parte*, 80 L. T. 807; 6 Manson, 288—Wright, J.

17. FRAUDULENT PREFERENCE.

Onus of Proof.—Where a payment is impeached by a trustee in bankruptcy as constituting a fraudulent preference, the onus is on him not merely to shew insolvency, but also to prove that the payment was made by the bankrupt with a view to prefer the particular creditor. *Dictum* of Vaughan Williams, J., in *Eaton & Co., In re; Viney, ex parte* (66 L. J. Q.B. 491; [1897] 2 Q.B. 16), to the contrary dissented from. *Laurie, In re; Green, ex parte*, 67 L. J. Q.B. 431; 46 W. R. 491; 5 Manson, 48—Wright, J.

Breach of Trust—Voluntary Conveyance and Deposit of Shares to Replace Trust Funds.—Where a debtor on the eve of bankruptcy executes a conveyance in trust for certain of

his creditors and deposits shares on the same trusts, to make amends for breaches of trust committed against such creditors, such conveyance and deposit being made without pressure from or communication with the creditors benefited thereby, and with the view of shielding the debtor from the consequences of his conduct, there is no fraudulent preference within the Bankruptcy Act, 1883, s. 48. *Sharp v. Jackson*, 68 L. J. Q.B. 866; [1899] A.C. 419; 80 L. T. 841; 6 Manson, 264—H.L. (E.)

— Payment in Good Faith as to Legal Liability.—If a debtor makes a payment, believing in good faith and on reasonable grounds that he is, although in fact he is not, legally bound to make it, such payment is not a fraudulent preference within the Bankruptcy Act, 1883. *Vautin, In re; Saffery, ex parte* (No. 2), 69 L. J. Q.B. 703; [1900] 2 Q.B. 325; 82 L. T. 722; 48 W. R. 652; 7 Manson, 291—Wright, J.

Payment to Creditor to Protect Surety—"Creditor."—To constitute a fraudulent preference under section 48 of the Bankruptcy Act, 1883, the preference must be the preference of a creditor, and the impeached payment must be to the creditor intended to be preferred. *Warren, In re; Tranter, ex parte*, 69 L. J. Q.B. 425; [1900] 2 Q.B. 138; 82 L. T. 502; 48 W. R. 523; 7 Manson, 137—D.

A payment, therefore, by a bankrupt to a creditor of a debt secured by a promissory note on which the creditor is primarily liable, made with a dominant view to relieve the sureties for the debt from their liability thereon, is not a fraudulent preference within the meaning of the section. *Pañne, In re, Read, ex parte* (66 L. J. Q.B. 71; [1897] 1 Q.B. 122), not followed. *Mills, In re; Official Receiver, ex parte* (5 Morrell, 55), and *Goldsmid, In re; Taylor, ex parte* (56 L. J. Q.B. 195; 18 Q.B. D. 295), followed. *Ib.*

Trustee and Cestui que Trust—Making Good Breach of Trust.—A trustee who had misappropriated part of the trust funds on the eve of his bankruptcy deposited in the box in which the trust documents were kept certain debentures of his own, accompanied by a memorandum in which he referred to the breach of trust, and stated that he made the deposit as security for whatever might be found due, which he recognized as a personal debt from him. He also referred to certain acts of kindness by the *cestuis que trust* towards his daughter and himself:—*Held*, that the dominant motive of the debtor was to repair his breach of duty as a trustee, and not to prefer any particular creditor, and the transaction was not a fraudulent preference within section 48 of the Bankruptcy Act, 1883. *Lake, In re; Dyer, ex parte*, 70 L. J. K.B. 390; [1901] 1 K.B. 710; 84 L. T. 430; 49 W. R. 291; 8 Manson, 145—C.A.

Per VAUGHAN WILLIAMS, L.J.—If a payment made by a man on the eve of his bankruptcy to a particular creditor is made in order to repair a breach of trust on the part of the debtor, the presumption is that the payment was made, not with an intention to prefer that creditor, but from a sense of duty. *Ib.*

Guarantor and Guarantee—Charge in Favour of Guarantor—"Creditor."—A guarantor who has not paid anything under his guarantee has

a right to prove in respect of his contingent liability under section 37 of the Bankruptcy Act, 1883, and therefore is a "creditor" within the meaning of the fraudulent-preference section (section 48). *Paine, In re; Read, ex parte* (66 L. J. Q.B. 71; [1897] 1 Q.B. 122), followed. *Mills, In re; Official Receiver, ex parte* (5 Morrell, 55), and *Warren, In re; Tranter, ex parte* (69 L. J. Q.B. 425; [1900] 2 Q.B. 138), distinguished. *Blackpool Motor Car Co., In re; Hamilton v. Blackpool Motor Car Co.*, 70 L. J. Ch. 61; [1901] 1 Ch. 77; 49 W. R. 124; 8 Manson, 193—Buckley, J.

18. SETTLEMENTS.

Voluntary Settlement—Avoidance.—W., a trader, converted his business into a limited company and became entitled to a number of shares in the company, and also to debentures issued by it. The company went into liquidation in 1898, and F., the son of W., agreed to buy the business from the company, paying 13,000*l.* and undertaking to pay the trade creditors. In order to enable the transaction to be carried out W. withdrew his claim in respect of his debentures, and joined with F. in his agreement to pay the trade creditors. It was admitted that W.'s motive in entering into this arrangement was partly in order to save his own credit as a trader. W. became bankrupt in 1899:—*Held*, that there had been no "settlement of property" which was void under section 47 of the Bankruptcy Act, 1883. *Player, In re; Harvey, ex parte* (54 L. J. Q.B. 554; 15 Q.B. D. 682), considered and followed. *Plummer, In re; Trustee, ex parte*, 69 L. J. Q.B. 936; [1900] 2 Q.B. 790; 83 L. T. 387; 48 W. R. 634; 7 Manson, 367—C.A.

— **Gift of Jewellery—"Settlement."**—Where a donor within two years of his bankruptcy gave to the donee a valuable pearl necklace and certain furniture, or money to be expended in the purchase of furniture, with an intention that such property should be retained by the donee for an indeterminate time, but without imposing any restriction on the donee's power to alienate it,—*Held*, that the gift was a settlement within the meaning of section 47, sub-section 3 of the Bankruptcy Act, 1883. *Player, In re; Harvey, ex parte* (No. 2) (54 L. J. Q.B. 554; 15 Q.B. D. 682), and *Vansittart, In re; Brown, ex parte* (62 L. J. Q.B. 277; [1893] 1 Q.B. 181), followed. *Tankard, In re; Official Receiver, ex parte*, 63 L. J. Q.B. 670; [1899] 2 Q.B. 57; 80 L. T. 500; 47 W. R. 624; 6 Manson, 188—Wright, J.

But, *quære*, whether section 57, sub-section 3, ought not to be held to extend to all conveyances or transfers whether by way of settlement or otherwise. *Ib.*

Revocable Settlement—Consent of Trustees—Substituted Settlement—Consideration—"Purchaser"—Avoidment.—A, who was then solvent, executed a voluntary settlement revocable with the consent of the trustees. Subsequently, more than two years later, he partially revoked this settlement with the necessary consent. This consent was given on condition that A should settle certain further property for the benefit (*inter alia*) of the

beneficiaries under the former settlement. Within two years of executing this second settlement A became bankrupt:—*Held*, that the second settlement was not a transaction of purchase for valuable consideration within the meaning of section 47 of the Bankruptcy Act, 1883, and was void accordingly as against the trustee in bankruptcy. *Pumfrey, In re; Hillman, ex parte* (48 L. J. Bk. 77; 10 Ch. D. 622), as explained in *Hance v. Harding* (57 L. J. Q.B. 403; 20 Q.B. D. 732), followed. *Parry, In re; Trustee, ex parte*, 73 L. J. K.B. 83; [1904] 1 K.B. 129; 89 L. T. 612; 52 W. R. 256; 11 Manson, 18; 20 T. L. R. 73—Wright, J.

Marriage Settlement—Husband's Covenant to Settle all After-acquired Property except Business Assets—Subsequent Transfer of Property to the Trustees after Act of Bankruptcy.—By his marriage settlement, executed in 1879, the debtor covenanted to settle all after-acquired property, both real and personal, except business assets. In 1891 he was very successful, and purchased a house and furniture for 17,000*l.*, in which he lived with his wife and family. Early in 1903 he was in financial difficulties, and on May 23 the trustees of the settlement served a written notice requiring him to transfer the house and furniture. On May 26 the debtor committed an act of bankruptcy, and on June 10 he conveyed the house and furniture to the trustees by two deeds. On July 15 the receiving order was made on an act of bankruptcy committed after June 10, and on July 23 the debtor was adjudicated a bankrupt:—*Held*, that the words "becoming bankrupt" in section 47 (2) of the Bankruptcy Act, 1883, must be construed by the light of section 43 of that Act, and mean the commission of an act of bankruptcy on which the receiving order is made, or, if more than one act of bankruptcy has been committed, the first act of bankruptcy proved to have been committed within three months next preceding the date of the presentation of the bankruptcy petition, and that, as the house and furniture had not been actually transferred to the trustees of the marriage settlement before May 26, the transfer on June 10 was void against the trustee in bankruptcy. *Reis, In re; Trustee, ex parte*, 73 L. J. K.B. 929; [1904] 1 K.B. 451; 90 L. T. 62; 52 W. R. 302; 11 Manson, 229; 20 T. L. R. 167—Wright, J.

Settlement of Life Policies—No Provision for Keeping up Policies—Payment of Premiums by Bankrupt.—A bankrupt had prior to 1877 insured his life by four policies. By a post-nuptial settlement in April, 1877, he assigned these policies to trustees upon certain trusts for the benefit of his wife and children. The settlement contained no provision for the payment of the premiums on the policies. The bankrupt paid the premiums down to November, 1899. In that month the receiving order in bankruptcy was made against him, and a few days afterwards he died:—*Held*, that the payments of the premiums did not constitute settlements within the meaning of section 47 of the Bankruptcy Act, 1883. *Harrison, In re; Whinney, ex parte*, 69 L. J. Q.B. 942; [1900] 2 Q.B. 710; 83 L. T. 189; 49 W. R. 2; 7 Manson, 378—C.A.

Discharge of Debts—Covenant in Marriage

Settlement.—The husband is not released from a covenant contained in his marriage settlement to settle all his after-acquired property except business assets by his becoming bankrupt and obtaining his discharge under the Bankruptcy Act, 1869, s. 49. *Collyer v. Isaacs*, (51 L. J. Ch. 14; 19 Ch. D. 342) and *Hardy v. Fothergill* (58 L. J. Q.B. 44; 13 App. Cas. 351) distinguished. *Reis, In re*; *Clough, ex parte*, 73 L. J. K.B. 929; [1904] 2 K.B. 769; 91 L. T. 592; 53 W. R. 122; 11 Manson, 229; 20 T. L. R. 547—C.A. See s.c. in *H.L., sub nom. Clough v. Samuel*, col. 85.

Separation Deed—Default in Payment of Annuity—Trustees' Right to Retain Trust Property.—Where a husband has become bankrupt, the trustees of a separation deed are entitled, as against the assignee in bankruptcy of the husband, to retain the trust property until the amount payable under the husband's covenant in the deed is satisfied. *Weston, In re*; *Davies v. Tagart*, 69 L. J. Ch. 555; [1900] 2 Ch. 164; 82 L. T. 591; 48 W. R. 467—Stirling, J.

Settlement of Settlor's Property—Forfeiture. See **CONDITION**.

Setting Aside Settlement—Costs.—See **SETTLEMENT**.

For Settlor's Benefit—13 Eliz. c. 5.—See **FRAUD**.

"Purchaser for valuable consideration."—See *Pope, In re*; *Dicksee, ex parte*, L. J. N. C. 1908, 257.

19. PROTECTED TRANSACTIONS.

Sale of Property—Act of Bankruptcy by Vendor before Date of Completion—Right of Purchaser to Refuse to Complete—Recovery of Deposit Paid by Purchaser.—Although a contract for the sale of property, the same to be completed on a certain date, entered into without notice of an available act of bankruptcy by the vendor, is a protected transaction under section 49 of the Bankruptcy Act, 1883, yet such protection does not extend to a conveyance or payment made in pursuance of such contract with notice of an available act of bankruptcy committed after the contract has been entered into and before the date fixed for completion, and the purchaser is entitled to refuse to complete and to recover back a deposit paid on entering into the contract, because the vendor is not in a position at the latter date to give either a good conveyance or a valid receipt for the purchase-money. *Powell v. Marshall, Parkes & Co.*, 68 L. J. Q.B. 477; [1899] 1 Q.B. 710; 80 L. T. 509; 47 W. R. 419; 6 Manson, 157—C.A.

Assignment to Creditor of Chose in Action in good Faith without Notice of Act of Bankruptcy.—On December 1, 1904, a bankruptcy petition was presented against the debtors, and on December 5 they assigned by deed to a creditor as security for the debt a sum of money due to them. The assignment was made in good faith and the creditor had no notice of the petition. On December 10 the receiving order was made against the debtors:—*Held*, that the assignment was a protected transaction within section 49 of the Bankruptcy Act, 1883, and was good as against the trustee

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in bankruptcy. *Badham, In re*; *Palmer, ex parte* (10 Morrell, 252), distinguished. *Dunkley, In re*; *Waller, ex parte*, 74 L. J. K.B. 963; [1905] 2 K.B. 683; 93 L. T. 248; 54 W. R. 171; 12 Manson, 384; 21 T. L. R. 707—Bigham, J.

Transfer of Property for Past Debt—Act of Bankruptcy—Fraudulent Preference.—Where a creditor takes a transfer of substantially the whole of the property of his debtor in payment of a past debt, with notice that there are other creditors, he cannot be said to be acting in good faith. Such a transaction is not protected by section 49 of the Bankruptcy Act, 1883, but is an act of bankruptcy and a fraudulent preference by the debtor. *Jukes, In re*; *Official Receiver, ex parte*, 71 L. J. K.B. 710; [1902] 2 K.B. 58; 86 L. T. 456; 50 W. R. 560; 9 Manson, 249—Wright, J.

Mortgage—Act of Bankruptcy Before Mortgage.—Where a mortgage is granted on a ship after the mortgagor has committed an act of bankruptcy, in respect of which he is subsequently adjudicated a bankrupt, the mortgage is protected by section 49 of the Bankruptcy Act if the mortgagee had no notice of the act of bankruptcy at the date of the mortgage, notwithstanding the fact that the ship remains in the possession of the mortgagor up to the date of the receiving order. *Lyon v. Weldon* (2 Bing. 334) followed. *The Ruby*, 83 L. T. 438; 9 Asp. M.C. 146—Gorell Barnes, J.

Payment to an Accountant for Preparation of Statement of Accounts—Knowledge of Act of Bankruptcy.—Where an accountant, who had prepared a statement of accounts and sent to the creditors a notice which amounted to an act of bankruptcy, had received payment for his services,—*Held*, that the transaction was not protected within the exception of *Sinclair, In re*; *Payne, ex parte* (15 Q.B. D. 616), and that the money so paid was recoverable by the trustee in the bankruptcy. *White, In re*; *Ward, ex parte*, 78 L. T. 25; 5 Manson, 17—Wright, J.

20. CREDITORS.

(1) SECURED CREDITOR.

Security on Property Represented by Debtor to be that of his Wife.—C. in 1898 owed a considerable sum to P. & Co. for goods supplied and for money lent. In August, 1898, P. & Co. agreed to advance to C. a further sum of 2,000l. As security for this advance it was arranged that C.'s wife should mortgage to P. & Co. a property called the Yacht tavern; C. represented to P. & Co. that this was his wife's separate property, and that it had been bought exclusively with her own money. On September 6, 1898, the mortgage was executed, C. joining therein. C. subsequently became bankrupt, and the trustee in his bankruptcy obtained an order from the Court declaring that the Yacht tavern was part of his estate, and that his wife was merely his nominee. P. & Co. having sold the Yacht tavern under the powers in the mortgage, sought to prove against C.'s estate for the full amount of their debt, without giving credit for the amount realised by the sale, arguing that the trustee was estopped from denying that the Yacht tavern was the separate

property of the wife:—*Held*, that there was no such estoppel against the trustee, and that P. & Co. could prove against C.'s estate only for the balance of their debt, after giving credit for the amount realised by the sale of the security. *Cooksey, In re; Portal, ex parte*, 83 L. T. 435—Wright, J.

Debt Secured by Mortgage—Bills of Exchange Given as Collateral Security—Proof on Covenant to Pay—Scheduling Bills to Proof.]—Where a creditor's debt is secured by a mortgage on the debtor's property, and as collateral security bills of exchange are given, the creditor seeking to prove in the bankruptcy of the debtor on the covenant for payment in the mortgage-deed must specify in his proof particulars of the bills held by him as being "securities" within Form 72 of the Bankruptcy Rules, 1886, 1890. *Ruthen, In re; Kidd, ex parte*, 5 Manson, 227—Wright, J.

Principal and Surety—Guarantee of Interest—Covenant to Pay Premiums on Policy of Insurance.]—The debtor borrowed 500*l.*, and covenanted jointly and severally with a third party to pay interest upon the loan so long as any part of the principal sum should remain due, and also to keep up the premiums upon a policy assigned by him to the lender as security. Upon the bankruptcy of the debtor the lender put in a proof assessing the value of his security at 100*l.*, and proving for the balance of the principal sum advanced. The third party also claimed to prove on the estate by way of indemnity for his liability for interest and premiums to the lender:—*Held*, that the principal sum ceased to be due upon the bankruptcy of the borrower, and that the security, having been valued, must be deemed to have been realised; consequently the third party was under no liability to the lender, and his proof must be rejected. *Moss, In re; Hallett, ex parte*, 74 L. J. K.B. 764; [1905] 2 K.B. 307; 92 L. T. 777; 53 W. R. 558; 12 Manson, 227—D.

Valuation of Security—Proof for Balance of the Debt—Increase in Value of Security—Amendment of Valuation.]—A debtor against whom a receiving order had been made submitted a scheme for payment to his unsecured creditors of 10*s.* in the pound. The scheme was accepted. Subsequently a secured creditor valued his security at half his debt and filed his proof for the other half. The unsecured liability of the debtor was thus so much increased that the scheme had to be abandoned, the debtor was made bankrupt, and a dividend of only 1*s.* in the pound was ever paid. The security having afterwards increased in value, the secured creditor applied under rule 13 in Schedule 2 of the Bankruptcy Act, 1883, to amend his proof and re-value his security at the full amount:—*Held*, that he was entitled to do so. *Dictum* of VAUGHAN WILLIAMS, J., in *Newton, In re; National Provincial Bank of England, ex parte* (65 L. J. Q.B. 686; [1896] 2 Q.B. 403), considered. *Fanshawe, In re; Le Marchant, ex parte*, 74 L. J. K.B. 153; [1905] 1 K.B. 170; 92 L. T. 32; 53 W. R. 222; 12 Manson, 7—Bigham, J.

— Mistaken Estimate—Lien—Amendment of Proof.]—The debtor was a registered holder of fully and partly paid-up shares in the applicant

company. At the time of proof the company had a first and permanent lien on all shares not fully paid up for all moneys due to (including calls made, even though the time appointed for their payment might not have arrived) and liabilities subsisting with the company from or on the part of any registered holder. No value was set upon this lien in the proof. The articles of association were subsequently altered so as to give a lien on the fully paid-up as well as on the partly paid-up shares. The company sought to amend the proof by a fresh valuation of the security:—*Held*, that as the company must, at the date when the original proof was carried in, have contemplated the possibility that the articles might be altered, they could not be said to have omitted to value the security from inadvertence. *Rowe, In re; West Coast Gold Fields, Lim., ex parte*, 73 L. J. K.B. 852; [1904] 2 K.B. 489; 91 L. T. 101; 52 W. R. 608; 11 Manson, 272—Bigham, J.

— Valuation of Security in Petition—Right of Trustee to Redeem at Assessed Value—Contract Induced by Fraud—Voidable Contract—Election by Vendor to Affirm.]—There is nothing in the Bankruptcy Act, 1883, or in the rules thereunder, which gives a trustee in bankruptcy a right to redeem a security at the value assessed by the petitioning creditor in his petition. His right is confined to cases where a creditor has proved either under Schedule I. for the purpose of voting, or under Schedule II. for the purpose of ranking for dividend. *Vautin, In re; Saffery, ex parte* (No. 1), 68 L. J. Q.B. 971; [1899] 2 Q.B. 549; 48 W. R. 96; 6 Manson, 391—Wright, J.

A creditor presented a petition for a receiving order against a debtor in respect of a dishonoured cheque given for shares, which he obtained from the creditor on a fraudulent representation that the cheque would be duly met. The creditor alleged in his petition that he had a security or lien on the shares, which he valued at 3,200*l.* The order was made, and the debtor was afterwards adjudicated a bankrupt. The debtor was subsequently arrested and convicted on the charge of obtaining valuable securities under false pretences, and an order was made by the Court under section 100 of the Larceny Act, 1861, for the restitution of the share certificates to the creditor as owner. The trustee in bankruptcy of the debtor claimed to be entitled to redeem the shares at the value put upon them by the creditor in his petition:—*Held*—first, that the mistake of the creditor in treating the shares in his petition as a security for his debt did not deprive him of his right to them, or give the trustee on that ground alone any claim to redeem them; and secondly, that there was nothing in the Bankruptcy Act, 1883, or the rules thereunder, which entitled the trustee to redeem the shares at the value placed upon them by the creditor in his petition. *Taylor, Ex parte; Lacey, in re* (13 Q.B.D. 128), distinguished. *Id.*

— Omission to Value Security—Inadvertence.]—A secured creditor who states in his proof in bankruptcy that his security is worthless does not omit to value his security within the meaning of rule 10 of the First Schedule to the Bankruptcy Act, 1883, which provides that, for the purpose of voting, a secured creditor shall,

unless he surrenders his security, state in his proof the particulars of his security and the value at which he assesses it, and shall be entitled to vote only in respect of the balance, if any, due to him after deducting the value of his security, and that if he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the Court on application is satisfied that "the omission to value the security has arisen from inadvertence" (COLLINS, L.J., doubting). *Piers, In re*; *Piers, ex parte*, 67 L. J. Q.B. 519; [1898] 1 Q.B. 627; 78 L. T. 314; 46 W. R. 475; 5 Manson, 97—C.A.

A secured creditor who, in consequence of erroneous information that his security is worthless, deliberately omits to value his security in his proof in bankruptcy, does not omit to value his security by "inadvertence" within the meaning of the rule. *Id.*

(2) UNSECURED CREDITORS.

(a) Preferential.

"Clerk or servant"—Commission Payable to Commercial Traveller.]—A commercial traveller was employed at a salary of 2*l.* per week and a commission by way of salary of 3½ per cent. upon all business done by him. At the date of his employer's bankruptcy the 2*l.* per week had been paid to him in full, but a sum of about 25*l.* was due for commission earned within the preceding four months:—*Held*, that the commission was part of the "salary" payable in respect of his services within section 1, sub-section 1 (b) of the Preferential Payments in Bankruptcy Act, 1888, and must be paid in priority to the ordinary debts. *Klein, In re*; *Goodwin, ex parte*, 22 T. L. R. 664—Bigham, J.

—Secretary of Company—Preferential Payments.]—*Scumble*, the secretary of a company may be a "clerk or servant" within the meaning of section 1 of the Preferential Payments in Bankruptcy Act, 1888, and section 2 of the Preferential Payments in Bankruptcy Amendment Act, 1897. But a secretary of a company who is at the same time the registrar of another company, devoting the greater part of his time to such second company, and employing and paying a clerk to do the greater part of the clerical work of the first company, is not entitled to the priority given by the Acts of 1888 and 1897 in respect of unpaid salary, inasmuch as those Acts are intended to apply to the case of a "clerk or servant" who personally renders services to a bankrupt or company. *Cairney v. Back*, 75 L. J. K.B. 1014; [1906] 2 K.B. 746; 96 L. T. 111; 14 Manson, 58; 22 T. L. R. 776—Walton, J.

"Servant"—"Wages or salary"—Opera Singer.]—An artist engaged to sing during an opera season at a certain sum for each performance *held*, upon the terms of the contract as a whole, to be a "servant," and his remuneration to be "wages or salary in respect of services rendered," within the meaning of section 1, sub-section 1 (b) of the Preferential Payments in Bankruptcy Act, 1888, so as to entitle him to priority of payment up to 50*l.* upon the winding-up of the company by whom he was engaged. *Winter*

German Opera, In re, 23 T. L. R. 662—Warrington, J.

Workmen's Wages—Debentures.]—The Preferential Payments in Bankruptcy Amendment Act, 1897, which gives workmen's wages and other debts of a company priority over debenture-holders with a floating charge on whose behalf a receiver has been appointed, is not retrospective in its operation, and does not therefore apply in a case where the receiver has been appointed before July 15, 1897, the date of the passing of the Act. *Waverley Typewriter, Lim., In re*; *D'Esterre v. Waverley Typewriter, Lim.*, 67 L. J. Ch. 360; [1898] 1 Ch. 699; 78 L. T. 593; 46 W. R. 685; 5 Manson, 269—Wright, J.

Landlord—Rent—Sale by Sheriff—Bankruptcy of Debtor—Title of Trustee in Bankruptcy to Proceeds of Sale.]—Under an execution in respect of a judgment for a sum exceeding 20*l.*, the sheriff having notice of an available act of bankruptcy sold the goods, and within fourteen days received notice of a bankruptcy petition. The sheriff afterwards received notice of the landlord's claim for a quarter's rent. A receiving order was made, and the debtor adjudicated bankrupt. The sheriff then paid the landlord his quarter's rent out of the proceeds of the execution, and paid the balance to the trustee:—*Held*, that the sheriff was right in deducting the amount of the landlord's rent out of the proceeds of the execution, and was only accountable to the trustee for the balance. *Mackenzie, In re*; *Hertfordshire (Sheriff), ex parte*, 68 L. J. Q.B. 1008; [1899] 2 Q.B. 566; 81 L. T. 214; 6 Manson, 413—C.A.

The right of a landlord under the Landlord and Tenant Act, 1709, s. 1, as explained by decisions, is not interfered with by the Bankruptcy Act, 1890, s. 11, sub-s. 2. *McCarthy, In re* (7 L. R. Ir. 473), followed. *Id.*

(b) Ordinary.

(i.) Proof.

"Provable debt"—Debt Incurred after Notice of Act of Bankruptcy—Incapacity of Creditor to Prove.]—The defendant applied to the plaintiff, a solicitor, to file his petition in bankruptcy, and in so doing committed an act of bankruptcy under section 4, sub-section 1 (b) of the Bankruptcy Act, 1883. The plaintiff filed the petition, and subsequently a receiving order was made against the defendant. Costs were incurred in the bankruptcy proceedings between the date of the act of bankruptcy and the making of the receiving order. The plaintiff received from the estate, under rule 125 of the Bankruptcy Rules, 1886, 1890, part of the costs. In an action against the defendant to recover the balance,—*Held*, that the plaintiff was not entitled to recover, upon the ground that the costs were a "provable debt" within section 37, sub-section 3 of the Act of 1883, although the plaintiff could not prove for them in the bankruptcy under sub-section 2, because at the time when they were incurred he had notice of an act of bankruptcy committed by the defendant. *Buckwell v. Norman*, 67 L. J. Q.B. 435; [1898] 1 Q.B. 622; 78 L. T. 248; 46 W. R. 339; 5 Manson, 64—C.A.

Assignment of Debts after Proof—Dividend—Claim to Payment by Assignee.]—A trustee in bankruptcy cannot under the Bankruptcy Act, 1883, and rules, recognise the title of an assignee of a proof to a dividend declared in bankruptcy. *Frost, In re; Official Receiver, ex parte*, 68 L. J. Q.B. 663; [1899] 2 Q.B. 50; 80 L. T. 496; 47 W. R. 512; 6 Manson, 194—D.

Semble, the assignee's remedy is to prove, and get his proof substituted for that of the original creditor, his assignor. *Ib.*

— Substitution of Proof by Assignee of Proving Creditor.]—The assignee of a proof who desires to take the benefit thereof, after satisfying the official receiver or trustee of the validity of the assignment, should apply to the Court to give leave to the official receiver to place a proof by him (the assignee) on the file in place of the proof of the assignor. *Iliff, In re*, 51 W. R. 80—D.

Bill of Exchange—Valuation of Securities—Consolidation of Debts.]—A holder of two bills of exchange, proving in the bankruptcy of the last endorser for the aggregate sum of the two amounts secured by the bills, cannot, where the bills are drawn and accepted by different persons, retain a surplus of over 20s. in the pound obtained by proving against the estates of the drawer, acceptor, prior indorsers, and the last indorser of the one bill, and attribute it to a deficiency on the other bill; but the bills for the purposes of proof must be treated as constituting distinct transactions, and the surplus on the one bill must be brought into account without regard to the deficiency on the other bill. *Morris, In re; James v. London and County Banking Co.*, 68 L. J. Ch. 299; [1899] 1 Ch. 485; 80 L. T. 37; 47 W. R. 324; 6 Manson, 178—C.A.

Inasmuch as drawers, acceptors, and prior indorsers are liable to indemnify the subsequent indorser, the dividends paid by their estates are paid out of the assets of the subsequent indorser, and his estate is therefore entitled to have the surplus which has been paid on one of the bills (not exceeding the amount of such surplus paid by his estate) paid to it, and the overpaid bill handed over to his trustee. *Ib.*

Company—Proof by—Further Dividends—Right of Crown—Bona Vacantia.]—The real and personal chattels of a dissolved corporation aggregate devolve upon the Crown as *bona vacantia*. *Higginson, In re; Att.-Gen., ex parte*, 68 L. J. Q.B. 198; [1899] 1 Q.B. 325; 79 L. T. 673; 47 W. R. 285; 5 Manson, 289—D.

A limited company proved in the bankruptcy of one of its debtors and received from time to time dividends in respect of its proof. Some years, however, before a final dividend was declared, the company was wound up and dissolved by order of Court:—*Held*, that the Crown was entitled to the final dividend to which the company would have been entitled, if in existence, as *bona vacantia*. *Ib.*

Contract—Breach of—Damages in Tort.]—S. stored goods with H. under a verbal contract, in breach of which H. sold the goods. S. brought an action against H., and in the state-

ment of claim set out the contract and its breach, but made no claim for damages for breach of contract, but only for detinue and conversion. Before judgment a receiving order was made against H., of which S. had notice. *WRIGHT, J.*, held that S., having elected to sue in tort rather than contract, must abide by the result, and that the trustee in H.'s bankruptcy had rightly rejected S.'s proof founded on that judgment debt and costs:—*Held*, that on S. undertaking to abandon the judgment and stay all further proceedings under it, she should be permitted to carry in a proof in the bankruptcy for damages for breach of contract. *Hopkins, In re; De Stedingk, ex parte*, 86 L. T. 676—C.A.

Damages Recovered in Divorce Suit—Bankruptcy of Co-respondent.]—Damages obtained by a petitioner in a suit in the Divorce Court against the co-respondent which are subject to any order of the Court appropriating them to any particular purpose are a debt or liability which is provable in the bankruptcy of the co-respondent. *O'Gorman, In re; Bale, ex parte*, 68 L. J. Q.B. 650; [1899] 2 Q.B. 62; 80 L. T. 501; 47 W. R. 543; 6 Manson, 204—Wright, J.

Costs—Contentious Business—Draft Bills of Costs Submitted—Account Stated—Mortgage to Secure Agreed Balance—Bankruptcy of Client—Trustee's Right to go behind Stated Account and Mortgage and Require Details.]—Where a solicitor from time to time delivers to a client draft bills of costs in respect of contentious business and a cash account, which are agreed by the client, and he executes a mortgage of his property in favour of the solicitor, and thereby covenants to pay the solicitor the amount due on the account stated, and then becomes bankrupt, and the solicitor lodges a proof for the amount agreed as being due to him, the trustee in bankruptcy's right and duty before admitting the proof is to go behind the account stated and the covenant, and to require satisfactory evidence that the debt on which the proof is founded was a real debt; and the estoppel to which the bankrupt may have subjected himself will not prevail against such trustee. *Van Laun, In re; Chatterton, ex parte* (No. 1), 76 L. J. K.B. 644; [1907] 2 K.B. 23; 97 L. T. 69; 14 Manson, 91; 23 T. L. R. 384—C.A.

Copyright—Sale—Royalties—Bankruptcy of Publisher—Claim by Author for Royalties—Breach of Contract.]—An author sold the absolute copyright in a book to a publisher in consideration of the payment of certain royalties. The publisher became bankrupt, and the trustee in bankruptcy carried on the business for some time. The author claimed to be paid in full his proportion of the royalties received by the trustee in bankruptcy in respect of sales of the book since the bankruptcy:—*Held*, that the author was only entitled to prove for damages for breach of contract in not paying the royalties, and could not claim for payment of the royalties in full. *Richards, In re; Deeping, ex parte*, 76 L. J. K.B. 643; [1907] 2 K.B. 83; 96 L. T. 712; 14, Manson, 88; 23 T. L. R. 388—Bigham, J.

Guarantee of Interest on Debenture in Company—Dissolution of Company—Operation of

Law—Liability of Guarantor—Proof for Future Interest.]—A guarantor, who has agreed to guarantee to the holder of a debenture in a company the regular payment of the interest thereon until the whole sum secured by the debenture has been repaid, is not released from his obligation by the fact that the principal debt has come to an end by operation of law; and the debenture-holder will be entitled to prove in the bankruptcy of the guarantor for the estimated value of the amount guaranteed. *FitzGeorge, In re; Robson, ex parte*, 74 L. J. K.B. 822; [1905] 1 K.B. 462; 92 L. T. 206; 53 W. R. 384; 12 Manson, 14—Bigham, J.

Gaming Debt—Bills—New Consideration.]—The debtor, being sued for a gambling debt of 800*l.*, successfully pleaded the Gaming Act, 1892. Thereupon the creditor wrote to the committee of the debtor's club informing them of the fact with the result that the debtor was not re-elected. The debtor then agreed to pay the creditor 100*l.* in cash, and to give bills for 400*l.* in consideration of the creditor withdrawing his letter. Upon the debtor becoming bankrupt, the creditor proved for the amount of the bills then due, but the proof was rejected by the trustee:—*Held*, that the bills were given not for the gaming debt, but for a wholly new consideration, which was not illegal, and that therefore the proof was wrongly rejected. *Browne, In re; Martingell, ex parte*, 73 L. J. K.B. 446; [1904] 2 K.B. 133; 90 L. T. 291; 52 W. R. 384; 11 Manson, 148; 20 T. L. R. 289—Buckley, J.

Legacy—Direction Giving Legatee Power to Retain Debt Due to Testator in or Towards Satisfaction of Legacy—Specific Legacy—Abatement.]—The testator bequeathed to his son 10,000*l.*, and directed that as regards any money due to him at his decease from that legatee the same should (but not to an amount exceeding 10,000*l.*) be set off and retained in or towards satisfaction of the legacy. The legatee was indebted to the testator's estate, and the executors obtained judgment against him for 26,398*l.* 12*s.* 6*d.*, after giving credit for the amount of the legacy. The legatee became bankrupt, and the testator's estate proved insufficient to pay the legacies in full. The executors proved in the bankruptcy for 5,356*l.* 1*s.* 2*d.*, the difference between the amount of the legacy of 10,000*l.*, with which the bankrupt had been credited, and 4,643*l.* 18*s.* 10*d.*, the proportion due on abatement:—*Held*, that the legacy was not specific, and was subject to abatement, and that the proof must be admitted. *Richardson, In re; Thompson, ex parte*, 86 L. T. 25—Wright, J.

Loan to Trader—Sharing Profits—Postponement of Lender—Contract not in Writing.]—Section 3 of the Partnership Act, 1890, which provides that where money is advanced by way of loan to a person engaged or about to engage in business, on a contract that the lender shall receive a share of the profits, the lender, in the event of the borrower being adjudged bankrupt, shall not recover anything in respect of the loan until the claims of the other creditors of the borrower have been satisfied, is not confined to contracts in writing. *Fort, In re; Schofield, ex parte*, 66 L. J. Q.B. 824; [1897] 2 Q.B. 495; 77 L. T. 274; 46 W. R. 147; 4 Manson, 234—C.A.

Married Woman—Surety for Husband—Right of Exoneration—Money Advanced for Husband's Business—Onus of Proof.]—A claim by a wife against her husband's estate in bankruptcy for exoneration in respect of a mortgage of her property for his benefit is not affected by the provision in section 3 of the Married Women's Property Act, 1882, as to the postponement of the wife's claim to that of other creditors in the case of money advanced to the husband for the purpose of his trade or business. *Cronmire, In re; Cronmire, ex parte*, 70 L. J. K.B. 310; [1901] 1 K.B. 480; 84 L. T. 342; 8 Manson, 140—C.A.

It will not be assumed in the absence of proof to the contrary that an advance by a wife to her husband was for the purpose of his business. *Ib.*

Per VAUGHAN WILLIAMS, L.J.—CAVE, J., in *Genese, In re; District Bank of London, ex parte* (55 L. J. Q.B. 118; 16 Q.B. D. 700), did not intend to decide that according to the true construction of section 3 of the Married Women's Property Act, 1882, it was intended to throw on the wife in all cases the burthen of proving that money lent by her to the husband was not lent for the purposes of his trade or business. *Ib.*

—Loan by Debtor's Wife for Purpose Unconnected with his Trade or Business.]—Section 3 of the Married Women's Property Act, 1882—which provides that money lent by a wife to her husband "for the purpose of any trade or business carried on by him, or otherwise," shall be treated as assets of the husband's estate in case of his bankruptcy, subject to the wife's claim to a dividend after the claims of other creditors for valuable consideration have been satisfied—does not apply to a loan by a wife to her husband for a purpose unconnected with his trade or business, and consequently a wife is entitled to prove against her husband's estate for such a loan *pari passu* with other creditors of her husband. *Tidswell, In re; Tidswell, ex parte* (56 L. J. Q.B. 548), approved. *Clark, In re; Schulze, ex parte*, 67 L. J. Q.B. 759; [1893] 2 Q.B. 330; 78 L. T. 735; 46 W. R. 678; 5 Manson, 201—C.A.

Money-lender—Proof of Debt by—Withdrawal of Proof—Jurisdiction of Bankruptcy Court to grant Relief under Money-lenders Act, 1900.]—A bankrupt was indebted to a money-lender for money lent, the money-lender holding a security for the debt. The creditor lodged a proof in the bankruptcy for the debt stating the amount at which he valued the security. The proof was not made use of in voting at any meeting of creditors. The trustee having required the creditor to give up the security under Schedule I. rule 12 of the Bankruptcy Act, 1883, he gave notice of withdrawal of the proof and of intention to correct the valuation by a new proof. The trustee then moved the Bankruptcy Court for an order for an account and for relief under the Money-lenders Act, 1900:—*Held*, that the jurisdiction of the Bankruptcy Court to exercise the powers of the Money-lenders Act arises only under section 1, sub-section 3 of that Act, and is confined to cases in which there is an application before the Court relating to the admission or amount

of a proof by a money-lender; that, as the proof had not been used either for purposes of voting or of claiming a dividend, the creditor was at liberty to withdraw it without the consent either of the trustee or of the Court; and that, as there was consequently no proof by the money-lender before the Court, it had no jurisdiction to entertain the motion. *Attree, In re; Ward, ex parte*, [1907] 2 K.B. 868; 23 T. L. R. 734—D.

Order and Disposition—Debtor's Petition—Goods Left with Bankrupt—Adjudged Property of Trustee by Order of Court—Proof by True Owner for Damages for Breach of Bailment.—Where a debtor was adjudicated a bankrupt on his own petition, and certain goods which had been left with him to be sold, or returned if not sold, were by order of the Court adjudged to be goods in the order and disposition of the bankrupt with the consent of the true owner, and to pass to the trustee as property divisible amongst the creditors under section 44, subsection 2 (iii.) of the Bankruptcy Act, 1883, the owner was allowed to prove in the bankruptcy for the damage he had sustained by reason of his goods not having been returned to him according to the terms of the bailment. *Ewall v. Partridge* (8 Term Rep. 308) and *Edmunds v. Wallingford* (54 L. J. Q.B. 305; 14 Q.B. D. 811) applied. *Button, In re; Haviside, ex parte*, 76 L. J. K.B. 833; [1907] 2 K.B. 180; 97 L. T. 71; 14 Manson, 180; 23 T. L. R. 422—C.A.

The presentation by the bankrupt of his own petition was not an abuse of the process of the Court or in any way wrongful. *Id.*

Partnership—Loan to on Terms of Sharing Profits—Subsequent Advances without Express Stipulation as to Rate of Interest—Dissolution of Partnership—Subsequent Agreement with Continuing Partner Continuing Loan at Fixed Rate of Interest—Postponement.—In 1893 A entered into an agreement with a partnership firm consisting of B and C, under which she advanced to the firm a sum of 1,600*l.* on terms of sharing profits. A subsequently made further advances without express stipulations as to rate of interest. In June, 1895, the partnership was dissolved by deed to which A was a party, and it was thereby agreed that B should continue the business, and be solely responsible for A's advances. In August, 1895, an agreement was entered into between A and B under which fresh advances were made by A to B, and it was thereby agreed that except as regarded the 1,600*l.* all A's advances should bear a fixed rate of interest. B afterwards became bankrupt and A sought to prove for all her advances:—*Held*, that except as to advances made after August, 1895, A was postponed under section 3 of the Partnership Act, 1890, to the other creditors of the bankrupt. *Mason, In re; Bing, ex parte*, 68 L. J. Q.B. 466; [1899] 1 Q.B. 810; 80 L. T. 92; 47 W. R. 270; 6 Manson, 169—Wright, J.

—Sale of Goodwill—Payment by Annuity.—S. sold to G. the trade name and goodwill of the business carried on by her late husband, whose sole executor and legatee she was. Part of the consideration for the sale was the payment to her of an annuity of 2,650*l.*, which was not expressed to be payable out of the profits of the business. In G.'s bankruptcy S. put in a proof for 29,000*l.*, the capitalised value of the

annuity:—*Held*, that the annuity was not a share of the profits of the business within the meaning of section 3 of the Partnership Act, 1890, and that the proof was not postponed until the claims of the other creditors should have been paid in full. *Gieve, In re; Shaw, ex parte*, 80 L. T. 737; 47 W. R. 616; 6 Manson, 249—C.A.

Shares in Company—Agreement to take—Disclaimer—Measure of Damages—Company in Liquidation.—Where a person who has agreed to take shares in a company becomes bankrupt, and his trustee in bankruptcy disclaims the agreement, the company, or its liquidator, if the company is in liquidation, is not entitled to prove in the bankruptcy for anything more than damages; and such damages are not to be assessed on the basis of the agreement being in existence and specifically enforceable, the disclaimer having operated to determine the agreement. *Hooley, In re; United Oranance and Engineering Co., ex parte*, 68 L. J. Q.B. 993; [1899] 2 Q.B. 579—Wright, J.

Stock Exchange Transactions—Bankruptcy of Broker—Debt for Differences Due to Customer—Collection of Assets by Official Assignee of Stock Exchange—Surplus after Payment of Stock Exchange Creditors—Claim by Trustee in Bankruptcy.—A sum of money due by a broker to his customer in respect of ascertained differences on speculative Stock Exchange transactions is not the specific money of the customer or in any way impressed with a special trust or lien in his favour, but is merely a book-debt of the broker which, upon the bankruptcy of the broker, passes to his trustee in bankruptcy as part of his general assets. The only remedy, therefore, of the customer is to prove in the bankruptcy of the broker for the amount. *King v. Hutton*, 68 L. J. Q.B. 975; [1899] 2 Q.B. 555; 48 W. R. 95—Phillimore, J.

—Default of Broker—Liquidation by Official Assignee of Stock Exchange—Receipt of Dividend by Creditor—Right of Creditor to Present Petition for Balance of Debt.—Where the assets of a defaulting member of the Stock Exchange are distributed by the official assignee of the Stock Exchange, a member being a creditor who has received a dividend in such distribution is not thereby precluded from suing the defaulter for the balance of his debt or from presenting a petition in bankruptcy against him in respect of such balance. *Mendelssohn v. Ratcliff*, 73 L. J. K.B. 1027; [1904] A.C. 456; 91 L. T. 204; 20 T. L. R. 670—H.L. (E.)

—Bankruptcy of Broker—Debt for Differences Due to Customer—Collection of Assets by Official Assignee of Stock Exchange—Surplus after Payment of Stock Exchange Creditors—Claim by Trustee in Bankruptcy.—A stockbroker opened a speculative account in certain shares with the defendant. He bought, for the defendant, certain of these stocks from jobbers on the Stock Exchange, and sold them again on behalf of the defendant to certain other jobbers. The account between the stockbroker and the defendant shewed a balance of profit in favour of the defendant in respect of these transactions. The stockbroker, having closed the contracts by passing on the ticket of the stocks which he had sold to the jobbers, absconded owing large

sums to outside creditors, and was then officially declared a defaulter on the Stock Exchange. The official assignee of the Stock Exchange under the rules of the Stock Exchange closed all the defaulting stockbroker's contracts which were then open, and having collected a certain sum due to the stockbroker from various jobbers, discharged all Stock Exchange liabilities, and then had a surplus available for distribution among outside creditors. This surplus included the balance of the differences which would have been payable to the defendant if the stockbroker had not become insolvent and been adjudicated a bankrupt. The plaintiff, who was the trustee in bankruptcy, claimed the balance as part of the stockbroker's general assets, whilst the defendant claimed it on the ground that it never belonged to the stockbroker at all, but was impressed with a trust in his (the defendant's) favour:—*Held*, that the relation between the stockbroker and the defendant was simply that of debtor and creditor, so that the balance was a mere general debt due from the stockbroker to the defendant, for which the defendant must prove in the bankruptcy in the ordinary way. *King v. Hutton*, 69 L. J. Q.B. 786; [1900] 2 Q.B. 504; 83 L. T. 68; 7 Manson, 393—C.A. Affirming, 48 W. R. 95—Phillimore, J.

— **Contracts for Differences—Bona fide Purchase of Stock with Profits of Gaming Transactions—Non-delivery—Damages.**—Gaming contracts for differences on sales and purchases of stocks entered into between the respondent and the debtor having resulted in a profit to the respondent, the respondent directed the debtor to use the profit for a *bona fide* purchase of stock, and the debtor thereupon sent a contract note to the respondent to the effect that he had sold the stock to him and debited him with the price of the stock, stamp, and fees. The debtor died before the stock was delivered, and the respondent claimed to prove against his estate for damages for the non-delivery of the stock:—*Held*, that the transaction was not equivalent to a payment by the debtor to the respondent of the price of the stock, and that the respondent was precluded by the Gaming Act, 1845, s. 18, from so proving. *Cronmire, In re; Waud, ex parte*, 67 L. J. Q.B. 620; [1898] 2 Q.B. 383; 78 L. T. 483; 46 W. R. 679; 5 Manson, 30—C.A. *And see* GAMING.

— **Deposit of Money as "Cover"—Recovery of Deposit.**—The respondent had deposited with the debtor money as cover to secure him against loss upon the gaming transactions. The money was never required or appropriated for that purpose, and the events in respect of which it was deposited had resulted in favour of the respondent:—*Held*, that the respondent was entitled to prove for it against the estate of the debtor. *Ib.*

Trustee and Cestui que Trust—Unauthorised Investment—Bankruptcy of Trustee—Dealing by Cestui que Trust with Investment—Valuing Security—Separate and Joint Estates—Damages.—Prior to the bankruptcy of Lake, who was a trustee of a settlement and also surviving partner of a firm of Lake & Lake, who were solicitors to the trust, a sum of

5,500*l.*, part of the trust funds, had been invested by him or his firm on a mortgage which was not authorised by the trust. New trustees of the settlement were appointed, who, without any notice to the trustee in bankruptcy, compromised an action brought by the mortgagor to set aside the mortgage. They then claimed to prove in the bankruptcy against both the separate estate of Lake and the joint estate of the firm, without valuing and giving credit for the benefit acquired under the compromise:—*Held*, on the equitable principle that a trustee who has made an unauthorised investment is entitled to an opportunity of taking to it on replacing the fund, that the trustees of the settlement, by making the compromise without the concurrence of the trustee in bankruptcy, were disentitled to prove in the present form, but, *semble*, could put in fresh proofs for damages for loss to the trust estate by the improper investment. *Salmon, In re; Priest v. Uppleby* (42 Ch. D. 351), applied. *Lake, In re; Howe, ex parte*, 72 L. J. K.B. 213; [1903] 1 K.B. 439; 88 L. T. 31; 51 W. R. 496—Wright, J.

Voluntary Payment made to Creditor by Stranger.—A voluntary payment by a stranger to a creditor in respect of a loss occasioned by the debtor is not a payment for which the creditor is bound to give credit in his proof. *Roue, In re; Derenburg, ex parte*, 73 L. J. K.B. 594; [1904] 2 K.B. 483; 91 L. T. 220; 52 W. R. 628; 11 Manson, 130—C.A.

Withdrawal—Substitution of Fresh Proof.—A creditor may withdraw his proof at any time before the trustee in bankruptcy has notified that he has admitted or rejected it. *Roue, In re; Derenburg, ex parte*, 73 L. J. K.B. 594; [1904] 2 K.B. 483; 90 L. T. 290; 52 W. R. 336; 11 Manson, 130—Buckley, J. *See s.c.* in C.A., 73 L. J. K.B. 594; [1904] 2 K.B. 483; 91 L. T. 220; 52 W. R. 628; 11 Manson, 130.

(ii.) Double Proof.

Bills of Exchange—Valuation—Consolidation of Debts.—A holder of two bills of exchange proving in the bankruptcy of the last indorser for the aggregate sum of the two amounts secured by the bills cannot retain a surplus of over 20*s.* in the pound, obtained by proving against the estates of prior indorsers of the one bill, and attribute it to a deficiency on the other bill, but both bills for the purposes of proof must be treated as constituting distinct transactions, and the surplus on the one bill must be brought into account without regard to the deficiency on the other bill. *Morris, In re; James v. London and County Banking Co.*, 67 L. J. Ch. 534; [1898] 2 Ch. 413; 46 W. R. 627; 5 Manson, 216—Romer, J.

(iii.) Interest.

Debt Carrying Interest above 5 per cent.—Scheme of Arrangement.—Section 23 of the Bankruptcy Act, 1890, which provides that where a debt "has been proved" upon a debtor's estate, and such debt includes interest, such interest shall, for the purposes of dividend, be calculated at a rate not exceeding 5 per centum

per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts have been paid in full, is not retrospective in its operation and does not therefore apply to the case of a debt under a scheme of arrangement which was sanctioned by the Court before the passing of the Act. *Athlumney (Lord)*, *In re*; *Wilson ex parte*, 67 L. J. Q.B. 935; [1898] 2 Q.B. 547; 79 L. T. 303; 47 W. R. 144; 5 Manson, 322—Wright, J.

(iv.) *Set-off*.

Mutual Dealings—Administration Order—Debt becoming Payable after Death of Debtor.]

—Where there have been mutual dealings between a creditor and a debtor, the creditor is entitled as against the trustee in the administration of the insolvent debtor's estate, under section 125 of the Bankruptcy Act, 1883, to set off against his indebtedness a debt due to him from the insolvent, although it has only ripened into a debt after the insolvent's death. *Watkins v. Lindsay*, 67 L. J. Q.B. 362; 5 Manson, 25—Wright, J.

The doctrine established in the case of ordinary administrations by *Rees v. Watts* (25 L. J. Ex. 30; 11 Ex. 410), *Newell v. National Provincial Bank of England* (45 L. J. C.P. 235; 1 C.P. D. 496), and *Gregson, In re*; *Christison v. Bolam* (57 L. J. Ch. 221; 36 Ch. D. 223), does not apply in the case of an administration in bankruptcy. *Ib.*

— **Brewer's Lease—Right to Set Off.]**—A firm of brewers let a public-house on lease, one of the terms of which was that all debts due to the landlords should be deducted out of the valuation to be paid by any incoming tenant, and the landlords were by the lease obliged to pay the amount of the valuation at the determination of the tenancy in default of finding another tenant able and willing to do so. At the date of the act of bankruptcy the tenant was indebted to the landlords to an amount of about 500*l.*, and the amount of the valuation as subsequently ascertained was about the same sum:—*Held*, that the landlords were entitled to set off the amount owing by the tenant against the sum due from the valuation. *Rushforth, In re*; *Holmes, ex parte*, 95 L. T. 807; 14 Manson, 135; 23 T. L. R. 41—D.

— **Time for Ascertaining.]**—Under section 38 of the Bankruptcy Act, 1883, the date of the receiving order is the date to be looked at for the purpose of ascertaining what mutual debts, credits, and dealings were existing between the bankrupt and other persons. *Daintrey, In re*; *Mant and Mant, ex parte*, 69 L. J. Q.B. 207; [1900] 1 Q.B. 546; 82 L. T. 239; 7 Manson, 107—C.A.

— **Debt Falling Due to Estate of Bankrupt after Date of Receiving Order under Contract Entered into Before.]**—A debt due from the bankrupt to another person before the date of the receiving order can be set off against a debt falling due from that person to the bankrupt's estate after the date of the receiving order, but under a contract entered into before and existing at that date, *Ib.*

(v.) *Expunging Proof*.

Application to Expunge—Assessment to Income Tax—Power of Court to Reconsider.]—Where a debtor has been assessed to income tax in respect of profits which he alleges he has not earned, but has not appealed against such assessment, it is not competent to the Court at his instance in his subsequent bankruptcy to go behind the assessment as in the case of a judgment, but the Court will treat the assessment as conclusive. *Calvert, In re*; *Calvert, ex parte* (No. 3), 68 L. J. Q.B., 761; [1899] 2 Q. B. 145; 80 L. T. 504; 47 W. R. 523; 6 Manson, 256—Wright, J.

Scheme—Additional Proofs—Objection by Debtor—Motion to Expunge.]—Where, after a scheme has been accepted, additional proofs are made to which the debtor objects and the official receiver refuses either to reject or admit them, the debtor can by leave apply by motion against the creditors to expunge the proofs. *Calvert, In re*; *Calvert, ex parte* (No. 1), 80 L. T. 268; 6 Manson, 209—Wright, J.

Partly Secured Debt—Subsequent Appreciation of Security—Motion for Conditional Abandonment of Proof—Liberty to Re-introduce Proof.]—Although a creditor in bankruptcy, who has tendered a proof of his debt, is entitled to withdraw his proof before it has been adjudicated upon, finally and unconditionally, on the footing, as it were, that no such debt has ever existed—yet it is in the discretion of the Court to refuse him permission to withdraw it conditionally, or with the reservation that he is to be at liberty to re-introduce it should occasion arise at some subsequent time. *Clark, In re*; *Buenos Ayres and Pacific Railway, ex parte*, 70 L. J. K.B. 259; [1901] 1 K.B. 655; 84 L. T. 208; 49 W. R. 528; 8 Manson, 186—Wright, J.

Service of Notice of Motion out of the Jurisdiction.]—Where leave was given a debtor to serve notices of motion to expunge their proofs on creditors some of whom were out of the jurisdiction, it was directed that the Scotch creditors should be served with the notices of motion by registered post, and that the notices of motion on the creditors in Western Australia should be served on the solicitors in London who had lodged their proofs. *Calvert, In re*; *Calvert, ex parte* (No. 2), 80 L. T. 499; 6 Manson, 216—Wright, J.

21. OFFENCES BY DEBTOR.

Failure by Debtor to Discover Property to Trustee—Disclosure by Debtor at Private Meeting of Creditors—Admissibility of Evidence.]—Evidence that a debtor at a private meeting of his creditors held shortly before his bankruptcy disclosed all his property is admissible for the purpose of negating any intent to defraud, upon an indictment under section 11, subsections 1, 2, 4, and 6 of the Debtors Act, 1869, charging him with not fully and truly discovering to the trustee in bankruptcy all his property. *Rex v. Wiseman*, 71 L. J. K.B. 128; 85 L. T. 791; 50 W. R. 333; 66 J. P. 40; 9 Manson, 12; 20 Cox C.C. 144—C.C.R.

Fraudulent Debtor—Assignment for Benefit

of Creditors—Quitting England with Property Divisible among Creditors—“His property.”—A debtor executed a deed of assignment for the benefit of his creditors whereby he conveyed and assigned all his property, including sums of money, to a trustee upon trust to sell, and out of the money coming to his hands by the ways and means aforesaid to pay himself the cost of carrying the deed into effect, and then to distribute the same among the creditors of the debtor as therein provided. The deed was executed by the debtor and by the trustee, but was not executed by or communicated to any of the creditors. Except a sum of 161*l.*, which the debtor had in his possession at the date of the deed and which he retained, the trustee took possession of the debtor's effects and carried on his business. Soon afterwards the debtor quitted England, taking with him 120*l.*, part of the sum of 161*l.* Within four months afterwards he was adjudicated a bankrupt:—*Held*, that the 120*l.* was part of “his property” which ought by law to be divided amongst his creditors within the meaning of section 12 of the Debtors Act, 1869, and that he was rightly convicted of a felony under that section. *Reg. v. Creese* (43 L. J. M.C. 51; L. R. 2 C.C.R. 105) distinguished. *Rev. v. Humphris*, 73 L. J. K.B. 464; [1904] 2 K.B. 89; 90 L. T. 555; 52 W. R. 591; 68 J. P. 325; 11 Manson, 139; 20 Cox C.C. 620; 20 T. L. R. 425—C.C.R.

Undischarged Bankrupt—Obtaining Credit—Maximum Punishment.—By section 31 of the Bankruptcy Act, 1883, where an undischarged bankrupt obtains credit to the extent of 20*l.* or upwards from any person without informing such person that he is an undischarged bankrupt, “he shall be guilty of a misdemeanour, and may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtors Act 1869” . . . :—*Held*, that the section refers to the class of misdemeanours mentioned in section 13 of the Act of 1869, and not to the class enumerated in section 11, and that therefore the maximum punishment which can be inflicted upon a prisoner convicted under section 31 is imprisonment for one year with hard labour. *Rev. v. Turner*, 73 L. J. K.B. 46; [1904] 1 K.B. 181; 89 L. T. 676; 52 W. R. 214; 68 J. P. 15; 20 Cox C.C. 590; 20 T. L. R. 67—C.C.R.

Purchase of Goods on Credit—Fraudulent Intention of Debtor—Vendor's Right to Disaffirm Contract—Re-taking Possession of Goods after Notice of Act of Bankruptcy—Title of Trustee.—When goods have been purchased on credit by a debtor with the fraudulent intention of not paying for them, the vendor, on discovering this fact, is entitled to disaffirm the sale within a reasonable time and re-take possession of the goods, although he has knowledge of the commission of an act of bankruptcy by the debtor. *Eastgate, In re; Ward, ex parte*, 74 L. J. K.B. 324; [1905] 1 K.B. 465; 92 L. T. 207; 53 W. R. 432; 12 Manson, 11; 21 T. L. R. 198—Bigham, J.

The title of the trustee in bankruptcy to the goods which he finds in the bankrupt's possession is subject to the rights of third parties, including that of the vendors of the goods, to disaffirm the contract. *Ib.*

Prosecution of Bankrupt—Sanction of Com-

mittee of Inspection—No Order of Court to Prosecute—Costs.—A trustee in bankruptcy, with the sanction of the committee of inspection but without leave of the Court, prosecuted the bankrupt for an offence under section 11 of the Debtors Act, 1869, upon which he was tried and acquitted:—*Held*, that the trustee was not entitled to the costs of the prosecution out of the estate, so far as they were increased by his not having obtained the leave of the Court. *Houes, In re; White, ex parte*, 71 L. J. K.B. 705; [1902] 2 K.B. 290; 9 Manson, 252—Wright, J.

Discharge—Offences under Debtors Act, 1869—“Special reasons”—Statement of.—Section 8, sub-section 2 of the Bankruptcy Act, 1890, provides that on an application by a bankrupt for his discharge “the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act, 1869, . . . unless for special reasons the Court otherwise determines, and shall on proof of any of the facts hereinafter mentioned,” either (*inter alia*) refuse the discharge or suspend the discharge for a period of not less than two years:—*Held*, that the Judge in granting a discharge under the section to a bankrupt who has committed a misdemeanour under the Debtors Act, 1869, must state in his judgment the “special reasons” which determine him to grant the discharge. *Stevens, In re; Board of Trade, ex parte*, 67 L. J. Q.B. 932; [1898] 2 Q.B. 495; 79 L. T. 80; 47 W. R. 61; 5 Manson, 222—D.

The fact that the jury recommended the bankrupt to mercy is not a “special reason” within the meaning of the statute. *Ib.*

Jurisdiction of Court to decline to Consider Report.—When the official receiver makes a report to the Court under section 16 of the Debtors Act, 1869, as amended by section 164 of the Bankruptcy Act, 1883, stating that in his opinion the bankrupt has committed an offence, but does not ask for an order to prosecute the bankrupt, it is not competent for the Court to refuse to allow the report to be filed or to take it into consideration upon the ground that no application is made for leave to prosecute. The Court may decline to make any immediate direction on the point, but must consider the report. *Dunn, In re; Official Receiver, ex parte*, 71 L. J. K.B. 83; [1902] 1 K.B. 107; 85 L. T. 567; 50 W. R. 183; 9 Manson, 1—C.A.

Statement of Affairs—Admissibility in Criminal Proceedings.—*See CRIMINAL LAW.*

22. ARREST OF DEBTOR.

“Where debtor has absconded or is about to abscond.”—The Court has power, under section 25, sub-section 1 (a) of the Bankruptcy Act, 1883, taken with section 7 of the Bankruptcy Act, 1890, to order a warrant to issue for the arrest of a debtor when it appears to the Court that there is probable reason for believing that he has absconded or is about to abscond; and the words “has absconded,” when taken in conjunction with the words “about to abscond,” are without limitation as to time, and mean has absconded before, or is about to abscond after, a notice of bankruptcy has been issued or a petition presented

by or against him. *Reg. v. Northallerton County Court Judge*, 68 L. J. Q.B. 24; [1898] 2 Q.B. 680; 79 L. T. 327; 47 W. R. 68; 5 Manson, 300—C.A. See s.c. *sub nom. Skinner v. Same*, in H.L., *post*, col. 150.

Bond to Secure Attendance for Examination—Release of Debtor—Failure to Attend—Estrated Bond—Destination of Proceeds.]—Where a debtor, arrested under section 25 of the Bankruptcy Act, 1883, for failing to attend an examination ordered by the Court, has been released on giving a bond with sureties for his appearance for examination and attendance upon the official receiver as and when required, and the bond is subsequently estrated by reason of his failure to attend, the proceeds of the bond will, as a general rule, go to the debtor's estate, and not to the Crown. In any exceptional case the Registrar in bankruptcy may apply to the Judge as to the application of the money. *Gordon, In re; Salmond, In re*, 72 L. J. K.B. 587; [1903] 2 K.B. 164; 89 L. T. 25; 10 Manson, 253—Wright, J.

—Form of Bond.]—Form of bond to be given to the senior Registrar in bankruptcy for the time being approved. *Ib.*

23. DISQUALIFICATION BY BANKRUPTCY.

County Court—Composition with Creditors—Disqualification of Guardians.]—See POOR LAW.

Forfeiture of Life Interest.]—See CONDITION.

Member of Urban Council.]—See *Marginson v. Tildsley, post*, LOCAL GOVERNMENT.

24. DISCHARGE OF BANKRUPT.

Application for—Transfer from Registrar to Judge in Bankruptcy.]—The fact that a bankrupt's application for his discharge raises issues of great importance is a good and sufficient reason for transferring the hearing of such application from the Registrar to the Judge sitting in bankruptcy. The fact that the Registrar has been concerned in the making of the order for the prosecution of the bankrupt for offences committed under the Debtors Act, 1869, does not prevent the Registrar from determining the bankrupt's application for his discharge on its merits, and does not constitute a sufficient reason for transferring the hearing of such an application to the Judge. *Hooley, In re; Hooley, ex parte* (No. 2), 80 L. T. 495; 6 Manson, 176—Wright, J.

Assets not Equal to 10s. in the Pound—Burden of Proof—Opposition—Official Receiver's Report.]—Upon an application by a bankrupt for an order of discharge the onus lies upon the person opposing the grant of the discharge to prove the facts which entitle the Court under section 8, sub-sections 2 and 3 of the Bankruptcy Act, 1890, to refuse or suspend the discharge. The official Receiver's report is, however, by sub-section 5, made *prima facie* evidence, if there is any definite finding thereon. *Van Laun, In re; International Assets Co., ex parte*, 23 T. L. R. 371—C.A.

Liquidation by Arrangement—After-acquired Property—Bequest to Debtor—Right of Executors to Retain Debt.]—Section 54 of the Bankruptcy Act, 1869, which contains provisions dealing with the *status* of undischarged bankrupts, applies to liquidating debtors. *Williams, Ex parte* (44 L. J. Bk. 122; L. R. 20 Eq. 743), followed. *Powell, In re; Powell v. Powell*, 11 Manson, 22; 20 T. L. R. 374—Swinfen Eady, J.

Prior to 1882 a father had lent his son various sums of money, amounting in the whole to 1,133*l.*, for which the son had given him a bill of sale on his furniture. In 1882 the son filed a petition under the Bankruptcy Act, 1869, for liquidation of his affairs by arrangement. In 1883 the liquidation was closed, but the creditors refused to grant the son his discharge. The father sold the property comprised in the bill of sale for 182*l.*, but did not prove in the liquidation for the balance of his debt. In 1903 the father died, having by his will bequeathed to the son a share of his residuary estate, which amounted to about 2,000*l.* The executors claimed to retain the balance of the debt out of the son's share:—*Held*, that section 54 of the Act of 1869 applied, that the debtor not having obtained his discharge the balance of the debt was a subsisting debt, and that the debtor must therefore bring it into account, together with interest thereon, from the expiration of three years from the close of the liquidation until distribution. *Ib.*

Suspending Discharge—Bankrupt without Means or Prospects.]—An order suspending a bankrupt's discharge until a dividend of 10s. in the pound has been paid, ought not to be made unless there is a reasonable prospect that some funds or property will be forthcoming, and will be available for payment of the debts of the bankrupt. *Marley, In re; Marley, ex parte*, 82 L. T. 692—D.

Misdemeanour by Bankrupt—"Special Reasons"—Suspension of Discharge.]—A bankrupt was convicted at the Central Criminal Court of a misdemeanour under sub-sections 9 and 10 of section 11 of the Debtors Act, 1869, in having within four months of his bankruptcy made false entries in his books with intent to conceal the true state of his affairs. The Judge who tried the case postponed sentence till the following sessions, the bankrupt being in the meantime kept in custody, and then he released the bankrupt on his own recognisances in 50*l.* for his appearance to hear judgment. The transaction to which this conviction related was subsequently challenged by the trustee, on the ground of its being a fraudulent preference, but Wright, J., held that it did not amount to that:—*Held*, without giving any decision as to what in general would constitute "special reasons" within section 8, sub-section 2 of the Bankruptcy Act, 1890, that the way in which the Judge at the trial dealt with the case and the light thrown upon the debtor's conduct by the decision of Wright, J., constituted special reasons within the sub-section for hearing the bankrupt's application for a discharge. *Solomons, In re*, 73 L. J. K.B. 55; [1904] 1 K.B. 106; 89 L. T. 637; 52 W. R. 473; 10 Manson, 369—C.A.

Per VAUGHAN WILLIAMS, L.J.—It does not

follow from the fact that the Judge who has tried a case of misdemeanour under the Debtors Act, 1869, thinks that there are circumstances connected with the offence which go in mitigation of it, that the bankrupt is entitled to his discharge at once. The intention of the Act is that there should be a period of probation, so that the Court may be able to judge from his conduct during that time whether or no he ought to be allowed again the ordinary rights of trading. *Ib.*

Per ROMER, L.J.—On hearing an application for discharge on the ground of special reasons the Court ought not to disregard the conduct of the bankrupt in the bankruptcy, and especially with reference to the act of misdemeanour of which he may have been guilty. *Ib.*

Discharge Conditional on Bankrupt Consenting to Judgment—Refusal to Consent—Re-hearing.]

—The bankrupt was a captain in the army with no means but his pay, and his insolvency was due to damages given against him in an action for breach of promise of marriage, the plaintiff being the only creditor. The Registrar made an order for the bankrupt's discharge on condition of his consenting to judgment for 600*l.* being entered against him, to which he refused his consent. On a re-hearing of his application for a discharge under rule 240, sub-rule 3, the Registrar substantially repeated his former order. The bankrupt appealed, and asked for an order suspending his discharge for two years only under section 8, sub-section 2 (ii.) :—*Held*, that, though the bankrupt was not entitled to such an order as of right, it was a proper order to make under all the circumstances of the case. *Gaskell, In re; Gaskell, ex parte*, 73 L. J. K.B. 656; [1904] 2 K.B. 478; 91 L. T. 221; 11 Manson, 125; 20 T. L. R. 469—C.A.

Conditional Discharge on Payment by Bankrupt.]—The Court suspended the bankrupt's discharge for two years, subject to the condition that, after setting aside 500*l.* a year out of his earnings for his own support, he should pay the surplus, if any, to the trustee until the creditors received 10*s.* in the pound on their debts. *Dallmeyer, In re; Dallmeyer, ex parte*, 22 T. L. R. 445—C.A.

Revocation — Default — Jurisdiction.] — A debtor, having been adjudicated bankrupt, had applied for his discharge, which was granted by an order made under section 8, sub-section 2 (iv.) of the Bankruptcy Act, 1890, conditional on his consenting to judgment being entered against him for the amount due from him; and by the same order he was ordered to pay the amount by instalments. The debtor having made default in payment of the instalments, notwithstanding an intermediate order for payment of all arrears,—*Held*, that the Court had ample jurisdiction under section 104 of the Bankruptcy Act, 1883, to rescind or vary the order of discharge, which was conditional not merely on the consenting to judgment, but also on the performance of it by payment of the instalments. *Summers, In re; Official Receiver, ex parte*, 76 L. J. K.B. 707; [1907] 2 K.B. 166; 96 L. T. 791; 14 Manson, 101; 23 T. L. R. 465—Bigham, J.

Consent to Judgment Payable by Annual In-

stalments—Modification of Terms.]—An application to the Court after the expiration of two years from the date of an order of discharge under the Bankruptcy Act, 1883, s. 28, sub-s. 2, to modify the terms of the order, should be made by the bankrupt, and not by the trustee. *Roberts & Co., In re; Bonzoline Manufacturing Co., ex parte*, 73 L. J. K.B. 724; [1904] 2 K.B. 299; 91 L. T. 222; 11 Manson, 134; 20 T. L. R. 474—C.A.

The bankrupt is not disqualified from making such an application by the mere fact that he has failed to comply with the requirements of rule 244 of the Bankruptcy Rules, 1886 to 1890, requiring him to render accounts of his after-acquired property. *Ib.*

The Court will modify the terms of the order for the bankrupt's discharge where on the evidence there is no reasonable probability of his being in a condition to comply with the terms of the order originally made. *Ib.*

25. THE COURT IN BANKRUPTCY.

County Court—Jurisdiction—Matter not arising out of the Bankruptcy—Amount in Dispute Exceeding 200*l.*—A County Court Judge has not jurisdiction (except by consent) under section 102, sub-section 1 of the Bankruptcy Act, 1883, to refer a claim exceeding 200*l.* not arising out of the bankruptcy to his Registrar, to ascertain, by taking an account, the amount really due. *Healey, In re; Healey, ex parte*, 93 L. T. 704—D.

— Judge Exercising Bankruptcy Jurisdiction

—Certiorari.]—A County Court Judge exercising bankruptcy jurisdiction under the Bankruptcy Acts, and acting within that jurisdiction, has all the powers of a Judge of the High Court exercising his jurisdiction, and so long as such County Court Judge is exercising bankruptcy jurisdiction the remedy by which to question an order made by such Judge when exercising such jurisdiction, if such order requires alteration or amendment, is by application to the Judge himself, sitting in bankruptcy, and not by *certiorari* to bring up the order into the Queen's Bench Division. *Skinner v. Northallerton County Court Judge*, 68 L. J. Q.B. 896; [1899] A.C. 439; 80 L. T. 814; 63 J. P. 756; 6 Manson, 274—H.L. (E.) Affirming, *Reg. v. Northallerton County Court Judge, supra*, col. 147.

— Appeal from—Amount not Exceeding 50*l.*

—Leave to Appeal—High Court—Jurisdiction.]—As the word "Court" in Bankruptcy Rule 129 means the original Court exercising jurisdiction in bankruptcy, an appeal cannot be brought from the order of a County Court relating to property not exceeding 50*l.* in value except by leave of that Court, and the High Court cannot give leave to appeal when it has been refused by the County Court. *Everson, In re; Official Receiver, ex parte*, 74 L. J. K.B. 38; [1904] 2 K.B. 619; 91 L. T. 81; 52 W. R. 656; 11 Manson, 389—D.

— Decree for Foreclosure—Power to Make.]—

By consent of parties, the Bankruptcy Court will, in a proper case, make a decree for accounts and foreclosure usual in a foreclosure action in the

Chancery Division. *Salmon, In re; Trustee, ex parte*, 72 L. J. K.B. 125; [1903] 1 K.B. 147; 87 L. T. 654; 51 W. R. 288; 10 Manson, 22—Wright, J.

26. COSTS.

Taxation—Parties Litigating with Trustee—Review at Instance of Board of Trade.—Rule 124 of the Bankruptcy Rules, 1886 and 1890, which provides that “where any bill of costs, charges, fees, or disbursements of any solicitor, manager, accountant, auctioneer, broker, or other person has been taxed by a Registrar of a County Court, the Board of Trade may require the taxation to be reviewed by a Bankruptcy Taxing Master of the High Court,” applies only to the costs of persons employed by the trustee in the bankruptcy, and not to the costs of persons litigating with the trustee outside the bankruptcy. *Hunt, In re; Board of Trade, ex parte*, 67 L. J. Q.B. 247; [1898] 1 Q.B. 287; 46 W. R. 384; 4 Manson, 315—Wright, J.

— **Solicitor to Trustee.**—See *supra*, THE TRUSTEE.

Bill of Sale—Bankruptcy of Grantor—Costs of Preparation and Redemption.—The grantor of a bill of sale became bankrupt, and the grantee, having sold the chattels therein comprised, realised a sum more than sufficient to discharge the amount secured by the bill of sale. By an antecedent agreement the grantor was liable to pay all the expenses of the bill of sale, and the grantee now claimed to deduct out of the fund in his hands his solicitor's costs in connection with the preparation and redemption of the bill. The official receiver, as trustee, having paid the costs under protest, moved in the bankruptcy for a declaration that certain heads of these costs could not be charged:—*Held*, that the Court having jurisdiction in the bankruptcy had a discretionary power under the Bankruptcy Act, 1883, s. 102, to tax the costs of the grantee's solicitor, and that the third-party taxation provided by the Solicitors Act, 1843, s. 38, did not exclude this discretionary jurisdiction. *Ford, In re; Official Receiver, ex parte*, 84 L. T. 329—D.

Costs of Solicitors to Trustee “Realising assets”—“Costs of Petitioner”—Re-hearing and Appeal—Priorities.—The “taxed costs of the petition” payable under rule 125 of the Bankruptcy Rules, 1886, will include the costs of a re-hearing of the petition and an appeal therefrom, and will be payable according to the rule in priority to the general disbursements of a trustee, other than those actually incurred in realising the assets of the debtor. *Bright, In re; Wingfield & Blew, ex parte*, 72 L. J. K.B. 287; [1903] 1 K.B. 735; 10 Manson, 31—Wright, J.

Proceedings taken in Name of Official Receiver—Taxation—Remission to Allow Official Receiver to be Represented.—A litigant was allowed to take proceedings in the name of the official receiver. They were unsuccessful, and costs were given against the official receiver. The indemnity given by the litigant proved to be insufficient. No notice of taxation was given to the official receiver, and he was unrepresented except by the solicitor for the litigant:—*Held*, that the bill ought to be remitted for re-taxation. *Dillon, In re; Official Receiver, ex parte*, 88 L. T. 127—Wright, J.

Security for Costs—Applicant Resident Abroad.—The jurisdiction to order an applicant resident abroad to give security for costs ought only to be exercised in extreme cases, and, in the absence of any evidence of inability to pay, an order ought to be refused. *Pilling, In re; Chapman, ex parte*, 94 L. T. 682—Bigham, J.

— **Action by Bankrupt—Remitted to County Court.**—See col. 603.

27. APPEAL.

Appeal from County Court—Amount not Exceeding 50*l.*—Leave to Appeal—High Court—Jurisdiction.—As the word “Court” in Bankruptcy Rule 129 means the original Court exercising jurisdiction in bankruptcy, an appeal cannot be brought from the order of a County Court relating to property not exceeding 50*l.* in value except by leave of that Court, and the High Court cannot give leave to appeal when it has been refused by the County Court. *Everson, In re; Official Receiver, ex parte*, 74 L. J. K.B. 33; [1904] 2 K.B. 619; 91 L. T. 81; 52 W. R. 656; 11 Manson, 339—D.

— **Deposit as Security for Costs—Costs of Application to Dispense with Deposit.**—The security for costs which appellants are required to lodge by rule 131 of the Bankruptcy Rules, 1886, is security for all costs in relation to the appeal. Costs ordered to be paid by the appellant upon his application to dispense with the payment of the deposit are on taxation properly deducted out of the deposit. *Child, In re; Child, ex parte*, 84 L. T. 326; 49 W. R. 447—Wright, J.

— **Small Amount Involved.**—Observations on appeals in bankruptcy where the subject-matter of the appeal is of small value compared with the costs incurred.—*Per ROMER, L.J. Bastable, In re; Trustee, ex parte*, 70 L. J. K.B. 784; [1901] 2 K.B. 518; 84 L. T. 825; 49 W. R. 561; 8 Manson, 289—C.A.

— **Evidence—Judge's Note—Shorthand Writer's Transcript.**—On the hearing of an appeal the Judge's note may, by special order, be supplemented on vital points by a transcript of a shorthand writer's note, but the whole of the shorthand writer's note ought not to be referred to. *Sprange, In re; Official Receiver, ex parte*, 77 L. T. 808; 4 Manson, 335—D.

— **Dispensing with Security.**—Where there is no respondent to an appeal, the Court will dispense with the security required by rule 131. *Garrard, In re*, 92 L. T. 779—D.

Appeal to Court of Appeal—Service of Notice.—See APPEAL.

28. SUMMARY ADMINISTRATION.

Claim for over 200*l.* not Arising out of the Bankruptcy—Jurisdiction.—An order for sum-

mary administration having been made under section 121 of the Bankruptcy Act, 1883, the official receiver applied to the County Court Judge for an order against a third party to pay him 843*l.* 14*s.* This claim did not arise out of the bankruptcy:—*Held*, that the County Court had no jurisdiction. The jurisdiction is the same in summary as in ordinary bankruptcies. Rule 273 does not affect the right of third parties to claim the protection given by section 102 of the Bankruptcy Act, 1883. *Billing, In re; Official Receiver, ex parte*, 86 L. T. 689—D.

Release of Official Receiver—Appointment by Creditors of New Trustee.—Where the official receiver, acting as trustee in a summary administration in bankruptcy, has been released, the creditors have no power to appoint a new trustee for the purpose of any future administration of the estate, but the official receiver continues to act. *Leach, In re; Barnes, ex parte*, 69 L. J. Q.B. 931; [1900] 2 Q.B. 649; 83 L. T. 222; 49 W. R. 76; 7 Manson, 384—Wright, J.

29. ADMINISTRATION ORDER.

Judgment for Debt Incurred Subsequently to Order—Stay of Execution on Judgment.—Section 122, sub-section 5 of the Bankruptcy Act, 1883, which provides that, during the continuance of an administration order, "no creditor shall have any remedy against the person or property of the debtor," in respect of a debt which the debtor has notified to a County Court, "except with the leave of that county court, and on such terms as that court may impose," applies to subsequent creditors as well as to creditors before the date of the order. Therefore, a creditor whose debt has been incurred after and without notice of the date of the administration order is only entitled to be scheduled as a creditor under the order, unless the Court in its discretion gives him leave to issue execution, or the order has been set aside or rescinded. *Frank, In re* ([1894] 1 Q.B. 9), not followed. *Pearson v. Wilcock*, 75 L. J. K.B. 717; [1906] 2 K.B. 440; 95 L. T. 531; 13 Manson, 214; 22 T. L. R. 653—C.A.

30. ADMINISTRATION OF INSOLVENT ESTATES.

Retainer—Executor's Debt Exceeding Assets—Realisation—Retainer in Specie.—An executor whose debt largely exceeds the value of his testator's estate may retain the entire assets in specie without first realising them. *Woodward v. Darcey (Lord)* (1 Plowd. 184) and *Chapman v. Turner* (9 Mod. 268; s.c. Vin. Abr. "Executor," D 2, p. 71) discussed. *Gilbert, In re; Gilbert, ex parte*, 67 L. J. Q.B. 229; [1898] 1 Q.B. 282; 77 L. T. 775; 46 W. R. 351; 4 Manson, 337—Wright, J.

Where therefore a trader died insolvent and indebted to his executrix in a sum of 870*l.*, and leaving assets valued at 300*l.*, and the executrix had, prior to the making of an administration order under section 125 of the Bankruptcy Act, 1883, asserted her right to retain the assets in specie, the Court held she was entitled under the circumstances to do so. *Ib.*

— **Assets Paid to Official Receiver under Mistake of Law—Right to Recover.**—The mere fact of payment of assets collected by an executor into the hands of an official receiver acting as trustee under an administration order in bankruptcy does not necessarily bar the executor's right of retainer. *Rhoades, In re; Rhoades, ex parte*, 68 L. J. Q.B. 804; [1899] 2 Q.B. 347; 80 L. T. 742; 47 W. R. 561; 6 Manson, 277—C.A.

An insolvent debtor died indebted to his executrix in a sum of 604*l.* The executrix got in the estate and paid the money into a bank in her own name. An order was subsequently made for the administration in bankruptcy of the debtor's estate. Thereupon the official receiver required the executrix to pay over to him the assets which she had collected, and this she accordingly did. She then put in a proof for the 604*l.*, but, on being informed that she had a right of retainer, she withdrew it:—*Held*, that the executrix had not, by handing over the assets to the official receiver without reserving her right of retainer, lost that right; that she must be assumed to have retained the amount of her debt whilst the assets were in her possession; and that the official receiver must repay the 604*l.* *Ib.*

Rights of Execution Creditor.—Section 45 of the Bankruptcy Act, 1883, which restricts the rights of creditors under execution or attachment, does not apply to the administration of the estate of a deceased insolvent in pursuance of an administration order made under section 125 of the Act. *Hasluck v. Clark*, 68 L. J. Q.B. 486; [1899] 1 Q.B. 699; 80 L. T. 454; 47 W. R. 471; 6 Manson, 146—C.A.

Consolidation of Proceedings—Administration of Estate of Deceased Partner—Bankruptcy of Surviving Partner.—An order may be made consolidating the proceedings in the administration in bankruptcy of the estate of a deceased member of a firm of two partners with the bankruptcy of the surviving member of the firm. *Greaves, In re; Official Receiver, ex parte*, 73 L. J. K.B. 975; [1904] 2 K.B. 493; 91 L. T. 80; 52 W. R. 633; 11 Manson, 270; 20 T. L. R. 564—Bigham, J.

And see EXECUTOR AND ADMINISTRATOR.

31. DEED OF ARRANGEMENT.

Agreement for Composition with Creditors—"Creditors generally"—Form—Construction—Registration.—The Deeds of Arrangement Act, 1887, does not apply to companies registered under the Companies Acts. An agreement for a composition construed to be for the benefit of "creditors generally." *General Furnishing Co. v. Venn* (32 L. J. Ex. 220; 2 H. & C. 158) applied. *Rileys, Lim., In re; Harper v. Rileys, Lim.*, 72 L. J. Ch. 678; [1903] 2 Ch. 590; 89 L. T. 529; 51 W. R. 681; 10 Manson, 314—Byrne, J.

Execution by Foreign Debtor Abroad—Business Carried on in England through Agent—"Mobilia sequuntur personam"—Registration of Deed in England.—The word "debtor" in the Deeds of Arrangement Act, 1887, which is supplementary to the law of bankruptcy, means debtor subject to the Bankruptcy Acts, so that

a deed of assignment for the benefit of creditors executed by foreign debtors in the country of their domicile, who are possessed of goods in this country, in respect of a business carried on through an agent, does not require registration here, and there is no *lex loci rei sita* in respect of such goods to interfere with the operation of the maxim *Mobilia sequuntur personam*. Principle of the decision in *Cooke v. Charles A. Vogeler Co.* (70 L. J. K.B. 181; [1901] A.C. 102) adopted. *Dulaney v. Merry*, 70 L. J. K.B. 377; [1901] 1 K.B. 536; 84 L. T. 156; 49 W. R. 381; 8 Manson, 152—Channell, J.

Deed of Assignment for the Benefit of Creditors—Notice—No Dissent—Delay in Presenting Petition.—There is no duty cast on a creditor who receives notice of the deed of assignment for the benefit of creditors to express his dissent; nor does mere attendance at a meeting of creditors where such a deed is agreed to amount to approval. An unexplained delay of two months in presenting a petition or expressing dissent from the deed amounts to acquiescence. *Carr, In re; Jacobs, ex parte*, 85 L. T. 552; 50 W. R. 336—D.

A creditor, by his agent, attended a meeting of creditors held on November 4, 1901, at which a resolution was carried approving a deed of assignment for the benefit of creditors. The agent neither assented nor dissented, but stated that he must consult his principal, and expressly reserved his right to take bankruptcy proceedings. On November 30 he wrote to the trustee under the deed saying he was not satisfied with the debtor's affairs, and that he still reserved his right to take steps in bankruptcy. The trustee in reply asked him if he intended to proceed in bankruptcy to do so at once in order to save trouble and expense. No further communication was made to the trustee till after the filing of the petition on January 27, 1902:—*Held*, that there had been no acquiescence or unexplained delay. *Day, In re; Hammond, ex parte*, 86 L. T. 238; 50 W. R. 448—D.

Petition—Deed of Assignment—Clause Empowering Trustee to Pay any Dissenting Creditor in Full—Recognition of Deed by Petitioning Creditor—Estoppel.—A creditor who by his acts recognises the title of the trustee under a deed of assignment executed by a debtor for the benefit of his creditors cannot afterwards rely on the execution of the deed as an act of bankruptcy, notwithstanding that the creditor has all along refused to assent to it. *Brindley, In re; Brindley, ex parte*, 75 L. J. K.B. 211; [1906] 1 K.B. 377; 94 L. T. 116; 54 W. R. 301; 13 Manson, 1; 22 T. L. R. 155—C.A.

A clause in a deed of this character empowering the trustee to pay in full any creditor who may decline to execute or assent to the deed is an improper clause. *Ib.*

Assignment of Debtor's Property—Assent of Petitioning Creditor—Further Act of Bankruptcy—Estoppel.—At a meeting of creditors it was resolved that a deed of assignment of all the debtors' property should be executed for the benefit of their creditors. B., one of the creditors present, did not assent or dissent; but when a nominee of the debtors was proposed as trustee of the deed he objected, and suggested another name, which was adopted

by the meeting. B. served on the debtors a bankruptcy notice founded on a judgment debt, which the debtors failed to comply with:—*Held*, that, though B. might by his conduct be prevented from availing himself of the deed of assignment as an act of bankruptcy, yet he was not so bound by the deed as to be precluded from petitioning and obtaining a receiving order for non-compliance with the bankruptcy notice. Observations of LORD CAIRNS, L.J., in *Stray, In re; Stray, ex parte* (36 L. J. Bk. 7; L. R. 2 Ch. 374), followed. *Mills, In re; Mills, ex parte*, 75 L. J. K.B. 247; [1906] 1 K.B. 389; 94 L. T. 41; 54 W. R. 322; 13 Manson, 9—C.A. And see *Crow, In re; Collier, ex parte*, 97 L. T. 140; 14 Manson, 279—D.

Registration—Affidavit of Creditors' Names—Fraudulent Conveyance—Omission of Creditor's Name—Exclusion of Creditor.—A deed of arrangement may be duly registered under section 5 of the Deeds of Arrangement Act, 1887, although the affidavit made by the debtor under section 6 of the Act does not contain the names and addresses of all the creditors of the debtor. *Maskelyne v. Smith*, 72 L. J. K.B. 237; [1903] 1 K.B. 671; 88 L. T. 148; 51 W. R. 372; 10 Manson, 121—C.A.

A deed of arrangement is not necessarily void under 13 Eliz. c. 5, either because it contains provisions in favour of the debtor or because a particular creditor is intentionally excluded from its operation. *Ib.* *Alton v. Harrison* (38 L. J. Ch. 669; L. R. 4 Ch. 622) and *Boldero v. London & Co. Discount Co.* (5 Ex. D. 47) followed. *Spencer v. Slater* (48 L. J. Q.B. 204; 4 Q.B. D. 13) commented on. *Ib.*

Non-registration of Deed of Arrangement—Deed for Benefit of Certain Creditors Named Therein—Validity.—A deed of arrangement for the benefit of certain pressing creditors named therein, and not for the benefit of creditors generally, does not require registration under the Deeds of Arrangement Act, 1887. *Saumarez, In re; Salaman, ex parte*, 76 L. J. K.B. 828; [1907] 2 K. B. 170; 97 L. T. 121; 14 Manson, 170; 23 T. L. R. 477—C.A.

—“For benefit of creditors generally.”—A debtor, who was unable to pay his debts, called a meeting of his creditors, at which he stated that his liabilities were about 5,500*l.*, of which about 3,800*l.* was for money lent by relatives, and his assets about 900*l.* It was arranged that the relatives should withdraw their claims, that the creditors should accept a composition of 5*s.* in the pound, and that one P., who was present, should be the trustee for the creditors. Three days later a deed was executed between the debtor and P., by which the debtor, in consideration of 50*l.* paid to him by P., conveyed all his property to P. absolutely “and not as trustee” for the debtor or his creditors, and P. covenanted to pay in full all claims against the debtor which would have preferential right in bankruptcy, and to pay a composition of 5*s.* in the pound to the creditors on their debts not exceeding 1,800*l.* This deed was not registered:—*Held*, that the deed was a deed made for the benefit of the creditors generally within section 4 of the Deeds of Arrangement Act, 1887, and was void to all intents and purposes because it was not registered as required by the Act. *Hedges v. Preston*, 80 L. T. 847—C.A.

A debtor in consideration of an immediate advance of 100*l.* by one of two trustees, assigned all his personal estate by deed to the trustees upon trust to sell, and out of the proceeds, in the first place, to repay the 100*l.* to the advancing trustee, and, in the second, to discharge the debtor's debts and liabilities, and, in the third, to hold the residue in trust for the debtor's daughter. The creditors were not parties to the deed:—*Held*, that the primary object of the deed was to benefit the debtor and his daughter, and not the debtor's creditors generally, and, therefore, that the deed did not fall within the Deeds of Arrangement Act, 1887, and consequently was not void for want of registration. *Hobbs, In re; Official Receiver, ex parte*, 6 Manson, 212—Wright, J.

Composition Scheme — Debts Provable — Interest above 5 per cent.—It is competent to the parties to a composition scheme to exclude from the scheme the operation of section 23 of the Bankruptcy Act, 1890. Where a scheme provided *simpliciter* that a dividend should be paid "on the amount of the debts . . . provable against the estate of the debtor,"—*Held*, on the right construction, that the operation of section 23 was tacitly excluded. *Nepean, In re; Ramchand, ex parte*, 72 L. J. K.B. 407; [1903] 1 K.B. 794; 88 L. T. 477; 51 W. R. 559; 10 Manson, 156—Wright, J.

Payment of Debt to Assignee—Bankruptcy Petition—Right of Trustees to Payment of Debt—Receipt of Balance from Assignee—Election—Following Debt into Hands of Trustee.—Where a debtor pays to an assignee under a deed of assignment for the benefit of creditors generally a debt thereby assigned, and subsequently a petition in bankruptcy is presented and a receiving order made upon the act of bankruptcy committed in the execution of the deed, the trustee in bankruptcy may claim repayment from the debtor of the debt so paid to the assignee, unless the debtor can shew that the money paid by him, or some part thereof, has come to the hands of the trustee in bankruptcy. *Davis v. Petrie*, 75 L. J. K.B. 992; [1906] 2 K.B. 786; 95 L. T. 239; 13 Manson, 344; 22 T. L. R. 771—C.A.

Withdrawal of Debt Obtained by Debtor—Provisional Release of Debt — Circumstances of Release not Disclosed—Provable Debt—Sanction of Court.—Where in a scheme of arrangement between a debtor and his creditors the debtor proposes to pay a composition of 7*s.* 6*d.* in the pound on all provable debts, and that such creditors as released their debts should not be included in the payment of the composition, and it turns out that the debtor has himself entered into an arrangement with the majority of his creditors, with a view to facilitating the payment of the composition, that they should release their debts, but the circumstances under which the releases were obtained are not fully disclosed, and the releases are conditional on the scheme being approved by the Court, the Court will, in the exercise of its discretion, refuse to sanction the scheme. *Pilling, In re*, 72 L. J. K.B. 392; [1903] 2 K.B. 50; 88 L. T. 667; 51 W. R. 465; 10 Manson, 142—C.A.

E. A. B., In re (71 L. J. K.B. 356; [1902] 1 K.B. 457), distinguished. The observations of WRIGHT, J., and PHILLIMORE, J., in *Baines, In*

re; Board of Trade, ex parte (86 L. T. 691), upon *E. A. B., In re (supra)*, disapproved. *Ib.*

Forfeiture of Bequest.—See **CONDITION.**

BARRISTER-AT-LAW.

Counsel's Authority—Reference of Action—Limit of Authority.—Counsel has no authority to agree to the reference of an action in disregard of the conditions imposed by his client on such reference. *Neale v. Gordon-Lennox*, 71 L. J. K.B. 939; [1902] A.C. 465; 87 L. T. 341; 51 W. R. 140; 66 J. P. 757—H.L. (E.)

In a libel and slander action the plaintiff authorised her counsel to agree to refer the action on the understanding that all imputations on her moral character were publicly withdrawn in Court. This condition was not made known to the defendant's counsel:—*Held*, that counsel had exceeded his authority, that the agreement must be set aside, and the cause restored to the list for trial. *Ib.*

Contempt of Court by.—See **CONTEMPT OF COURT.**

Fees.—See **COSTS.**

BASTARDY.

Maintenance of Bastard—Marriage of Mother—Liability of Husband—Liability of Putative Father.—A bastard child may become "chargeable to a parish" within the meaning of section 5 of the Bastardy Laws Amendment Act, 1873, although its mother has married a man who is able to maintain the child. *Plymouth Guardians v. Gibbs*, 72 L. J. K.B. 33; [1903] 1 K.B. 177; 87 L. T. 685; 51 W. R. 157; 67 J. P. 61; 1 L. G. R. 48—D.

Woman Living Apart from her Husband—"Single woman"—Application for Bastardy Order in respect of Child born before Marriage.—A married woman, who has had an illegitimate child before her marriage, cannot, although living apart from her husband, apply for a bastardy order against the putative father of such child, as her husband is liable for its maintenance. *Featfield v. Childs*, 63 J. P. 117—D.

Application for Summons—Twelve Months' Limit—Exhaustion of Application by Hearing and Determination.—The hearing of a bastardy summons upon which no order is made, upon the ground that the evidence adduced by the complainant is insufficient, is a hearing and determination of the summons so as to exhaust the application upon which it is based, notwithstanding a statement by the magistrates that they do not dismiss the summons upon the merits, and that the complainant may apply again if she can bring further evidence in support of her claim. *Reg. v. Thomas* (8 L. T. 460) and *Staples v. Staples* (41 L. T. 347) followed. *Reg. v. Lancashire Justices* (29 L. T. 886) distinguished. *Reg. v. Robinson; Corbishley, Ex parte*, 67 L. J. Q.B. 510; [1898] 1 Q.B. 734; 78 L. T. 350; 46 W. R. 462; 62 J. P. 309—D.

Similar Applications made on Same Day to Different Justices.—Where an applicant for a bastardy summons makes three applications

against the same man on the same day to three different magistrates, no summons being issued upon any one of them at the time owing to the impossibility for the time being of effecting service, those three applications must be deemed to be one application, except for the single purpose of ensuring the issue of a summons as soon as an opportunity for effecting service occurs; and therefore, where a summons is issued upon one of such applications, the exhaustion of that one application by the hearing and determination of the summons is the exhaustion of all three. *Ib.*

Evidence of Mother—Corroboration.]—In corroboration of the evidence of the mother, who was a servant to the appellant's grandfather, in an application for an order against the appellant under section 4 of the Bastardy Laws Amendment Act, 1872, evidence was given that the appellant and respondent were seen "out together evenings in the lanes," and that after the birth of the child the appellant asked if the respondent "was going to swear the child": *Held* (*dissentiente* WILLS, J.), that this was corroboration in some material particular to satisfy section 4 of the Bastardy Laws Amendment Act, 1872. *Harvey v. Auning*, 87 L. T. 637; 67 J. P. 73—D.

Corroboration in "material particular".]—*Semble*, Under section 4 of the Bastardy Laws Amendment Act, 1872, the corroboration of the evidence of the mother "in some material particular by other evidence" must be evidence which has some relation to the conduct of the person charged—that is, the putative father—or have some relation to the probability of his being the father. *Refell v. Morton*, 70 J. P. 347—Lord Alverstone, C.J.

Affiliation Order—Application by Married Woman—"Single Woman."]—An application under section 3 of the Bastardy Laws Amendment Act, 1872, cannot be made by a married woman if she is living with her husband. *Jones v. Davies*, 70 L. J. K.B. 38; [1901] 1 K.B. 118; 83 L. T. 412; 49 W. R. 136; 65 J. P. 39—D.

Quashing Order—Action for Seduction.]—See ESTOPPEL.

BILL OF EXCHANGE.

1. *Statute*, 159.
2. *Signature*, 160.
3. *Drawer*, 160.
4. *Acceptance*, 160.
5. *Indorsement*, 160.
6. *Notice of Dishonour*, 162.
7. *Action upon*, 163.
8. *Cheque*, 163.
9. *Promissory Note*, 169.
10. *Master of Ship*, *by*, 172.
11. *Other Matters*, 173.

1. STATUTE.

6 Edw. 7 c 17 is the *Bills of Exchange (Crossed Cheques) Act*, 1906.

2. SIGNATURE.

Proof of Genuineness—Onus.]—Per LORD ARDWALL.—The onus of proving that the signature on a bill is genuine lies on the holder of the bill. *British Linen Co. v. Cowan*, 8 F. 704—Ct. of Sess.

3. DRAWER.

Agreement for Agent to Provide Drawer for Particular Purpose—Insertion of Name for Another Purpose—Liability of Third Person who Takes in Good Faith.]—In pursuance of an agreement made between the plaintiffs and R. for accommodation in relation to acceptances, the plaintiffs handed R. certain bills, which they had accepted, in which the dates and drawers' names were left blank, which under the agreement were to be provided by R. The bills were to be used by R. to recoup himself for advances to the plaintiffs, and for the purpose of raising money for the plaintiffs. R. used the bills for his own purposes, and, having filled in the dates, handed them to the defendant L., who, acting in good faith, inserted drawers' names. In an action against L. for conversion,—*Held*, that although L. took the bills in good faith, he was liable, as he took the bills with only an acceptor's name, but no drawer's name, and so ran the risk that R. had no authority, or only a limited authority, to allow a drawer's name to be put in the instrument; that here R. had no authority to insert a drawer's name under the circumstances, as the only authority he had to insert a name was that of a drawer who would take the bill for the plaintiff's benefit; and that the insertion of the words in the agreement, "drawers to be provided by the said R." did not extend the limited authority actually given. *Watkin v. Lamb*, 85 L. T. 483—Kennedy, J.

4. ACCEPTANCE.

"Approved acceptance."]—An "approved acceptance" in a mercantile contract means an acceptance to which no reasonable objection can be taken, and it is not competent to prove that by the custom of a particular trade it means an acceptance to which no objection has in fact been made. *McDowall and Neilson's Trustee v. Snowball Co.*, 7 F. 35—Ct. of Sess.

Trading Firm—Acceptance by Partner—Authority to Bind Firm.]—See PARTNERSHIP.

5. INDORSEMENT.

Right of Transferee to have Transferor's Indorsement—"Holder."]—The plaintiff agreed to advance a sum of money to one Chapman if the latter would procure a bill of exchange for the amount accepted by himself with the name of a responsible drawer attached. Chapman accordingly brought to the plaintiff a bill drawn by the defendant to his own order and accepted by Chapman, and the plaintiff made the advance. The bill was not indorsed by the defendant, but this was not noticed at the time of the advance. The defendant, who had received no consideration for the bill, gave it to Chapman for the purpose of his raising money upon it. The defendant having refused to indorse the bill,—*Held*, that the effect of the transaction was that the defendant was the "holder" of the bill within

section 2 of the Bills of Exchange Act, 1882, immediately after it had been accepted by Chapman, and that he transferred the bill, by means of Chapman, to the plaintiff, and that the plaintiff as the transferee was entitled to have the indorsement of the defendant and to recover against him on the bill. *Walters v. Neary*, 21 T. L. R. 146—C.A.

Incomplete Bill—Indorser Guaranteeing Debt—Circuity of Action—Estoppel.—The defendant T. being unable to pay for some pigs bought from the plaintiffs' testator, the defendant S. agreed to be responsible for the price of any pigs delivered to T. S. accordingly indorsed bills for the price of the pigs, and for several years transactions took place between the parties upon this footing. In each case the acceptance by T. and the indorsement by S. were placed upon a blank bill form, which was then handed to the plaintiffs' testator, who afterwards filled up the body of the bill. In an action upon two such bills filled up with the name of the deceased as drawer and indorser, *Held*, that, as the defendant S. had agreed to become liable for the price of pigs supplied to T., and the transactions between the parties had for several years proceeded on the faith of such agreement, and as the bills sued upon had been indorsed in pursuance of the agreement and made out with the authority of S., he was estopped from setting up the defence of circuity of action or that the bills were incomplete at the time when he indorsed them, and that the plaintiffs were entitled to recover. *Glenie v. Tucker*, 76 L. J. K.B. 874; [1907] 2 K.B. 507; 97 L. T. 434; 23 T. L. R. 596—A. T. Lawrence, J. Affirmed, 24 T. L. R. 177—C.A.

Person Signing otherwise than as Drawer or Acceptor—Subsequent Indorsement by Drawer.—A stranger to a bill who writes his name across the back of it before it has passed out of the hands of the drawer does not, by the operation either of section 55, sub-section 2 (a), or of section 56 of the Bills of Exchange Act, 1882, thereby become liable to the drawer upon failure of the acceptor to pay the bill at maturity. The provisions of section 56 as to the liability of a person who signs a bill otherwise than as drawer or acceptor are not satisfied unless the bill be complete on the face of it when signed by such person. *Jenkins v. Comber*, 67 L. J. Q.B. 780; [1898] 2 Q.B. 163; 78 L. T. 752; 47 W. R. 48—D.

The decision of the HOUSE OF LORDS in *Steele v. McKimlay* (5 App. Cas. 754) has not been deprived of authority, nor has the principle there laid down been altered by the Bills of Exchange Act, 1882. *Ib.*

Forged Indorsement—Cheque Payable to "Fictitious or non-existing person"—Knowledge or Intention of Drawer.—Where a cheque has been obtained by a fraudulent representation from the drawer, who has designated an existing person as the payee, intending that he only should be the payee, the cheque cannot, where the name of such payee has been forged, be treated as payable to bearer on the ground that the payee is a "fictitious or non-existing person" within the meaning of section 7, sub-section 3 of the Bills of Exchange Act, 1882. *Vinden v. Hughes* (74 L. J. K.B. 410; [1905]

1 K.B. 795) followed. *Macbeth v. North and South Wales Bank*, 75 L. J. K.B. 1026; [1906] 2 K.B. 718; 11 Com. Cas. 293—Bray, J. Affirmed, H.L., 77 L. J. K.B. 464.

Indorsement of Stolen Cheque—Transfer Valid by Law of Foreign Country—Conversion of Cheque in England.—By Austrian law the holder of a stolen cheque who takes the cheque *bona fide* for value and without gross negligence acquires a valid title to the cheque even though he takes it under a forged indorsement, and if the holder pays it into an English bank which presents it to the bank upon which it is drawn and receives the proceeds, the English bank is not liable to an action for conversion by the original owner of the cheque, inasmuch as the validity of the indorsement and the transfer of the cheque in Austria depend upon Austrian law. *Embiricos v. Anglo-Austrian Bank*, 74 L. J. K.B. 326; [1905] 1 K.B. 677; 92 L. T. 305; 53 W. R. 306; 10 Com. Cas. 99; 21 T. L. R. 268—C.A.

6. NOTICE OF DISHONOUR.

Bill Drawn by one Company and Indorsed in favour of another Company—Same Secretary to both Companies—Knowledge—Presumption of Notice.—It is not true as a general proposition that the knowledge of a fact which comes to a person as secretary of one company is notice of the fact to him as secretary of another company from the mere existence of the common relationship. The question in such a case is whether or not the information he receives as secretary of one company is received by him under such circumstances that it would be his duty to communicate it to the other company. *Fenwick, Stobart & Co., In re; Deep Sea Fishery Co., ex parte*, 71 L. J. Ch. 321; [1902] 1 Ch. 507; 86 L. T. 193; 9 Manson, 205—Buckley, J.

Draft Drawn by Branch Bank on Bank—Liability of Bank to True Owner.—A draft drawn by the manager of a branch of a bank as manager upon the bank is not a bill of exchange within the meaning of the Bills of Exchange Act, 1882, since it is not addressed by one person to another within the meaning of section 3, sub-section 1 of the Act, and section 17 of the Revenue Act, 1883, does not apply to such a draft, since it is not issued by a customer of a bank. *Ib.*

The A company drew a bill of exchange on the B company and indorsed it over to the C company. The same person acted as secretary both for the A company and for the B company. The bill was dishonoured, but no express notice of dishonour was given by the C company to the A company. *Held*, that notice of dishonour was not to be imputed to the A company by reason of the dual position occupied by the secretary. *Ib.*

Branch Bank—Notice Sent to Wrong Address.—The holders of a bill of exchange gave it for collection to a branch bank of a country bank which had several branches in different places. The branch bank sent the bill to a London bank for collection. The bill was duly presented for payment and was dishonoured on a Saturday. On the following Monday the London bank sent notice of the dishonour by

post to the country bank, but by mistake the letter containing the notice was addressed not to the branch bank from which the bill had been received, but to another branch of the country bank carrying on business in another place. The mistake in the address having been discovered, the London bank on the Tuesday morning sent a telegram addressed to the branch bank from which the bill had been received, notifying that it had been dishonoured:—*Held*, by A. L. SMITH, L.J., and RIGBY, L.J., that, as the two acts of sending the notice by post to the wrong address, but to the right person, and the telegram to the right address when the mistake was discovered, must be treated as one continuing act, due notice of dishonour had been given as required by section 49, sub-section 12 (b) of the Bills of Exchange Act, 1882; but *held*, by COLLINS, L.J., that as the several branches of a bank ought to be treated not as one and the same person, but as different persons, for the purpose of receiving notice of dishonour of a bill, the obligation imposed by the section had not been complied with. *Fielding v. Corry*, 67 L. J. Q.B. 7; [1898] 1 Q.B. 268; 77 L. T. 453; 46 W. R. 97—C.A.

7. ACTION UPON.

Payment by Bill—Dishonour—Bill Outstanding in Hands of Third Parties—Right of Creditor to Sue on Original Debt.—It is a good defence for a debtor sued on a debt for the discharge of which he had originally given a bill of exchange to plead that at the time at which the writ was issued against him the bill, although it had been dishonoured, was outstanding in the hands of a third party; and the fact that the creditor has subsequently obtained possession of it is not a sufficient remedy of the original defect in his cause of action. *Davis v. Reilly*, 66 L. J. Q.B. 844; [1898] 1 Q.B. 1; 77 L. T. 399; 46 W. R. 96—D.

Holder for Value—Solicitor to Drawer—Lien for Costs—Bill Overdue when Obtained by Solicitor.—The acceptors of a bill of exchange, for whose accommodation it was drawn, handed it to the drawer with instructions to him to get it discounted. The drawer endorsed it in blank and handed it to L., asking him to get it discounted. L. claimed to keep it, and the drawer thereupon sued him for detention of the bill. In this action the drawer obtained judgment, and the bill, which by this time was overdue, was handed over by L. to the drawer's solicitors. The solicitors knew of the circumstances under which the bill had been drawn. They retained possession of the document, over which they claimed a lien in respect of their bill of costs in the action by the drawer against L. Afterwards they brought an action upon the bill against the acceptors, claiming so much as would satisfy their lien:—*Held*, that the solicitors had no right of action against the acceptors. *Redfern v. Rosenthal*, 86 L. T. 855—C.A.

8. CHEQUE.

Cheque Payable to "Fictitious person"—Knowledge and Intention of Drawer.—For the

purpose of construing section 7, sub-section 3 of the Bills of Exchange Act, 1882, which enacts that "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer," the circumstances of the particular case must be looked at to see whether the name inserted in a bill or cheque is the name of a "fictitious person," having regard to all those circumstances. *Clutton v. Attenborough* (66 L. J. Q.B. 221; [1897] A.C. 90) held to be inapplicable. *Bank of England v. Vagliano* (60 L. J. Q.B. 145; [1891] A.C. 107) distinguished. *Vinden v. Hughes*, 74 L. J. K.B. 410; [1905] 1 K.B. 795; 53 W. R. 429; 21 T. L. R. 324—Warrington, J.

Forged Indorsement—Crossed Cheque to Order—Indorsement by Customer—Immediate Credit to Customer—Cheque Crossed by Banker—Draft drawn by Branch Bank on Head Office.—The protection afforded by section 82 of the Bills of Exchange Act, 1882, to a banker who in good faith and without negligence receives payment for a customer of a crossed cheque, is restricted to the process of collecting the cheque for the customer, and does not extend to a case in which the banker makes himself a holder for value, as, for example, by immediately crediting the customer with the amount of the cheque. *Capital and Counties Bank v. Gordon; London, City, and Midland Bank v. Gordon*, 72 L. J. K.B. 451; [1903] A.C. 240; 88 L. T. 574; 51 W. R. 671; 8 Com. Cas. 221—H.L. (E.)

A cheque is not a "crossed cheque" within the Act which is crossed for the first time by the recipient banker. *Ib.*

A draft drawn by a country branch of a bank on its head office, not being an instrument upon which an action can be brought by the drawer, is not a bill of exchange, but the banker who cashes it is entitled to the protection of section 19 (which is still unrepealed) of the Stamp Act, 1853. *Ib.*

An instrument constituting an order for the payment of money, and crossed, but payable only upon signature by the payee of a form of receipt at its foot, is not a bill of exchange within the meaning of the Act. *Ib.*

Indorsement of Stolen Cheque—Transfer Valid by Law of Foreign Country—Conversion of Cheque in England.—By Austrian law the holder of a stolen cheque who takes the cheque *bona fide* for value and without gross negligence acquires a valid title to the cheque even though he takes it under a forged indorsement, and if the holder pays it into an English bank which presents it to the bank upon which it is drawn and receives the proceeds, the English bank is not liable to an action for conversion by the original owner of the cheque, inasmuch as the validity of the indorsement and the transfer of the cheque in Austria depend upon Austrian law. *Embiricos v. Anglo-Austrian Bank*, 78 L. J. K.B. 993; [1904] 2 K.B. 870; 91 L. T. 652; 53 W. R. 92; 9 Com. Cas. 308; 20 T. L. R. 794—Walton, J.

Cheque Given in Part Payment before Performance of Contract Rendered Impossible—Misfortune beyond Control of either Party—Payment of Cheque Subsequently Stopped—

Right to Recover on Cheque.—The plaintiff, a refreshment contractor, agreed with the defendants, who were acting on behalf of the Navy League, to supply at an agreed rate the refreshments on a steamer hired by the defendants for the purpose of taking members of the Navy League to the naval review on the occasion of the King's Coronation. By the contract 300*l.* was to be paid by the defendants to the plaintiff on the Monday previous to the review day, and it was a term of the contract that, in the event of the cancellation of the review before any expense had been incurred by the contractor, there should be no liability on the part of the defendants. The plaintiff expended a small sum on extra knives, forks, &c., but nothing on refreshments. A cheque for 300*l.* was sent by the defendants to the plaintiff on the stipulated day, but was not paid by the plaintiff into his bank. On the next day, owing to the illness of the King, the review was cancelled. An endeavour was subsequently made to effect an arrangement between the parties, but ultimately the defendants stopped payment of the cheque before it was presented:—*Held*, in an action on the cheque, that upon the cheque being stopped the rights of the parties were the same as though it had never been given, and that the plaintiff was not entitled to recover. *Elliott v. Crutchley*, 72 L. J. K.B. 927; [1903] 2 K.B. 476; 89 L. T. 417—Ridley, J.

Provision for Payment in Advance "on account"—Impossibility of Performance of Contract—Right to Recover.—A contractor offered to supply refreshments for the defendants upon a steamship upon the occasion of a Naval Review on terms which included a provision that 300*l.* should be paid to the contractor "on account of the refreshments" on the Monday previous to the Review day. The defendants accepted the terms, subject to the following stipulation: "It is of course understood that in the event of the cancellation of the Review before any expense is incurred by the caterer, there shall be no liability on our side." On the day named the defendants sent a cheque for 300*l.* to the plaintiff. On the following day it became known that the Review could not be held in consequence of the illness of the King. The cheque was stopped by the defendants:—*Held*, in an action by the contractor on the cheque, that upon the true construction of the contract the parties had provided for the contingency of the performance of the contract becoming impossible, and that the defendants were only liable to repay to the contractor the amount of the expense he had incurred, and were not liable to pay the 300*l.* *Elliott v. Crutchley*, 73 L. J. K.B. 406; [1904] 1 K. B. 565; 90 L. T. 497; 52 W. R. 499; 20 T. L. R. 286—C.A.

Countermand of Payment—Telegram Placed in Bank's Letter Box—Telegram Overlooked—Notice.—Payment of a cheque can be countermanded by telegram. A cheque drawn upon the defendants' bank was given by the plaintiff on October 31 to a third person. Upon the same day the plaintiff, after banking hours, sent a telegram to the bank countermanding payment of the cheque. The bank being closed, the telegram was put into the bank letter-box. On the next morning the bank cashier, when

clearing the letter-box, by some accident left the telegram lying in the box, where it remained until the following morning, November 2, when it was opened. In the meantime the cheque was presented for payment on November 1, and was paid. In an action by the plaintiff to recover the sum so paid away as money had and received,—*Held*, by DARLING J., that the telegram having been delivered at the bank before the cheque was paid was a good countermand of payment, and that therefore the plaintiff was entitled to recover; by A. T. LAWRENCE, J., that the countermand of payment was not good until it was in fact brought to the knowledge of the bank, and that therefore the plaintiff was not entitled to recover. *Cur-tice v. London City and Midland Bank*, 23 T. L. R. 594—D. Reversed, C.A., 77 L. J. K.B. 34; [1908] 1 K.B. 293; 24 T. L. R. 176—C.A.

Receipt Annexed to Cheque—Unconditional Order to Pay—Negotiable Instrument.—The defendants, who were tobacco manufacturers, agreed with their customers to distribute among them annually for four years from April, 1902, their entire net profits on goods sold by them in the United Kingdom, and in addition the sum of 50,000*l.* each quarter in proportion to their purchases. The defendants paid the first quarterly bonus, and before the time for the second distribution arrived they sold their business and went into voluntary liquidation. They paid the second bonus to each customer by means of a cheque upon a banker, which was signed by the defendants and the liquidator, the cheque being stated as sent as the customer's share of the second and final bonus distribution. The cheque was payable to the customer or order, and at the foot were the words: "The receipt at back hereof must be signed, which signature will be taken as an endorsement of this cheque." On the back were the words: "Received from Mr. Joseph Hood (liquidator of Ogdens, Limited) this cheque for" the amount specified "being my share of the second and final bonus distribution of the company":—*Held*, that the cheque was a negotiable instrument, as the order to pay was unconditional, the words at the foot not being addressed to the banker and not affecting the order to them. *Nathan v. Ogdens, Limited*, 93 L. T. 553; 21 T. L. R. 775—A. T. Lawrence, J. See s.c. in C.A., *ante*, ACCORD AND SATISFACTION.

Negotiability—Condition to Pay "against cheque."—A cheque was given in the following form: "Pay to Messrs. K. & H. against cheque or [the word "order" was deleted] four hundred pounds sterling":—*Held*, that the words "against cheque" had no effect upon the negotiability of the cheque so given. *Glen v. Semple*, 3 F. 1134—Ct. of Sess.

Condition Attaching to Delivery—Proof of—Negotiation.—A condition attached to the delivery of a cheque that the drawer should be entitled to stop payment unless he received within a specified time the cheque of a third party to meet it, may be proved by parol, and is effectual against an indorsee who is not a holder in due course. *Semple v. Kyle*, 4 F. 421—Ct. of Sess.

Cheque Drawn by Three Persons—Liability

of Drawers to Bank.]—Three persons drew a cheque on a bank in favour of blank or order. None of the drawers had any funds at their credit with the bank at the time. The bank cashed the cheque, payment being made to one of the drawers, and opened an account in the names of the drawers, the account being debited with the amount of the cheque:—*Held*, that the drawers were jointly and severally liable to the bank for the amount of the cheque. *Henderson v. Wallace & Pennell*, 5 F. 166—Ct. of Sess.

Crossed Cheque—Receiving Payment for a Customer—Giving Credit to Customer before Cheque Cleared—Crediting Customer in Bank's Books—Negligence—Holding Out—Name of Individual same Name as Firm.]—A banker does not lose the protection of section 82 of the Bills of Exchange Act, 1882, merely because, before a crossed cheque paid in by a customer is cleared, he makes a credit entry in the bank's books or in the pass-book not communicated to the customer. *Capital and Counties Bank v. Gordon* (19 T. L. R. 462; [1903] A.C. 240) distinguished. It may be negligence on the part of a banker to receive payment for a customer of a crossed cheque marked "Account of payee," where the banker has information which may lead him to think that the account into which he is paying the amount of the cheque is not the payee's account. The defendants, however, *held* not negligent. *Bevan v. National Bank*, 23 T. L. R. 65—Channell, J.

—"Not negotiable"—"Customer"—Defective Title—Liability of Banker.]—A person accustomed to get cheques cashed at a bank, but having no account and no entry of debit or credit in any book or paper of the bank, is not a "customer" within the meaning of the Bills of Exchange Act, 1882, s. 82. Where, therefore, a bank gives cash to such person for a cheque obtained by fraud and marked "Not negotiable" and the cheque is honoured, the bank must refund the amount thereof to the drawer, its title being no better than that of the person for whom the cheque was cashed. *Great Western Railway v. London and County Banking Co.*, 70 L. J. K.B. 915; [1901] A.C. 414; 85 L. T. 152; 50 W. R. 50; 6 Com. Cas. 275—H.L. (E.)

—Forged Indorsement—Banker Receiving Payment for Customer—Receiving Bank—Collecting Bank—Cheques Crossed Generally—Specially Crossed by Receiving Bank to Collecting Bank—"To account of" Receiving Bank—Crediting Customer when Cheque Cleared.]—The defendants, who were bankers, received from their customer cheques crossed generally. These they crossed specially to other bankers, adding words directing payment to their own account. They then entered the amounts of the cheques to the credit of their customer in their own books, but not in his pass-book. They did not themselves present the cheques for payment, but handed them to the bankers to whom they had specially crossed them, who cleared the cheques, credited the defendants' account with the amount, and informed the defendants that they had done so. The defendants then entered the amounts of the cheques in their customer's pass-book, and allowed him to draw against them:—*Held*, that they had merely received

payment for a customer within the meaning of section 82 of the Bills of Exchange Act, 1882, and were protected by that enactment, although their customer, having forged the indorsements, had no title to the cheques. *Akroherri (Ashanti) Mines v. Economic Bank*, 73 L. J. K.B. 742; [1904] 2 K.B. 465; 91 L. T. 175; 52 W. R. 670; 9 Com. Cas. 281; 20 T. L. R. 564—Bigham, J.

—Collection—Negligence—Liability to True Owner.]—The Bills of Exchange Act, 1882, s. 82, provides that where a banker without negligence receives payment of a crossed cheque for a customer who has no title to the cheque, the banker shall not incur any liability to the true owner of the cheque. A cheque for 542l. was drawn in favour of the plaintiffs, or order, and crossed generally. The plaintiffs' secretary indorsed the cheque with the name of the plaintiffs, followed by his own name and the word "secretary," and, without the authority of the plaintiffs, paid the cheque into his account at the defendants' bank for collection. The secretary had never previously paid into his own account a cheque drawn in favour of the plaintiffs. The defendants, without making any enquiry as to the authority of the secretary to deal with the cheque, placed the amount to the credit of the secretary, and collected the proceeds from the paying bank:—*Held*, that the defendants had not acted without negligence, and were liable to the plaintiffs for the amount of the cheque. *Hannan's Lake View Central v. Armstrong & Co.*, 5 Com. Cas. 188—Kennedy, J.

—Agents to Collect Crossed Cheque—Holders for Value.]—J., a clerk of the plaintiff, stole certain cheques and forged the indorsement thereon. He paid them into his accounts at the defendants' bank, and his accounts were at once credited with them. The accounts were sometimes in credit and sometimes overdrawn. The stolen cheques were paid in at various times over a period of some four years. The cheques were, when paid in by J., (1) drawn in favour of G. or order on other banks and uncrossed; (2) drawn in favour of G. or bearer on other banks and uncrossed; (3) drawn on another branch of the defendants' bank, payable to order, and uncrossed; (4) drawn on another branch of the defendants' bank and crossed; (5) drawn on other banks, crossed, and marked "Not negotiable"; (6) drawn to order on other banks and crossed; (7) drawn to bearer on other banks and crossed. In collecting the cheques the defendants acted *bona fide* and without negligence. *Held*, that the defendants received all the cheques as agents to collect for their customer; that as to (1) and (2) they were liable for the conversion of the proceeds, but that as to (3), (4) they were protected by section 60 of the Bills of Exchange Act, 1882, and as to (5), (6), (7) they were also protected by section 82 of the same Act. *Gordon v. London, City, and Midland Bank*, 83 L. T. 762—Bucknill, J.

The defendants also received, crossed, a document addressed to a banker, stating: "Pay to — the sum named below on presentation of the subjoined receipt duly signed and dated." *Held*, that the defendants were entitled to the protection of section 82 of the Bills of Exchange

Act, 1882, by virtue of section 17 of the Revenue Act, 1883. Bankers are not deprived of the protection of section 82 of the Bills of Exchange Act, 1882, by reason of crossing, for the purpose of collection, crossed cheques received by them. *Ib.*

Cheque to Order Crossed by Banker.—Where a cheque payable to order is handed by a customer to a banker uncrossed the banker cannot claim the protection of section 82 of the Bills of Exchange Act, 1882, upon the ground that he crossed the cheque upon receipt of it. *Fenwick, Stobart & Co., In re; Deep Sea Fishery Co., ex parte*, 71 L. J. Ch. 321; [1902] 1 Ch. 507; 86 L. T. 193; 9 Manson, 205—Buckley, J.

Crossed Cheque on Branch Bank Paid into another Branch.—A cheque payable to order drawn upon one branch of a bank was paid crossed into another branch of the bank by a customer who had forged upon it the indorsement of the drawee. The bank dealt with the cheque in good faith, without negligence, and in the ordinary course of business by entries in their books debiting the drawer and crediting the customer paying the cheque in with the amount thereof:—*Held*, in an action by the drawee against the bank for conversion of the cheque, that, if the provisions of sections 79 and 80 of the Bills of Exchange Act, 1882, involving the employment of two banks in the transaction, were applicable, the bank had satisfied the requirements of those sections; and, if those sections did not apply, section 60 of the Act protected the bank from liability to the drawee. *Ib.*

Certification of Cheque—Payment under Mistake.—*See* BANKER.

Cheque Given Abroad for Gambling Debt Incurred There—Action in England.—*See* *Moulis v. Owen*, *post*, INTERNATIONAL LAW.

Illegal Consideration—Betting.—*See* GAMING.

Payment by Cheque.—*See* PAYMENT.

Payment of Forged Cheque.—*See* BANKER.

9. PROMISSORY NOTE.

Inchoate Instrument—Blank Stamped Paper Filled up by Agent in Excess of Authority—Note in Hands of Payee—Applicability of Common Law Doctrine of Estoppel—Holder in Due Course—Negotiation.—A person who has signed a blank stamped paper, and delivered it to an agent authorising him to fill it up as a promissory note for a certain amount payable to a named payee for the purpose of obtaining an advance from the payee is estopped from asserting against the payee, who has *bona fide* advanced money on the note, that the agent has exceeded his authority as to the amount, provided that the stamp covers the amount for which the note has been filled up. *Lloyd's Bank v. Cooke*, 76 L. J. K.B. 666; [1907] 1 K.B. 794; 96 L. T. 715; 23 T. L. R. 429—C.A.

Section 20 of the Bills of Exchange Act, 1882, whatever the true construction of it may be, has not the effect of preventing the common law doctrine of estoppel from being applicable to negotiable instruments. *Ib.*

Per FLETCHER MOULTON, L.J.—According to the true construction of section 20 of the Bills of Exchange Act, 1882, the estoppel created by the proviso to that section operates in favour of a payee of a promissory note as well as in favour of an indorsee. *Ib.*

Sum Payable “together with any interest that may accrue thereon”—“Sum certain.”—An obligation to pay a capital sum on demand “together with any interest that may accrue thereon” is not a promissory note, as, the rate of interest not being specified, the obligation is not for a sum certain, as required by the Bills of Exchange Act, 1882. *Lamberton v. Aiken*, 2 F. 189—Ct. of Sess.

Form—Joint and Several Agreement—Condition as to Rights of Holder.—A condition added to an instrument purporting to be a joint and several promissory note, “that no time given to or security taken from or composition or arrangement entered into with either party hereto shall prejudice the rights of the holder to proceed against any other party,” does not deprive the instrument of its character as a promissory note within the meaning of the Bills of Exchange Act, 1882. *Yates v. Evans* (61 L. J. Q.B. 446) approved. *Kirkwood v. Smith* (65 L. J. Q.B. 408; [1896] 1 Q.B. 582) overruled. *Kirkwood v. Carroll*, 72 L. J. K.B. 208; [1903] 1 K.B. 581; 88 L. T. 52; 51 W. R. 374—C.A.

Signature Obtained by Fraud—Negligence—Holder in Due Course.—Where a person has been induced to sign a promissory note by a fraudulent representation that he is witnessing a deed, and at the time he signs it he believes he is witnessing a deed, and has no knowledge of the existence of the promissory note, and the jury negative negligence upon his part in so signing the document, he is not estopped in an action brought against him upon the note by the payee of the note from relying upon the true facts as a defence, and such facts afford an answer to the action. *Lewis v. Clay*, 67 L. J. Q.B. 224; 77 L. T. 653; 46 W. R. 319—Lord Russell of Killowen, C.J.

The payee of a promissory note is not a “holder in due course” within the meaning of section 29 of the Bills of Exchange Act, 1882, inasmuch as he is not a person to whom, after its completion by and as between the immediate parties, the note has been negotiated. Even if the plaintiff had been a “holder in due course” he would not upon the facts stated above have been entitled to recover. *Ib.*

The law as declared by *Foster v. Mackinnon* (38 L. J. C.P. 310; L. R. 4 C.P. 704) is still in force, and has not been altered by the Act of 1882. *Ib.*

Alteration whether “material” or “apparent”—Insertion of Word “Limited” after Name of Company.—A promissory note was made in Liverpool and posted to Canada by which the defendants promised to pay to the order of “The Goderich Organ Co.” a certain sum. “The Goderich Organ Co.” having been converted into a limited company called “The Goderich Co., Lim.,” an officer of that company, without the consent or knowledge of the

defendants as makers of the note, inserted the word "Limited" on the face of the note and indorsed it on behalf of the limited company to the plaintiffs, who were holders in due course. There was sufficient space within which to write the word "Limited" on the face of the note, and the plaintiffs took it without any knowledge that it had been altered. The note being dishonoured on presentation, the plaintiffs sued to recover the amount due upon it:—*Held*, that the insertion of the word "Limited" on the face of the note, if a "material," was not an "apparent" alteration; that, consequently, by section 64 of the Bills of Exchange Act, 1882, the note was payable according to its original tenor—that is, was payable as if the word "Limited" had not been inserted; and therefore that the indorsement was irregular and did not entitle the plaintiffs to sue upon it. *Bank of Montreal v. Exhibit and Trading Co.*, 11 Com. Cas. 250; 22 T. L. R. 722—Phillimore, J.

Note Payable Abroad—Stamp Required when Sued on in England.—Section 72, sub-section 1 (a) of the Bills of Exchange Act, 1882, which provides that "where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue," does not exempt a bill or note made abroad from the necessity of complying with the requirements of the English Stamp Act when the bill or note is sued on in this country. *Id.*

Promissory Note Payable on Demand Given to Payee not for Negotiation—Note left in Possession of Payee after Payment by Maker—Indorsement to Third Party for Value by Payee after Payment—Note Obtained by Fraud from Indorsee by Payee and Returned to Maker—Maker no Better Title as against Indorsee than Payee—Estoppel—Holder "in his own right."—The words "in his own right" in section 61 of the Bills of Exchange Act, 1882, which provides that "when the acceptor of a bill of exchange is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged," do not mean merely "not in a representative character," as executor, for instance, but mean a holder having a right to the instrument not subject to that of any one else, but good against all the world. *Nash v. De Freville*, 69 L. J. Q.B. 484; [1900] 2 Q.B. 72; 82 L. T. 642; 48 W. R. 434—O.A.

The defendant at various periods made five promissory notes, payable on demand, which he handed to the payee, who promised not to negotiate them. The first three notes were given to the payee as security for money due to him, and the remaining two promissory notes were given in substitution for the first three, which the defendant allowed to remain in the payee's possession. The payee, in violation of his promise, indorsed the five promissory notes for value to the plaintiffs, and without notice of any defect in their title, who gave him a cheque for a sum exceeding the total amount of the promissory notes. This cheque was duly met by the plaintiffs. Subsequently the defendant paid the payee a sum of money for the purpose of discharging his liability on the last two promissory notes which were not handed back to the defendant by the payee, nor did the defendant then know that they had been

negotiated by the payee. The plaintiffs having pressed the payee for payment of the promissory notes, he gave them his cheque and received back the five promissory notes, which he immediately sent by post to the defendant, who received them the next day and destroyed them. The payee absconded, and the cheque given by him to the plaintiffs was dishonoured. The plaintiffs sued the defendant on the promissory notes, and alternatively claimed for a conversion of the same:—*Held*, that the defendant came within the rule laid down in *Lickbarrow v. Mason* (2 Term Rep. 63) as being the person who had enabled the payee to occasion the plaintiffs' loss, and that he must therefore sustain it. *Held also*, that even if there was any consideration for the transfer of the promissory notes by the payee to the defendant, yet under the circumstances he could acquire as against the plaintiffs no better title than the payee had. *Id.*

Blank Form with Signature Thereto—Delivery to Agent to Negotiate only on Receiving Instructions—Negotiation by Agent without Instructions—Liability of Principal—Estoppel.—The defendant on leaving Cape Colony for England gave to T. and W. a power of attorney to manage all his affairs in the colony. He also left with them two lithographed forms of promissory notes, containing the words "promise to pay," and signed by him, but left blank in all other respects, and unstamped, informing them that these forms were only to be filled up and negotiated on his sending them instructions from England to that effect. Subsequently T., without having received any instructions from the defendant, and in fraud of the defendant, filled up the notes and discounted them to the plaintiff, who acted in good faith and without notice of the limitation of T.'s authority. T. having converted the proceeds of the notes to his own use, and the plaintiff having brought an action upon the notes against the defendant,—*Held*, that, as the defendant had never authorized T. to fill up and issue the notes, he was not estopped from denying that they had been made with his authority, and that the plaintiff could not recover. *Smith v. Prosser*, 77 L. J. K.B. 71; [1907] 2 K.B. 735; 97 L. T. 155; 23 T. L. R. 597—C.A.

Note in Hands of Payee—Incomplete Instrument—Negotiation.—The defendant applied to A. for a loan of 15*l.*, and gave him his signature in blank on stamped paper authorising him to fill it up as a promissory note payable to himself for 15*l.* A. fraudulently filled it up as a promissory note for 30*l.* payable to the plaintiff, who took it and gave value for it without having any knowledge that A. had exceeded his authority. The amount of the stamp was sufficient for a note for 30*l.*:—*Held*, that there had been no negotiation of the note after completion to a holder in due course within the meaning of the proviso to section 20, sub-section 2 of the Bills of Exchange Act, 1882, and that the plaintiff was therefore not entitled to recover. *Herdman v. Wheeler*, 71 L. J. K.B. 270; [1902] 1 K.B. 361; 86 L. T. 48; 50 W. R. 300—D.

10. MASTER OF SHIP, BY.

Necessaries—Master's Bill of Exchange—Personal Liability.—The master of a vessel is

personally liable on a bill of exchange drawn by him upon the owners in payment of necessities ordered by him, for which he purports by the terms of the bill to hold his vessel, owners, and freight responsible. *The Ripon City* (66 L. J. P. 110; [1897] P. 226) followed. *Ceylon Coal Co. v. Goodrich*, 73 L. J. P. 104; [1904] P. 319; 91 L. T. 151; 9 Asp. M.C. 606—Gorell Barnes, J. See SHIPS AND SHIPPING.

11. OTHER MATTERS.

Acceptance by One Partner—Validity.]—See PARTNERSHIP.

Assignment of Debt—Negotiable Instrument—Notice.]—See ASSIGNMENT.

Bill Receivable—Whether a “book debt.”]—See BANKER.

Certifying Cheque.]—See BANKER.

Contemporaneous Oral Agreement to Renew—Admissibility.]—See EVIDENCE.

Delivery for Discount—Whether Property of Bank or Customer.]—See BANKER.

Directors of Company—Liability of—Bill Accepted—Omission of “Limited.”]—See *Derivative Co. v. Ashworth*, post, COMPANY.

Donatio Mortis Causa.]—See WILL.

Effect on Right of Stoppage in Transitu.]—See SALE OF GOODS.

Payment by Bill.]—See PAYMENT.

Proof—Valuation.]—See BANKRUPTCY.

BILL OF SALE.

1. *What is*, 173.
2. *Form*, 176.
3. *Non-Registration*, 180.
4. *Seizure and Sale*, 180.
5. *Absolute Bill of Sale*, 182.
6. *Other Matters*, 182.

1. WHAT IS.

Sale and Hire-Purchase Agreement—Loan Secured by Mortgage on Furniture.]—By an agreement dated May 4, 1899, the bankrupt agreed to purchase from S. a freehold hotel, together with the furniture, fittings, and effects on the premises, for 30,000*l.* The purchase was to be completed on May 15, 1899. Being in want of money to complete the purchase, the bankrupt applied to the defendants for a loan of 2,000*l.*, and offered as a security a fourth mortgage on the hotel. This the defendants refused, and suggested that the bankrupt should give them a bill of sale on the furniture, but this he declined to do. The defendants then offered to buy the furniture from S. and to let it to the bankrupt on a hire-purchase agreement, and to this the bankrupt agreed. Accordingly

on May 15, the day fixed for the completion, but before the actual completion, the defendants, out of their own moneys, purchased the furniture, fixtures, and effects from S., and after the completion they let the same to the bankrupt on a hire-purchase agreement. This agreement was not registered as a bill of sale. On December 13, 1900, a receiving order was made against the bankrupt, and he was subsequently adjudicated a bankrupt. The plaintiff, the trustee in bankruptcy, claimed the furniture as forming part of the bankrupt's estate:—*Held*, that the transaction was in substance a loan by the defendants to the bankrupt secured by a mortgage of the furniture, which was void for want of registration under the Bills of Sale Acts, 1878 and 1882. *Mellor's Trustee v. Maas*, 72 L. J. K.B. 82; [1903] 1 K.B. 226; 88 L. T. 50; 10 Manson, 26—C.A.

— Colourable Transaction—Inference of Fact—Registration.]—The appellant advanced money to a hotel keeper, who subsequently became bankrupt, on a hire-and-purchase agreement of the furniture, under which the purchase-money was to be paid by instalments. The agreement was not registered as a bill of sale:—*Held*, on the evidence, that the transaction was not a real sale, but a loan on security, and that the agreement was, for want of registration as a bill of sale, void against the trustee in bankruptcy. *Maas v. Pepper*, 74 L. J. K.B. 452; [1905] A.C. 102; 92 L. T. 371; 53 W. R. 513; 12 Manson, 107; 21 T. L. R. 304—H.L. (E.)

Letters of Lien—Secured Creditor—Order and Disposition—Bankruptcy.]—The debtors purchased goods in England for shipment to India upon the orders of a firm there. The goods had to be sent to bleachers to be prepared, and for the purpose of paying for the goods the debtors obtained advances from a bank, to whom they gave letters of lien stating that the advances were loans on the security of goods in preparation for shipment to the East, and that as security for the advance the debtors held the goods then in the hands of the bleachers on the bank's account and under lien to them. The bleachers' receipts for the goods were inclosed with the letters of lien. The debtors were adjudged bankrupt while some of the goods were in the hands of the bleachers, and other goods were in the debtors' warehouse, having been sent there from the bleachers, in respect of which letters of lien had been given to the bank. The trustee in bankruptcy claimed the goods upon the ground that the letters of lien were bills of sale, and therefore void as not being in the required form and not having been registered:—*Held* (STIRLING, L.J., *dubitante*), that the letters of lien came within the exceptions mentioned in section 4 of the Bills of Sale Act, 1878, as being documents “used in the ordinary course of business as proof of the possession or control of goods,” and therefore were not bills of sale. *Hamilton, Young & Co., In re; Carter, ex parte*, 74 L. J. K.B. 905; [1905] 2 K.B. 772; 93 L. T. 591; 54 W. R. 260; 12 Manson, 365; 21 T. L. R. 757—C.A.

Verbal Agreement for Sale of Goods—Valuation and Inventory—Lease of Chattels in Schedule.]—I. being indebted to H., agreed to sell his “valuation” at the M. S. Hotel to him, T. to value for both. T. then prepared and signed

an inventory and valuation for 930l. 12s. 7d., which was stamped and dated August 9, 1902. Subsequently, on September 12, 1902, H. granted I. a quarterly lease of the M. S. Hotel, and also let to him the fixtures and effects set out in the schedule, and at the end of the lease it was stated, "the whole of the valuation as per inventory is the property of J. R. Holmes and Sons, brewers, Bingley," and this was signed by I.:—*Held*, that neither the document of August 9 nor the lease of September 12 constituted a bill of sale, as there was a good sale, which passed the property independently of the documents. *Clapham v. Ives*, 91 L. T. 69—D.

Inventory with Receipt Attached—Sale by Sheriff—Receipt of Sheriff's Officer—Subsequent Hire of Goods to Execution Debtor.—In April, 1901, the goods of an execution debtor were seized by the sheriff under a writ of *fi. fa.* By consent of the execution debtor the goods were, on April 22, sold by the sheriff to the claimant for 240l., and the claimant paid this sum to the sheriff and took formal possession of the goods on the same day. The claimant, on April 25, let the goods on hire to the execution debtor, who remained in possession thereof, and on the same day the claimant wrote to the auctioneers who had been employed by the sheriff with a view to a sale by auction, asking them to send him an inventory of the goods. The claimant wished for the inventory in order that it might be attached to the hire agreement. The auctioneer sent to the claimant a receipt, dated April 27, and signed by the sheriff's officer, for the purchase-money of the goods, though the claimant had not asked for it, and also the inventory. In 1904 the goods were seized under a writ of *fi. fa.* issued under another judgment against the execution debtor:—*Held*, that it was the intention of all parties that the property in the goods should pass to the claimant on April 22, 1901, and that the sale was complete on that day; that neither the inventory and receipt nor the receipt alone were intended to be an instrument of transfer or a record of the transaction; and that, therefore, neither of them required registration as a bill of sale. *Stammers v. Margrett*, 21 T. L. R. 342—Walton, J.

Marriage Settlement—Assignment of Personal Chattels.—An assignment of personal chattels to the trustees of a marriage settlement in pursuance of a covenant by the husband to settle all his after-acquired property except business assets does not require registration under the Bills of Sale Act, 1878, being within the exception of a marriage settlement contained in section 4. *Wenman v. Lyon* (60 L. J. Q.B. 668; [1891] 2 Q.B. 192) and *Courcier v. Bardili* (27 Sol. J. 276) followed. *Reis, In re*; *Clough, ex parte*, 73 L. J. K.B. 929; [1904] 2 K.B. 769; 91 L. T. 592; 53 W. R. 122; 11 Manson, 229; 20 T. L. R. 547—C.A. See s.c. in H.L., *sub nom. Clough v. Samuel*, ante, BANKRUPTCY.

Mortgage—Trade Fixtures with Freehold—Power to sell Fixtures Separately—Validity.—The decisions under the repealed Bills of Sale Act, 1854—such as *Daglish, Ex parte* (42 L. J. Bk. 102; L. R. 8 Ch. 1072)—that a mortgage enabling the mortgagee to sell trade fixtures separately requires to be registered as a bill of sale under that Act, are not limited to mort-

gages of leaseholds, where the mortgagor's interest in the land is of a different nature to his interest in the fixtures, but apply also to mortgages of freeholds, where the fixtures are essentially parts of the freehold, and pass by the grant. *Johns v. Ware*, 68 L. J. Ch. 155; [1899] 1 Ch. 359; 80 L. T. 112; 47 W. R. 202; 6 Manson, 38—Romer, J.

2. FORM.

Grantor Generally Known by Assumed Name.]

—The Bills of Sale Act, 1878, contains no provision which makes it necessary to state the name of the grantor, and consequently the description of the grantor in the bill of sale, in the affidavit filed with the Registrar, and in the register, by a name other than that by which he is generally known, will not, in the absence of any intention to mislead creditors, invalidate the registration. *Stokes v. Spencer*, 69 L. J. Q.B. 792; [1900] 2 Q.B. 483; 83 L. T. 199; 49 W. R. 13; 7 Manson, 402—D.

Omission of Name of Grantor and of Attesting Witness in Filed Copy.]

—The omission of the name of the grantor of a bill of sale and of the name and address of the attesting witness in the copy thereof filed upon registration under section 10, sub-section 2 of the Bills of Sale Act, 1878—those particulars being contained in the affidavit filed with such copy—does not render the bill of sale void. *Thomas v. Roberts* (67 L. J. Q.B. 478; [1898] 1 Q.B. 657) followed. *Coates v. Moore*, 72 L. J. K.B. 539; [1903] 2 K.B. 140; 89 L. T. 8; 51 W. R. 648; 10 Manson, 271—C.A.

Affidavit with Description of Residence and Occupation—Manager of Business at Weekly Salary.]

—The description of a grantor of a bill of sale, in the affidavit filed under section 10, sub-section 2 of the Bills of Sale Act, 1878, as a married woman, does not satisfy the statutory requirement when her occupation as manager to a Court milliner is omitted. *Kemble v. Addison*, 69 L. J. Q.B. 299; [1900] 1 Q.B. 430; 82 L. T. 91; 48 W. R. 331; 7 Manson, 156—D.

Variation in Address of Grantors in Bill and Affidavit—Misdescription—Validity.]

In a bill of sale the grantors were described as W. D., of 25 B. F. Road; L. D., of 93 B. F. Road; K., of 94 W. Road. In the affidavit the addresses were: 23 B. F. Road; 23 B. F. Road; 24 W. Road:—*Held*, that the bill of sale was void for misdescription. *Murray v. Mackenzie* (L. R. 10 C.P. 625) followed. *Marks v. Derrick*, 80 L. T. 60—D.

Bill of Sale by Two Grantors not Jointly Interested in Chattels Assigned.]

—A bill of sale given by two or more grantors, who are not joint owners of the chattels comprised in the schedule to the bill of sale—each being owner of a portion only of the chattels, and the portion belonging to each not being distinguishable in the schedule—is void under section 9 of the Bills of Sale Act, 1882, as not being made in accordance with the form in the schedule to the Act. *Saunders v. White*, 71 L. J. K.B. 818; [1902] 1 K.B. 472; 86 L. T. 173; 50 W. R. 825; 9 Manson, 113—C.A.

Omission of Date in Filed Copy—"True copy."]

—The omission of the date of a bill of sale in the copy thereof filed upon registration under section 10, sub-section 2 of the Bills of Sale Act, 1878, does not necessarily render the bill of sale void; and the affidavit filed with the copy may be looked at to supply the omission. *Thomas v. Roberts*, 67 L. J. Q.B. 478; [1898] 1 Q.B. 657; 78 L. T. 712; 5 Manson, 70—D.

Omission of Address of Grantee—Grantee a Limited Company—Sufficiency of Description.]—The omission of the address of the grantee from a bill of sale given by way of security for the payment of money renders the bill void under section 9 of the Bills of Sale Act, 1882, as not being made in accordance with the form in the schedule to that Act, even where the grantee is a limited company, the name of which alone is ordinarily sufficient for purposes of identification. *Altree v. Altree*, 67 L. J. Q.B. 882; [1898] 2 Q.B. 267; 78 L. T. 794; 47 W. R. 60; 5 Manson, 235—D.

“Defeasance or condition”—Collateral Security—Guarantee by Third Person.]—A collateral security given by a third person upon the execution of a bill of sale, being a guarantee by that person for the payment of the principal advanced and the interest in case the bill of sale should prove insufficient or inoperative for that purpose, is not a “condition or defeasance” within the meaning of section 10, sub-section 3 of the Bills of Sale Act, 1878, so as to require registration. The Court refused to re-open the transaction under section 1 of the Money-lenders Act, 1900. *Oakes v. Green*, 23 T. L. R. 560—Channell, J.

Statement of Consideration—“Now paid”—Joint Debt of Grantor and Grantee—Unmatured Promissory Note.]—The consideration for a bill of sale is none the less truly set forth to be “now paid” because part is applied by the grantee in pursuance of a contemporaneous agreement in retiring a current promissory note upon which the grantor and grantee are jointly and severally liable. *Richardson v. Harris* (22 Q.B. D. 268) distinguished. *Wiltshire, In re; Eymon, ex parte*, 69 L. J. Q.B. 145; [1900] 1 Q.B. 96; 81 L. T. 616; 48 W. R. 256; 7 Manson, 145—D.

—True Consideration—Payment off of Prior Bill of Sale with Money Advanced.]—Where the money consideration as set forth in a bill of sale has been actually paid to the grantor it is not necessary to refer to the payment off of a prior bill of sale out of the proceeds. *Davies, In re; Equitable Investment Co., ex parte*, 77 L. T. 567; 4 Manson, 358—Wright, J.

—Provision for Repayment of Principal and Interest by Monthly Instalments of a Specified Amount—Interest.]—Where the principal and interest advanced on a bill of sale is to be repaid by regular instalments of a specified amount the holder is in the same position as if the date of repayment which can be gathered by calculation had been inserted in the bill of sale, and can only be redeemed by payment of interest to that date. *Id.*

—“Now due and owing.”]—A statement in a bill of sale that it is granted “in consideration of a sum of 90*l.* now due and owing” does not truly set forth the consideration for which it is

given, within the meaning of section 8 of the Bills of Sale Act, 1882, when the grantor already owes 40*l.* of the 90*l.* to the grantee, and only receives the additional 50*l.* on execution of the bill of sale. *Davies v. Jenkins*, 69 L. J. Q.B. 187; [1900] 1 Q.B. 133; 81 L. T. 788; 48 W. R. 286; 7 Manson, 149—D.

Omission of Receipt.]—The omission of an acknowledgment of the receipt of the consideration by the grantor is a departure from the form in the Act which renders the bill of sale void under section 9. *Id.*

Estoppel—Approbating and Reprobating the Transaction—Bill of Sale Invalid.]—The defendant gave a bill of sale over his goods to the plaintiffs. Subsequently executions were levied upon the goods, and on each occasion the plaintiffs, at the request or with the knowledge and concurrence of the defendant, successfully asserted their title to the goods under the bill of sale. In an action by the plaintiffs against the defendant, the latter alleged that the bill of sale was invalid, the consideration not being truly stated:—*Held*, that the defendant could not set up the invalidity of the bill of sale, as he could not both affirm and disaffirm the transaction. *Comitti v. Maher*, 94 L. T. 158; 22 T. L. R. 121—Kekewich, J.

Title Deeds Included in Schedule—Assigned as Personal Chattels without Creating Charge on Land.]—The owner of land may deal with the title deeds as mere personal chattels divorced from the land. *Dicta in Barton v. Gainer* (27 L. J. Ex. 390; 3 H. & N. 387) approved and followed. *Swanley Coal Co. v. Denton*, 75 L. J. K.B. 1009; [1906] 2 K.B. 873; 95 L. T. 659; 13 Manson, 353—C.A.

By a bill of sale the grantor assigned to the grantee the several chattels and things specifically described in the schedule thereto annexed then being in and about the Lion Hotel, by way of security for a loan; and thereby covenanted to insure the chattels and things, and to pay rates and taxes in respect of the premises in which the same might be. It was further provided that the grantee should be at liberty to remove and sell the same at the expiration of five days from seizure or taking possession thereof. The schedule specifically enumerated certain furniture and effects, and concluded with “Assignment of lease of the Lion Hotel, and all the muniments of title referred to in the said assignment”:—*Held* (COZENS-HARDY, L.J., dissenting), that, according to the true construction of the bill of sale, the title deeds included in the schedule were granted as personal chattels severed from the leasehold interest to which they related, and not with the intention of creating any charge thereon, and that therefore the bill of sale was not void under the Bills of Sale (1878) Amendment Act, 1882, s. 9. *Cochrane v. Entwistle* (59 L. J. Q.B. 418; 25 Q.B. D. 116) distinguished. *Id.*

Schedule—Live Farming Stock—Specific Description.]—The schedule to a bill of sale setting out the live farming stock assigned by the grantor as “2 horses, 4 cows, and 1 calf” is not such a sufficiently specific description as to satisfy section 4 of the Bills of Sale Act, 1882.

Davies v. Jenkins, 69 L. J. Q.B. 187; [1900] 1 Q.B. 133; 81 L. T. 788; 48 W. R. 286; 7 Manson, 149—D.

Time for Payment—"On or before a fixed day"—Defeasance of Security.—A bill of sale containing an agreement by the grantor to pay principal and interest "on or before" a fixed day is not void under section 9 of the Bills of Sale Act, 1882, as not being in accordance with the statutory form. *De Braam v. Ford*, 69 L. J. Ch. 82; [1900] 1 Ch. 142; 81 L. T. 568; 7 Manson, 28—C.A.

Covenant to Produce Last Receipt for Rent on Verbal Demand—Power to Seize.—By a bill of sale the grantor covenanted that when called upon by the grantee he would produce to him the policy of insurance and the receipt for the last premium and the last receipt for the rent, rates, and taxes. The bill of sale contained a proviso that the chattels thereby assigned should not be liable to seizure or to be taken possession of by the grantee for any cause other than those specified in section 7 of the Bills of Sale Act, 1882, and also a further proviso that if the chattels thereby assigned should be seized or taken possession of by the grantee in consequence of the breach of any of the covenants therein contained, the grantee should be at liberty to remove or sell the same as therein mentioned:—*Held*, that the power given to the grantee to seize in default of the production of the last receipt for rent, rates, and taxes, on a verbal demand, coupled with a further proviso as to compliance with the Act, did not render the bill of sale invalid as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882. *Bullock, In re; Ward, ex parte*, 68 L. J. Q.B. 953; [1899] 2 Q.B. 517; 81 L. T. 268; 48 W. R. 46—Wright, J.

Covenant to Replace Goods worn out—Term for Maintenance of Security.—A bill of sale on household goods is not void as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882, because it contains a covenant by the grantor to replace any articles worn out with others of equal value, such a covenant being one which can be included in the bill of sale as being for the maintenance of the security. *Seed v. Bradley* (63 L. J. Q.B. 387; [1894] 1 Q.B. 319) followed. *Coates v. Moore*, 72 L. J. K.B. 539; [1903] 2 K.B. 140; 89 L. T. 8; 51 W. R. 648; 10 Manson, 271—C.A.

Amount of Interest and Period when Amount Payable Uncertain.—By a bill of sale, in consideration of 50*l.* due and owing from the grantor to the grantee, the grantor assigned to the grantee certain chattels in the schedule "by way of security for the payment of the said sum of 50*l.*" The grantor further agreed that he would pay the grantee "the said principal sum with interest thereon after the rate of 5*l.* per centum per annum by the following instalments—namely, 10*l.* on the 25th Dec. 1903, and the like sum of 10*l.* on the 25th March, the 24th June, the 29th Sept., and the 25th Dec. in each year succeeding, until the whole amount be duly paid":—*Held*, that the bill of sale was void, as not being in accordance with the statutory form in the Bills of Sale Act (1878) Amendment Act, 1882. *Attia v. Finch*, 91 L. T. 70—D.

Repayment of Sum Secured—Ambiguity—Validity.—By a bill of sale the grantor assigned to the grantee certain chattels by way of security for the sum of 70*l.*, and interest thereon at the rate of 1*s.* in the pound per month, and the grantor further agreed that he would pay to the grantee the principal sum and the interest "by monthly payments of seven on the 25th day of every month" succeeding the date of the bill of sale:—*Held*, that it being clear from the terms of the deed that the sum intended to be inserted in the clause was "seven pounds," the bill of sale was not void as not being in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882. *Mourmand v. Le Clair*, 72 L. J. K.B. 496; [1903] 2 K.B. 216; 88 L. T. 738; 51 W. R. 589; 10 Manson, 261—D.

3. NON-REGISTRATION.

Apparent Possession—Bona Fide Purchase—Execution Creditor.—The owner of certain furniture, which was in a house occupied by him, sold it in 1903 to a company by an agreement which was not registered as a bill of sale, and in 1904 the company *bona fide* sold it to the original owner's mother by a document which was not registered. The furniture remained in the apparent possession of the original owner till 1905, when it was seized in execution under a judgment obtained against him. His mother having claimed the furniture,—*Held*, that as she could not shew either a registered title or that she had taken possession so as to render registration unnecessary, the title of the execution creditor must prevail. *Hopkins v. Gudgeon*, 75 L. J. K.B. 452; [1906] 1 K.B. 690; 94 L. T. 578; 54 W. R. 419; 13 Manson, 363—D.

Goods not in Apparent Possession.—The bankrupt, being indebted to a friend, and having no property but her furniture, transferred the furniture in satisfaction of the loan, and carried out the transaction by documents which were found in fact to constitute an absolute bill of sale. Subsequently the sheriff seized the goods in execution, and was actually in possession when the bankrupt filed her own petition. The trustee in bankruptcy claimed the furniture, and sought to set aside the bill of sale as void for want of registration:—*Held*, following *Saffery, Ex parte; Brenner, in re* (16 Ch. D. 669), that the bill of sale could not be avoided, because at the date when the bankrupt filed her petition the goods were not in her possession or apparent possession, but in the possession of the sheriff. *Eales, In re; Steel, ex parte*, 54 W. R. 202—D.

4. SEIZURE AND SALE.

Seizure for Purpose of Maintaining Security—Default in Payment of Interest—Relief—Jurisdiction to Order Bill of Sale to be Delivered up.—By a bill of sale given to secure the repayment of an advance and interest thereon at the rate of 60 per cent. per annum, the grantor covenanted to repay the principal sum at the expiration of twelve months, and the interest by equal monthly instalments on the 8th of each month during the twelve months. The grantor

having made default in the payment of the sixth monthly instalment of interest, the grantee seized the chattels comprised in the bill of sale, the warrant to the bailiff authorising him to take and hold possession until the monthly instalment of interest was paid. Upon an application by the grantor for relief under section 7 of the Bills of Sale Act, 1882,—*Held*, that the grantee having seized, not for the purpose of realising but merely of maintaining the security, the Court had no jurisdiction to order the bill of sale to be given up to the grantor upon payment by him of the principal sum advanced and interest to date. *Wickens, Ex parte* (67 L. J. Q.B. 397; [1898] 1 Q.B. 543), approved and distinguished. *Ellis, Ex parte*, 67 L. J. Q.B. 734; [1898] 2 Q.B. 79; 78 L. T. 733; 46 W. R. 531; 5 Manson, 231—C.A.

Seizure of Chattels Assigned for Purpose of Realising the Security—Non-production of Last Receipt for Rent—Reasonable Excuse—Tender of Principal and Interest to Date—Such "order as may seem just."—Five days after the execution of a bill of sale by which the chattels were assigned to secure the repayment of a loan at the expiration of one year, and the payment of interest thereon by monthly instalments, the grantee demanded in writing that the grantor's rent receipt for the previous quarter should be sent to him by post. The receipt was not sent, and eight days later the grantee seized the assigned chattels, demanding the principal sum lent with the full interest for one year and costs of levy. The grantor applied at chambers for relief under section 7 of the Bills of Sale Act (1878) Amendment Act, 1882. The rent, the receipt for which was demanded, was thirty-two days overdue at the time of the seizure, and it did not appear that the landlord had asked for payment of it:—*Held*, that as the grantee had seized for the purpose of realising his security, the Judge at chambers had jurisdiction to order the bill of sale to be given up on payment of the principal with interest to the date of seizure. *Held also*, that as the grantee had not shewn that the failure of the grantor to produce her last receipt for rent was without reasonable excuse, the seizure was wrongful, and the Judge was right in refusing to allow the grantee the costs of levy. *Held also* (per CHITTY, L.J., and COLLINS, L.J.), that a demand in writing for a receipt to be sent by post is not a demand in writing to produce the receipt within the meaning of section 7 of the Bills of Sale Act (1878) Amendment Act, 1882. *Cotton, Ex parte* (11 Q.B. D. 301), approved. *Wickens, Ex parte*, 67 L. J. Q.B. 397; [1898] 1 Q.B. 543; 78 L. T. 213; 46 W. R. 385; 5 Manson, 55—C.A.

Covenant to Produce Last Receipt for Rent on Verbal Demand.—By a bill of sale the grantor covenanted that when called upon by the grantee he would produce to him the policy of insurance and the receipt for the last premium and the last receipt for the rent, rates, and taxes. The bill of sale contained a proviso that the chattels thereby assigned should not be liable to seizure or to be taken possession of by the grantee for any cause other than those specified in section 7 of the Bills of Sale Act, 1882, and also a further proviso that if the chattels thereby assigned should be seized or taken possession of by the grantee in conse-

quence of the breach of any of the covenants therein contained, the grantee should be at liberty to remove or sell the same as therein mentioned:—*Held*, that the power given to the grantee to seize in default of the production of the last receipt for rent, rates, and taxes, on a verbal demand, coupled with a further proviso as to compliance with the Act, did not render the bill of sale invalid as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882. *Bullock, In re; Ward, ex parte*, 68 L. J. Q.B. 953; [1899] 2 Q.B. 517; 81 L. T. 268; 48 W. R. 46; 6 Manson, 367—Wright, J.

Principal and Interest Repayable by Instalments—Sale by Mortgagee under Authority of Mortgagor—Account—Interest Subsequent to Sale.—A sale of chattels by the grantee of a bill of sale under an express authority from the grantor will be treated by the Court upon the same principle as a sale by a mortgagee under a power of sale, or as a sale by the Court under the Interpleader Rules. *West v. Diprose*, 69 L. J. Ch. 169; [1900] 1 Ch. 337; 82 L. T. 20; 48 W. R. 389; 64 J. P. 281; 7 Manson, 152—Cozens-Hardy, J.

Where a bill of sale of the furniture and effects in a house provided for the repayment of the principal sum advanced and interest by means of ten monthly instalments, and after one instalment had been paid the grantor authorised and requested the grantee to sell the house and furniture and deduct whatever the grantor was liable to pay under the bill of sale, and the sale realised more than enough to pay the principal and interest due to that date, the grantee will not be entitled to claim any interest after the date of the sale. *Ib.*

5. ABSOLUTE BILL OF SALE.

Registration Void—Assignment of Goods by Grantee—Title of Assignee—Execution Creditor of Grantor—Apparent Possession—Interpleader.—The grantee of goods under an absolute bill of sale assigned the goods by a duly registered bill of sale. At the date of the second bill of sale the first was unregistered:—*Held*, that the second bill of sale conveyed a title valid against all who became execution creditors of the grantor of the first bill of sale after the date of the second. *Cookson v. Swire* (54 L. J. Q.B. 249; 9 App. Cas. 653) followed. *Antoniadi v. Smith*, 70 L. J. K.B. 869; [1901] 2 K.B. 589; 85 L. T. 200; 49 W. R. 693; 8 Manson, 335—C.A.

6. OTHER MATTERS.

Mortgage—No Specific Mention of Fixtures. See *Calvert, In re, post*, MORTGAGE.

Reputed Ownership.—See BANKRUPTCY.

BIRDS.

See WILD BIRDS.

BIRTHS.

Statute.—7 Edw. 7 c. 40 is *The Notification of Births Act*, 1907.

BOARD.

Directors, of.]—See COMPANY.

Local Board.]—See LOCAL GOVERNMENT.

BOARDING-HOUSE.

See LANDLORD AND TENANT.

BOND.

Penalty—Interest—Payments Made of Interest as Such—Administration Suit—Payment by Receiver.]—After a decree for administration of real and personal estate, a receiver who had been previously appointed by deed to collect the rents of the landed property of the deceased, and to keep down the interest on the incumbrances, and who was also a mortgagee in possession, was left undisturbed in possession by the Court. One of the incumbrances was a bond debt for 500*l.*, on which judgment had been entered, and the judgment was registered as a mortgage against the lands. Interest was paid by the receiver, under orders of the Court, for a number of years to the bond creditor, and accounts were passed in the suit, and embodied in the final decretal order, shewing that the payments were appropriated to interest, and that the principal sum of 500*l.* was due to the bond creditor at the date of the final order, December 17, 1867. Further payments were made by the executors of the deceased, and by the Court receiver—all expressly on account of interest—down to January, 1897. The total amount of the payments exceeded the penalty of the bond. All creditors prior to the bond creditor had been paid off, when some further lands were sold, the proceeds of which came to be allocated. The bond creditor claimed to be paid 500*l.* for principal, and the interest accrued since January, 1897. A subsequent creditor having challenged the right of the bond creditor to receive anything further than the amount of the penalty of the bond,—*Held*, that the payments having been made as interest, and applied as such, and the amount of the interest due at any one time, together with the principal, never having reached the penalty, the rule which prevents a bond creditor from being paid more than the amount of the penalty did not apply. *Hatton v. Harris* ([1892] A.C. 547) distinguished. *Knipe v. Blair*, [1900] 1 Ir. R. 372—C.A.

— **Penal Sum—Interest—Damages.]—**A bond in a penal sum with a condition to make void the same upon payment of a lesser sum with interest thereon up to and at a certain date is an interest-bearing security, the interest being recoverable as interest, and not as damages; and interest can be recovered from the date of the bond to the date of payment. *Cook v. Fowler* (43 L. J. Ch. 855; L. R. 7 H.L. 27) distinguished. *Dixon, In re*; *Heynes v. Dixon*, 69 L. J. Ch. 609; [1900] 2 Ch. 561; 83 L. T. 129; 48 W. R. 665—C.A.

Bond by Husband to Wife's Trustees—Receipt of Wife's Income by Husband—Constructive Payment of Interest—Bond for Principal and Interest

at Specified Date—Penalty—Bar by Lapse of Time.]—Under a marriage settlement money belonging to the wife was authorised to be invested on personal security, and the interest directed to be paid to the wife for her separate use for life, and after her death to her husband for life. The money was advanced by the trustees to the husband on his bond. The wife lived twenty-four years after the date of the bond, and the husband survived her for twenty years. They lived together in amity. For the whole forty-four years no interest on the bond was paid by the husband, and after his death the bond was found amongst his papers:—*Held*, that there was no presumption of payment of the bond by the husband, that the debt secured by the bond was not barred by the Statute of Limitations, and that the capital sum was recoverable from the husband's executors, together with interest from the date of his death. *Dixon, In re*; *Heynes v. Dixon*, 68 L. J. Ch. 689; [1899] 2 Ch. 561; 48 W. R. 71—Byrne, J.

Interest is payable as interest and not as damages under a bond having a condition on defeasance to make void the same upon payment of a lesser sum at a day certain, even although no express mention of interest is made in the bond; nor is the amount of interest recoverable diminished by reason only of the bond being conditioned for payment of principal and interest up to and at a certain date. *Ib.* And see DEED.

BOOKS.

See COPYRIGHT.

BOROUGH.

See CORPORATION; LOCAL GOVERNMENT.

BOUNDARIES

Highway—Roadside Waste—Presumption of Dedication to Public.]—*Prima facie*, when a highway runs between fences, unless there is something to shew the contrary, the public have a right to the whole space, and are not confined to the metalled part of it. *Offin v. Rochford Rural Council*, 75 L. J. Ch. 348; [1906] 1 Ch. 342; 94 L. T. 669; 54 W. R. 244; 70 J. P. 97; 4 L. G. R. 595—Warrington, J.

Where a triangular piece of land is by the side of and not fenced off from a highway, it must be assumed, there being no evidence to the contrary, that the fences bounding it were put up as boundaries of the highway and therefore that the piece of land formed part of the highway. *Ib.*

Ditch and Hedge Adjoining—Ownership.]—A road was laid out in 1847 under an inclosure award, and its width was stated to be thirty feet. The defendant council, in whom the road was vested, claimed that they were entitled to the adjoining ditch, bank, and hedge:—*Held*, that as the road was of the width of thirty feet without the ditch, bank, or hedge, and that as the plaintiff had exercised rights of

ownership over these, the plaintiff and not the defendants had made out a title to them. *Simcox v. Yardley Rural Council*, 69 J. P. 66; 3 L. G. R. 1350—Swinfen Eady, J.

Ditch and Fence—Presumption of Ownership—Acts of Ownership.]—The plaintiff and defendant were adjoining owners of land, the lands being bounded by a bank with a fence, with a ditch on the defendant's side. For nearly fifty years defendant had trimmed the fence, pollarded the trees, and cleansed the ditch, but there was no evidence of knowledge on the part of the plaintiff:—*Held*, that these acts of ownership did not rebut the presumption that the bank and fence were the property of the plaintiff. *Henniker v. Howard*, 90 L. T. 157—D.

Trees near Boundary of Adjacent Properties.]—*Per* LORD STORMONTH DARLING.—Trees whose stems are wholly on one side of the boundary of two adjacent properties, but which stand so near the boundary as to extend their roots into the other side of it are not the common property of both proprietors. *Hetherington v. Galt*, 7 F. 706—Ct. of Sess.

Party-walls—Erection at Joint Expense—Contribution to—Building Estate Sold in Plots—Implied Contract between Sub-purchasers from Original Purchasers of Plots.]—Where an estate has been laid out in plots for building upon the condition (*inter alia*) that the purchaser of a plot first building a party-wall is to be repaid by the purchaser of the adjoining plot one-half of the value of the party-wall, and the original purchasers of plots sell their plots, either built upon or vacant, to other purchasers, an implied contract arises between these sub-purchasers of adjoining plots that, as between them, the sub-purchaser of a vacant plot, adjoining a plot on which a house has already been built by an original purchaser, when he builds his house up to the house already built and makes use of its gable-walls, he shall repay the then owner of the house, and not the original builder, the half cost of the party gable-wall. *Irving v. Turnbull*, 69 L. J. Q.B. 593; [1900] 2 Q.B. 129—D.

Conveyance—Parcels—Land Situate on the Seashore—Bounded by the Seashore—Accretion—Plan.]—In 1864 the predecessor in title of the defendants conveyed to the predecessors in title of the plaintiffs a piece of land described as being situate on the seashore, and bounded "on or towards the west by the seashore," and on the other sides by boundaries as to which there was no dispute, and more particularly delineated in the plan drawn on the back of the conveyance. There was a strip of land intervening between the western boundary of the land conveyed as shewn on the plan and what was there defined as seashore. Since 1864 the sea had gradually receded and left uncovered a considerable amount of land on the west side of the property as delineated on the plan. The question was as to the property in and rights over this piece of land—*Held*, that "seashore" in the conveyance meant that portion of land adjacent to the sea which was ordinarily and *prima facie* vested in the Crown with its special rights and obligations; and declaration made that the plaintiffs as owners of the land conveyed in 1864 were entitled to free access and egress to and from the sea from and to their

premises. *Held*, by VAUGHAN WILLIAMS, L.J., and STIRLING, L.J., that the defendants were estopped from saying that any part of the land on the western boundary of the land conveyed as described on the plan was anything else than seashore. *Held* also, by VAUGHAN WILLIAMS, L.J., that the predecessor of the defendants impliedly covenanted that he would do nothing to prevent the grantees enjoying the land and the house which the evidence showed it was contemplated by all parties should be built thereon, as land and a house facing on the sea and having the seashore as a boundary. *Held*, by ROMER, L.J., that, as between the grantor and the grantees, the foreshore at the date of the conveyance was fixed as coming up to the western boundary of the land described in the conveyance, and the land in dispute must be held to be an accretion subsequent to the deeds, and accordingly land which had become the property of the plaintiffs. *Mellor v. Walmesley*, 74 L. J. Ch. 475; [1905] 2 Ch. 164; 93 L. T. 574; 53 W. R. 581; 21 T. L. R. 591—C.A.

Boundary formed by Railway—Presumption of Ownership—Ad Medium Filum.]—Where land adjoining a railway is granted by conveyance the presumption of ownership *ad medium filum via* which arises in the case of a highway does not apply as regards the railway. *Thompson v. Hickman*, 76 L. J. Ch. 254; [1907] 1 Ch. 550; 96 L. T. 454; 23 T. L. R. 311.—Neville, J.

Plan—Variation between Plan and Parcels.]—If a conveyance contains an adequate and sufficient definition with convenient certainty of what was intended to pass by it, any erroneous statement as to dimensions or quantity, or any inaccuracy in the plan, will not vitiate the description or have any effect.

Per SWINFEN EADY, J.—s.c. 73 L. J. Ch. 756; [1904] 2 Ch. 525; 91 L. T. 317; 52 W. R. 665; 20 T. L. R. 695.

Riparian Owner—Bed of Stream.]—*See* WATER.

BUILDING AGREEMENT.

See WORK AND LABOUR.

BUILDING SOCIETY.

1. *Rules*, 186.
2. *Winding-up*, 187.
3. *Other Matters*, 190.

1. RULES.

Validity—Insolvency of Society—Priorities between Different Classes of Members—Transfer of Properties to Members in Exchange for Shares—Breach of Trust—Payment of Interest on Shares.]—When a building society is known to be insolvent, no rule can be passed altering the rights of the members of the society, so as necessarily to affect their rights *inter se* in respect of liability or in respect of distribution of assets, to the injury of some of such members, for the benefit or advantage of others, even

although it may be a rule which could properly be made by a society not in contemplation of liquidation. But a rule passed with the object of facilitating realisation of assets and enabling the society to get rid of burdensome obligations may legitimately be passed by a building society which is known to be insolvent, as auxiliary to its existing rules. *Sixth West Kent Building Society v. Hills*, 68 L. J. Ch. 476; [1899] 2 Ch. 60; 81 L. T. 86; 47 W. R. 647—Byrne, J.

A building society issued preferential shares (known as C shares), the proprietors of which were entitled to be paid interest in lieu of bonus and other periodical profits. The remaining shares (known as A and B shares) were issued on ordinary conditions. A new rule, passed in 1889, of the society provided: "After the 31st day of December, 1890, no further advances shall be made upon shares then existing. From and after the passing of this rule the withdrawal of shares, other than C shares, by priority of notice shall cease, and all funds derived from repayment of advances, from realisation of properties in possession, or from any other source, shall be applied as follows: First, to the expenses of management and secretary's salary, the payment of capital and interest on C shares, and the remainder *pro rata* to the repayment from time to time of the subscriptions standing to the credit of the holders of unadvanced shares, until the total assets of the society shall have been realised and distributed." At that date the society was known to be insolvent. By a further rule, passed in 1891, it was provided: "In order to facilitate the realisation of any properties now or at any time in possession of the society, the directors shall have power to sell the same or any part thereof to any member, and receive in payment, either wholly or in part, any fully paid-up or subscription shares held by the member, whether under notice of withdrawal or not, provided that such shares shall be taken subject to the deduction of any withdrawal fee in force for the time being." At the time the rule of 1891 was passed the only creditors of the society were members of the society in respect of their shares. The assets from all sources of the society were not sufficient to repay in full to members the capital sums due on their shares:—*Held*, that the rule of 1889 was invalid so far as it sought to give priority in respect of capital to the holders of C shares, who had not given notice of withdrawal before the change in the rules, over holders of A and B shares; but that the C shares retained their preferential right to interest. *Held further* that the rule of 1891 was not *ultra vires*, and that unless the power thereby given were exercised with the fraudulent purpose of benefiting a particular member, the directors could not be made liable for a breach of trust. *Held further*, that the C shareholders were entitled by the terms of the original contract to payment of interest notwithstanding the society was insolvent. *Ib.*

2. WINDING-UP.

Building Society whose Registry is Cancelled.]

—A winding-up order may be made against a building society whose registry has been cancelled under the Building Societies Act, 1894, s. 6. *Grosvenor House Property Acquisition and*

Investment Building Society, In re, 71 L. J. Ch. 748; 50 W. R. 630—Buckley, J.

List of Contributories—Ceasing to be a Member by not Paying Instalments.]—The rules of a building society contained an article (16) providing that when the fines due by a member amounted to the sum standing at his credit, the amount thereof should be forfeited to the society, and that the member should thereafter cease to have an interest in the society. The article required notice to be sent to every member six months in arrear. The society having gone into liquidation, the liquidator placed on the list of contributories B., a member whose contributions had been exceeded by fines twenty years before the liquidation, but who had received no notice as to arrears:—*Held*, that, under article 16, B. had ceased to be a member of the society before the liquidation, and that his name should not have been put on the list of contributories. *Irvine and Fullerton Building Society v. Cuthbertson*, 8 F. 1—Ct. of Sess.

The rule applied in *Moore v. Rawlins* (28 L. J. C.P. 247; 6 C. B. (N.S.) 289), that a clause of forfeiture in the case of shares of a joint-stock company operates only at the option of the directors, held not applicable. *Ib.*

Scheme of Arrangement—Surplus Assets—Priorities—Widows and Children of Deceased Members.]

—Upon the construction of a scheme of arrangement entered into between the creditors and contributories of an unincorporated building society, in the course of its winding-up by the Court, it was declared that the surplus assets ought to be distributed according to the rights of the shareholders under the rules of the society. The question then arose, whether the widows and children of deceased members were entitled to precedence, having regard to the customary provision in the rules that "if more than one member shall give notice to withdraw at one time they shall be paid in rotation, according to the priority of notice; provided always that the widows and children of deceased members shall always have the precedence." The rules also provided (clause 25) that, in case of a member dying, his share and interest should belong to his executors or administrators, or other the person or persons thereafter mentioned; that, when on the death of any member without leaving a will a sum of money not exceeding 50% should become payable, such sum should, in default of letters of administration being taken out to the deceased member, be paid to any person nominated by the deceased in writing (such person being husband, wife, father, mother, child, brother or sister, nephew or niece, of such member), and, in case there should be no such nomination, or the person so nominated should have died before the deceased member, or in case the member should have revoked such nomination, then such sum should be paid to the person who should appear to be entitled under the Statutes of Distributions to receive the same, without taking out letters of administration:—*Held*, that the true construction of the rules was that, whenever there was a competition between persons who had given notice to withdraw their shares and the widows and children of deceased members whom the society

was bound to recognise under clause 25, then the widows and children should always have precedence. *Held*, therefore, that under the scheme such widows and children were entitled to be paid in priority to the other shareholders of the society, such widows and children ranking *inter se* according to the dates of the deaths of the deceased members through whom they claimed. *West London and General Permanent Benefit Building Society, In re*, 78 L. T. 393—C.A.

Mortgage—Reconveyance—Stamp—Exemption.]—A reconveyance by a building society executed by trustees appointed for a special purpose under an instrument of dissolution of the society, indorsed upon a mortgage, is under section 41 of the Building Societies Act, 1874, exempt from stamp duty in the same way that the statutory form of receipt provided by section 42 is exempt under section 41. *Old Battersea Building Society v. Inland Revenue Commissioners*, 67 L. J. Q.B. 696; [1893] 2 Q.B. 294; 78 L. T. 746—D.

Voluntary Dissolution—Rules—Withdrawal of Members—"Not to exceed one-half of monthly income from share subscriptions"—**Priority of Payment.]**—Where by the rules of a building society members might withdraw on giving a month's notice in writing, and were to receive certain specified payments on withdrawal according to the receipt of the notice of withdrawal by the society, and the directors were authorised from time to time to limit the withdrawals so as not to exceed one-half of the monthly income from share subscriptions, but all previous applications for advances were to have priority over notices of withdrawal, and the society was wound up voluntarily, it was held, all outside creditors having been paid, that members whose notices of withdrawal matured before the winding-up were entitled to be paid in full in priority to members whose notices matured after the winding-up, and also to members who had given no notice of withdrawal, and according to the priority of the receipt of such notices by the society, notwithstanding that such payments would exhaust the whole of the assets of the society. *Counties Conservative Permanent Benefit Building Society, In re; Davis v. Norton*, 69 L. J. Ch. 798; [1900] 2 Ch. 819; 49 W. R. 71—Stirling, J.

Deceased Member.]—The rules contained no provisions as to deceased members. One of the members died before the winding-up without having given any notice of withdrawal, and it was held that his executor was entitled to be paid in priority to all members who had given notice of withdrawal subsequent to the death of such member. *West London and Permanent Building Society, In re* (78 L. T. 393), applied. *Ib.*

Advance on Fully Paid Share—Ultra Vires—Set-off.]—A member who had given notice of withdrawal, and subsequently accepted an advance from the society, which was admittedly *ultra vires*, on the security of his fully paid share, was held to have waived his notice of withdrawal, and not to be entitled to set off the amount due from him in respect of the advance against such fully paid share. *Brownlie v. Russell* (8 App. Cas. 235) distinguished. *Ib.* And see COMPANY.

3. OTHER MATTERS.

Advances to Infant Member—Repudiation.]—See INFANT.

Calls on Shares.]—See COMPANY.

Campbell's (Lord) Act.]—See NEGLIGENCE.

Canada.]—See COLONY.

Canal.]—See WATER AND WATERCOURSE.

Cape of Good Hope.]—See COLONY.

Contract.]—See WORK AND LABOUR.

BY-LAW.

See LOCAL GOVERNMENT; RAILWAY;
TRAMWAY.

CARGO.

See SHIPPING.

CARRIER.

1. *Passengers*, 190.
2. *Passengers' Luggage*, 192.
3. *Goods*, 193.
 - (a) *Loss of and Injury to*, 193.
 - (b) *Delay*, 195.
 - (c) *Misdelivery*, 197.
4. *Rates*, 197.
5. *Station Accommodation*, 212.
6. *Arbitration of Differences*, 218.

And see RAILWAY; SHIPPING.

1. PASSENGERS.

Ticket—Conditions Incorporated—Delay Caused to Passenger by Negligence of Company.]—D. travelled by an early workman's train, which arrived late and he consequently lost a day's wages:—*Held*, that the railway company were not liable to him, notwithstanding their admitted negligence, because the printed notice on the back of the ticket (to the effect that the departure or arrival of the trains at the times specified in the time-table was not guaranteed nor were the company under any circumstances to be held responsible for delay or detention, however occasioned, or any consequences arising therefrom) was a condition incorporated into the contract. *Duckworth v. Lancashire and Yorkshire Railway*, 84 L. T. 774; 49 W. R. 541; 65 J. P. 517—D.

— **Continuance of Journey to More Distant Station—Fare for Whole Distance Greater than Sum of Fares to Intermediate Station—Quantum Meruit—Amount.]**—The through fare by a railway from H. to M. was greater than the fares from H. to S., an intermediate station, and from S. to M. added together. The defendant, intending to travel from H. to M., took a ticket

at H. for S. On arriving at S. he gave up his ticket, tendered the fare from S. to M. which was refused, and travelled on to M. by the same train without a ticket:—*Held*, that he was liable for the through fare for the entire journey, less the amount which he had already paid, and not merely for the fare from S. to M. *London and North-Western Railway v. Hinchcliffe*, 72 L. J. K.B. 530; [1903] 2 K.B. 32; 88 L. T. 800; 51 W. R. 556; 67 J. P. 205—D.

Right of Railway Passenger to Break his Journey—Determination of Contract.]—The plaintiff took a return ticket from Chorley to Manchester on the defendants' railway. On her return journey she travelled by a train by which it was necessary for her to change at Bolton. Upon her arrival there she alighted, and was about to leave the station to visit a friend when a ticket-collector demanded her ticket, and she gave it up under protest. On resuming her journey to Chorley by a later train on the same day she was required to pay the fare from Bolton to Chorley, which she did under protest. In an action to recover back the amount so paid,—*Held*, that the contract of the company was to carry the plaintiff from Chorley to Manchester and back by two continuous journeys; that the plaintiff, by leaving the company's premises, released them from all contractual relations; and that she was not, therefore, entitled to recover. *Ashton v. Lancashire and Yorkshire Railway*, 73 L. J. K.B. 701; [1904] 2 K.B. 313; 91 L. T. 349; 52 W. R. 655; 20 T. L. R. 482—D.

Railway Company—Carriage by Steamship—Negligent Navigation—Loss of Ship—Passenger Travelling with Free Pass—Loss of Luggage.]—Section 81 of the Railways Clauses Act, 1863 (which extends the provisions of the Railway and Canal Traffic Act, 1854, to steam vessels), does not apply to a railway company whose special Acts were passed before the Act of 1863. *The Stella* (No. 2), 69 L. J. P. 70; [1900] P. 162; 82 L. T. 390; 9 Asp. M.C. 66—Gorell Barnes, J.

Section 14 of the Regulation of Railways Act, 1868, does not operate to prevent a railway company making conditions with a passenger travelling with a free pass which exempt the company from liability for the loss of such passenger's luggage, although no notice has been posted in the company's offices as required by that section. *Ib.*

Carriage of Passengers—Dangerous Luggage—Fatal Explosion—Negligence—Onus Probandi.]—Railway companies are bound to use reasonable care and diligence in the conveyance of passengers; but they are not common carriers of passengers, and are not under obligation to carry safely. *East Indian Railway v. Kalidas Mukerjee*, 70 L. J. P.C. 63; [1901] A.C. 396; 84 L. T. 210—P.C.

The appellant's son was killed by an explosion of bombs brought by passengers into a railway carriage. There was no evidence of the appearance or dimensions of the parcels, or that any servant of the company knew or had reason to suspect the character of the parcels, which were taken into the carriage according to a practice which prevails in India as well as in England:—*Held*, that the company was not liable, and was not under obliga-

tion to disprove that the parcels suggested danger, or to search every parcel carried by a passenger. *Collett v. London and North-Western Railway* (20 L. J. Q.B. 411; 16 Q.B. 984) explained. *Ib.*

Evidence of Negligence—Closing Carriage Door—Personal Injuries.]—It is not evidence of negligence on the part of servants of a railway company that they close railway carriage doors, left open by passengers who have quitted the train, without warning other passengers still seated in the carriages that they are about to do so; and a passenger, so left seated, who places his finger in the hinge of the open door of the carriage as it is being closed by the company's servant cannot recover damages for personal injuries. *Drury v. North-Eastern Railway*, 70 L. J. K.B. 890; [1901] 2 K.B. 322; 84 L. T. 658—D.

Train in Motion—Shutting Door without Notice—Injury to Passenger.]—B. being a passenger from D. to U., at L., some people getting into the carriage, he put his hand in the doorway. While the train was moving, the door was banged to by a servant of the defendant company without any notice or warning, and B.'s hand was injured:—*Held*, that there was no evidence of negligence on the part of the company. *Benson v. Furness Railway*, 88 L. T. 268—D.

Train Snowed up—Injury to Passenger.]—In an action of damages for personal injury against a railway company, the pursuer averred that when she was travelling in one of the defenders' trains it became snowed up between two stations; that the windows of the compartment in which she travelled were covered with snow so that she could not see out; that she was unable to open the windows, which were rendered immovable by the frost; that the company's officials left her unattended during the stoppage, which lasted for more than an hour; that in consequence of the exposure to cold her health was seriously injured; that the exposure was due to the fault of the company; that the other passengers were forwarded to the next station by a special train, but that pursuer was not informed of this arrangement:—*Held*, that the pursuer had averred no relevant case. *Mathieson v. Caledonian Railway*, 5 F. 511—Ct. of Sess.

Accident to Passenger in Station, after Alighting from Train—Accident due to Intoxication.]—A railway company is not liable in damages for failing to see an intoxicated passenger safely off the platform at which he arrives. *McCormick v. Caledonian Railway*, 6 F. 362—Ct. of Sess.

2. PASSENGERS' LUGGAGE.

Steamship Company—Conditions on Ticket—Fitness of Ship—Seaworthiness.]—While the plaintiffs were passengers upon the defendants' steamer, their personal luggage, owing to the crowded state of the vessel, was placed in a lavatory, which was not in use, but adjoined another which remained in use. During the voyage the lavatory in use became stopped by some cotton-waste improperly placed in it by

some person, and an overflow of water occurred, by which the luggage was damaged. Upon the back of the plaintiffs' ticket were printed conditions exempting the defendants from liability for damage to passengers' luggage, although caused by negligence or default of the defendants' servants, providing that reasonable diligence had been used by the defendants to render the ship at starting seaworthy and fit for the voyage:—*Held*, that the defendants were liable for the damage to the luggage upon the ground that, having regard to the contingency of the overflow of water from the lavatory in use, the vessel, in sailing with the luggage so stowed, was not seaworthy with regard to the carriage of the luggage, and that reasonable diligence had not been used by the defendants to render the ship seaworthy within the meaning of the ticket. *Upperton v. Union Castle Mail Steamship Co.*, 89 L. T. 289; 9 Com. Cas. 50; 9 Asp. M.C. 475—C.A.

3. GOODS.

(a) LOSS OF AND INJURY TO.

Loss of Goods—Exemption of Insurable Losses—Liability for Loss caused by Servants' Negligence.—Goods belonging to the plaintiffs were carried in one of the defendants' barges under a contract containing a clause that the defendants would not be liable "for any loss of or damage to goods which can be covered by insurance." Owing to negligence on the part of the defendants' lighterman, the barge sank and the plaintiffs' goods were lost. In an action for damages for breach of contract,—*Held*, that the defendants were liable, as the exemption clause, being in general terms, did not relieve them from liability for loss occasioned by the negligence of their servants. *Price v. Union Lighterage Co.*, 73 L. J. K.B. 222; [1904] 1 K.B. 412; 89 L. T. 731; 52 W. R. 325; 9 Com. Cas. 120; 20 T. L. R. 177—C.A.

Carriage over Several Lines—Special Contract—Owner's Risk—Goods Lost by Fire while on Rail—Privity of Contract.—Where two or more railway companies agree together to carry through goods at a special rate in consideration that the goods are conveyed at owner's risk on their respective lines, and goods are lost or damaged, the sender has no cause of action, although the loss or damage to the goods occurred through the negligence of one of the companies other than that to which the sender or his agent consigned the goods on these terms. *Barratt v. Great Northern Railway*, 52 W. R. 479; 20 T. L. R. 175—D.

Contract for Carriage of Goods—"Owner's risk" Condition—Deviation from Route—Delay—Liability of Carrier.—By a contract between the plaintiff and the defendants, a railway company, for the carriage of goods to their destination by a specified route, the plaintiff, in consideration of the defendants charging a reduced rate below their ordinary rate, agreed to relieve the defendants "during any portion of the transit from all liability for . . . delay or detention, except . . . from wilful misconduct on the part of the company's servants." After having sent the goods a part of the way by the route contracted for, the defendants by mistake sent

them to a station which was not on that route, and on discovering their mistake sent them on by another and more direct route, which was the most expeditious course to adopt in the circumstances. In consequence of the delay the goods arrived at their destination in a damaged condition:—*Held*, that the defendants were relieved from liability. *Mallett v. Great Eastern Railway* (68 L. J. Q.B. 256; [1899] 1 Q.B. 309) discussed and distinguished. *Foster v. Great Western Railway*, 73 L. J. K.B. 811; [1904] 2 K.B. 306; 90 L. T. 779; 52 W. R. 685; 20 T. L. R. 472—D.

Inherent Defect in Goods Carried—Injury to Goods caused by Defect—Liability of Carrier.

A common carrier is not liable for an injury to goods caused by an inherent latent defect in the goods themselves, the existence of which was unknown both to the sender and the carrier. *Lister v. Lancashire and Yorkshire Railway*, 72 L. J. K.B. 385; [1903] 1 K.B. 878; 88 L. T. 561; 52 W. R. 12—D.

The question of liability is not affected by the fact that, in the course of the transit, the carrier's servants may have done some act contributing to the injury. *Ib.*

Perishable Merchandise—"Passenger" Train.

—A consignment note relating to perishable merchandise bore that it was to be carried by a railway company "by passenger train":—*Held*, that a train which had the facilities and privileges of a passenger train, but did not carry passengers, was a passenger train in the sense of the consignment note. *Caledonian Railway v. Muirhead's Trawlers, Lim.*, 6 F. 605—Ct. of Sess.

Damage of Article in Transit—Rejection by Consignee—Liability of Carrier.

—A machine of the value of 100*l.* was damaged while in the custody of a carrier. The consignee refused to take delivery and sued the carrier for the value of the machine. It was proved that the damaged parts of the machine could be repaired at a cost, according to the defendants' witnesses, of 16*l.*, and according to the pursuers' witness of 30*l.*, in addition to the expense of an expert to adjust them, but the pursuers' witnesses would not say that in the result the machine would work satisfactorily:—*Held*, that the machine was so much damaged that the consignee was entitled to reject it, and that the carrier was bound to pay the full value of the machine. *Dick v. East Coast Railways*, 4 F. 178—Ct. of Sess.

Through-Booking — Condition Limiting Liability of Contracting Company to Wilful Misconduct of its Servants on its own Line—Validity—

Onus of Proof.—Where there is a through-booking of goods which necessitates their being carried over lines owned by different companies, a condition limiting the liability of the contracting company to wilful misconduct of its servants on its own line is valid. When the goods are damaged in transit, the onus of proving that they were not damaged by the wilful misconduct of the servants of the contracting company on its line lies on the contracting company. *Mahoney v. Waterford, Limerick, and Western Railway*, [1900] 2 Ir. R. 273—Q.B. D.

—The Highland Railway Co. at Inverness accepted delivery of a piano in a packing-case in terms of the following consignment note, partly printed and partly written: "Ordinary consignment note for traffic carried at company's risk. The Highland Railway Company will please receive the under-mentioned goods and forward them subject to the conditions on the back hereof. Senders, L. & Co. [Below.] Consignee, J. G. Kirkwall, Orkney. Mode of transit, goods or passenger train. Goods and steamer, *via* Aberdeen. Who pays the carriage? Senders to Aberdeen only. Consignee pays steamer freight." One of the conditions printed on the back was that in respect of goods booked through by the company for conveyance partly by railway and partly by sea, "the company shall be exempted from liability" for any loss or damage during the carriage by sea from accidents from machinery, boilers, and steam. On the piano being delivered at Kirkwall it was found to be damaged, and the consignee having refused to take delivery, the sender raised an action of damages against the railway company. The defenders contended that as there was no through fare, and as they were only entitled to hire for the carriage to Aberdeen, they were not liable as carriers beyond that point:—*Held*, that the consignment note was to be construed as imposing a contract by the railway company to carry the goods from Inverness to Kirkwall, and that they were responsible as carriers for the safe carriage of the goods to Kirkwall. *Logan v. Highland Railway*, 2 F. 292—Ct. of Sess.

Goods in Custody of Carrier Seized by Officer of the Law—Consequential Damages.—A. delivered to a railway company at Peebles a box for carriage to a consignee in Edinburgh. At Edinburgh the box, while in the custody of the railway company, was opened by a fishery officer, who took possession of a salmon contained in it. Thereafter A. was prosecuted for having in her possession a salmon known by her to have been taken from the Tweed in close time, but was acquitted. A. then sued the railway company for damages, claiming, besides general damages, the costs she had incurred in defending the criminal prosecution, alleging that the damage had been caused by the fault of the defenders in allowing the box to be opened and the salmon removed without a legal warrant, and by their breach of the contract of carriage:—*Held*, that the action was not maintainable. *Boswell v. North British Railway*, 4. F. 500—Ct. of Sess.

(b) DELAY.

Delay in Delivery—Measure of Damages—Notice of Special Circumstances.—The owners of a steamship of 4,000 tons which had broken one of her pistons and was lying at Plymouth, got another cast at Port Glasgow and sent it by rail from there to Plymouth. The agreement with the railway company was that the casting should be carried by passenger train at a special rate and at the company's risk. A delay of between three and four days having taken place in delivery, the shipowner sued the company for damages, including outlays and loss of profit caused by the detention of the ship, amounting to 300*l*. The railway company

admitted that there had been a breach of contract, but they disputed the amount of damages claimed. It was proved that the railway company received notice from the shipowners' agents that the carriage was urgent, and that any delay in the delivery of the casting would cause the detention of the ship, but the company were not informed of the size of the ship, and that it had a crew of fifty-seven men on board, and that the casting was a piston and formed part of the machinery of the vessel. A high charge was made for the carriage of the casting:—*Held*, that the railway company were not liable for the loss of profit, and were only liable for part (estimated at 50*l*.) of the outlays caused by the detention of the ship. "*Den of Ogil*" Co. v. *Caledonian Railway*, 5 F. 99—Ct. of Sess.

Loss of Market—Just and Reasonable Condition—No Negligence.—Goods carried at various times by the defendant company for the plaintiffs arrived too late for market and the plaintiffs suffered loss for which they sued. In answer to questions left to them by the judge, the jury found that the defendants accepted the goods with the knowledge that they were to be sold in particular markets, that the defendants lost those markets, but that they had not—except in one instance—been guilty of negligence. On these findings judgment was reserved for further consideration. Two kinds of consignment notes had been used, one of which contained a notice that the defendants had two rates for the carriage of the goods thereinunder mentioned, "one, the ordinary liability of a railway company; the other, a reduced rate, adopted when the sender agrees to relieve the company from all liability for loss, damage, misdelivery, delay, or detention, except upon proof that such loss, &c., arose from wilful misconduct on the part of the company's servants." The defendants admitted that, as a matter of fact, they had only one rate for the carriage of the class of goods consigned by the plaintiffs. Both kinds of consignment notes contained the following, among other, conditions: "The company will not be liable for any loss of market":—*Held*, that if section 7 of the Railway and Canal Traffic Act, 1854, had been applicable, the condition would have been unreasonable, but that, as the jury had negatived negligence, the defendants were not within section 7, and that, at common law, the condition was good as a notice to the consignor. *Duckham v. Great Western Railway*, 80 L. T. 774—Darling, J.

Liability Limited to Wilful Misconduct—Acts of Omission—Onus of Proof.—G., having contracted with the railway company that they were to be exonerated from liability in respect of the transit of his goods, save when the damage arose from their wilful misconduct, delivered at Ballymena station for carriage to Manchester a case of fowls, which the railway company knew to be perishable goods requiring to be forwarded without delay. They failed to dispatch the goods by either of two trains which would have ensured their arrival in time for the Manchester markets on the following morning, for which they were intended, and when the goods did arrive in Manchester they were late,

and, being perishable, had deteriorated in value. At G.'s instance the consignee refused to take delivery, and G. sued the company for the loss occasioned by their wilful misconduct in delaying the goods:—*Held* (PALLES, C.B., dissenting), that under the circumstances, unreasonable delay, even though entirely unexplained, was not sufficient to amount to wilful misconduct, and that it lay upon the plaintiff to prove that the defendants intentionally delayed the goods. *Graham v. Belfast and Northern Counties Railway*, [1901] 2 Ir. R. 13—Q.B. D.

(c) MISDELIVERY.

Carriage by Rail at Owner's Risk—Reduced Rate—Goods Sent by Wrong Route—"Misdelivery"—Liability of Carriers.—A railway company which accepts goods for carriage by a named route is liable to the consignor in damages for loss occasioned to him owing to the goods being carried by a different route. A clause in the consignment note exempting the company from liability for loss, damage, misdelivery, delay, or detention of the goods, except upon proof that such loss, &c., arose from wilful misconduct on the part of its servants, has no application to such a case. *Mallett v. Great Eastern Railway*, 68 L. J. Q.B. 256; [1899] 1 Q.B. 309; 80 L. T. 53; 47 W. R. 334—D.

4. RATES.

"Ordinary luggage"—Bicycle.—A bicycle is not "ordinary luggage" within the meaning of section 17 of the Great Northern Railway and East Lincolnshire Railway Acts Amendment Act, 1850. *Britten v. Great Northern Railway*, 68 L. J. Q.B. 75; [1899] 1 Q.B. 243; 79 L. T. 640—Channell, J.

Carriage of Non-perishable Goods by Passenger Train—Inclusive Charge for Collection, Carriage, and Delivery—Rebate where Consignee Collects.—There being no obligation on a railway company to carry non-perishable goods by passenger train, such company can quote an inclusive charge for collection, carriage, and delivery, provided section 90 of the Railway Clauses Act, 1845, is not infringed, and a consignor who delivers such goods at the station cannot claim any rebate in respect of the collection portion of the charge. *Stone v. Midland Railway*, 72 L. J. K.B. 377; [1903] 1 K.B. 741; 88 L. T. 92—D.

Undue Preference—Ultra Vires—Action by Shareholder.—An undue preference in the carriage of goods given by a railway company to a customer, though contrary to law, is not *ultra vires*, and no action in respect thereof lies against the company or the customer at the instance of a shareholder. *Anderson v. Midland Railway*, 85 L. T. 408; 50 W. R. 40—Buckley, J.

Competing Wharftowners.—Any person who is directly prejudiced by the breach of the statutory duty imposed on a railway company to give similar treatment to all similar traffic can apply to the Railway and Canal Com-

mission for an order to remedy the grievance. Hence a wharfinger, who has no interest in the goods carried, can complain of undue preference given to a competing wharfinger. *Forwood v. Great Northern Railway*, 20 T. L. R. 320—Ry. Com.

—Ultra Vires—Action by Shareholder of Railway Company against Company and Third Party.]

—It is not *ultra vires* for a railway company having a fixed rate of charge for the conveyance of goods of a specified class to allow one of its customers to send goods of that class at a lower rate than the fixed rate. Such an act may entitle other customers to appeal to the Railway Commissioners, on the ground of undue preference, under section 2 of the Railway and Canal Traffic Act, 1854, but it does not enable a shareholder of the company suing on behalf of himself and all other shareholders to maintain an action against the company and the preferred customer to recover from the latter the difference between the rate paid and that which ought to have been paid. *Anderson v. Midland Railway*, 71 L. J. Ch. 89; [1902] 1 Ch. 369; 85 L. T. 408; 50 W. R. 40—Buckley, J.

—Ports—Benefit of Geographical Position—Group Rate—Coal Traffic—Charges Disproportionate to Distance.]

—Upon a complaint that the railway company did not in respect of coal traffic give the applicants or the traders of Carrickfergus the benefit of the geographical position of the port and harbour of Carrickfergus as compared with the ports of Larne and Belfast in relation to the several towns and places on the railway lying west and north-west of Carrickfergus, it having appeared that the railway company had established uniform rates from the three ports of Larne, Belfast, and Carrickfergus to certain inland towns, and that the effect of such group rates was that Carrickfergus sustained a loss of mileage advantage amounting to fourteen miles as against Larne in respect of the Cookstown and similar traffic,—*Held*, that so much of the complaint as related to the rates charged by the railway company for the conveyance of coal from the ports of Larne and Carrickfergus respectively to Ballyclare junction, to Antrim and the intermediate stations to Cookstown junction, and to towns and places on the railway between Cookstown junction and Cookstown and Draperstown respectively being the same, notwithstanding the distance the coal was carried from Carrickfergus was shorter than that from Larne, was true, and that the Carrickfergus traffic in coal was thereby subjected to an undue disadvantage. *Held*, further, that the rates for coal from Carrickfergus to the aforementioned towns and places must be lower than those from Larne to the same by the sum of 3d. per ton. *Carrickfergus Harbour Commissioners v. Belfast and Northern Counties Railway*, 10 Ry. & Can. Traff. Cas. 74—Ry. Com.

—Shipment Rate and Works Rate—Works Rate for same Services Higher than Shipment Rate

—Right of Trader to Apply for Reduction of Works Rate—Right to make Application where Trader does not Directly Pay Rate.]—The mere fact that a railway company charge a higher rate for carriage of coal over the same length of line to traders' works—all traders being charged an equal rate—than they do for coal for shipment,

is not of itself sufficient to give a trader a right to apply to the Court for reduction of the works rate, and such difference between the works rate and the shipment rate does not necessarily shew an undue preference or an undue prejudice within the meaning of the Railway and Canal Traffic Acts. *Spillers & Bakers v. Taff Vale Railway*, 90 L. T. 713; 20 T. L. R. 101—Ry. Com.

A railway company carried from certain collieries to C. large quantities of coal, the greater proportion of which was for shipment from that port to places abroad and to ports in England, and the remaining part was for works in C., including the works of the applicants, who were large flour millers in C., and for home consumption. They carried the shipment coal at a low shipment rate, but all other coal, whether for works (including the applicants' works) or for home consumption, was charged a higher or works rate, the works rate being some 50 per cent. higher than the shipment rate, and being the same for all traders in C. It was proved that the low shipment rate was justified by necessity, and that owing to competition with other ports and to other causes it was practically impossible in the interests of the public for the company to raise the shipment rate; and further, that the works rate was a reasonable rate, and was in fact so low that it could not reasonably be made lower without reducing it to a non-paying rate, and though there was some slight competition, no real or substantial competition was proved between the two classes of coal. Upon a complaint by the applicants that the higher works rate charged for the carriage of their coal as compared with the low shipment rate was an undue preference and an undue prejudice within the meaning of the Railway and Canal Traffic Acts,—*Held*, that the mere difference in the two rates was not in itself sufficient to prove an undue preference or an undue prejudice, or to give the applicants a right to come to the Court for relief; that, under the circumstances, within the meaning of sub-section 2 of section 27 of the Railway and Canal Traffic Act, 1888, not only was the lower charge for the shipment traffic "necessary for securing in the interests of the public the traffic in respect of which it is made," but also "the inequality could not be removed without unduly reducing the rates charged to the complainant," and that therefore the applicants were not entitled to a reduction in the works rate charged to them. *Ib.*

Semble, in such case, the fact that the rates are charged by the railway company to and paid by the colliery company, and not directly charged to or paid by a trader himself in the first instance, does not prevent the trader from applying to the Court under the Railway and Canal Traffic Acts, if in substance the charge is made so as to affect the traders' interest. *Ib.*

— **Reasonable Facilities—Private Siding—Jurisdiction of Railway Company.**—The owner of a private siding on a railway has no other right than a right to use the railway as a highway for his own engines and carriages on payment of tolls, and although a railway company has power to receive and deliver goods at a private siding it is under no obligation to do so,

and this is so although the railway company may have been in the practice of receiving and delivering goods at such siding for a number of years. A railway company is entitled to deliver certain classes of goods at a private siding without thereby coming under any obligation to deliver other classes of goods. Therefore, where a railway company has refused to deliver at such a siding a certain class of goods, the provisions of section 2 of the Railway and Canal Traffic Act, 1854, have no application, and the Railway Commissioners have no jurisdiction to order the railway company to deliver such goods at the private siding. *Cowan v. North British Railway*, 3 F. 677—Ct. of Sess.

The Railway Commissioners pronounced an order finding that the railway company in delivering coal at the private sidings of other traders in the neighbourhood, competitors in trade with the applicant traders, and refusing to deliver coal at the applicants' siding, had given to such other traders an undue preference, and subjected the applicants to an undue prejudice, and ordering the railway company to desist from so doing:—*Held*, that this order was within the jurisdiction of the Commissioners. *Ib.*

Sufficient Notice under Section 13 of the Railway and Canal Traffic Act, 1888.—Section 13 of the Railway and Canal Traffic Act, 1888, enacts that "in cases of complaint of undue preference no damages shall be awarded . . . unless and until the party complaining shall have given written notice to the railway company requiring them to abstain from or remedy the matter of complaint, and the railway company shall have failed, within a reasonable time, to comply with such requirements in such manner as the Commissioners shall think reasonable." The applicants sent a letter to the London and North-Western Railway Co., who were the railway company admitted at the hearing to have given the undue preference complained of. Such letter, which was dated August 1, 1895, was in the following terms: "When I saw you in London on the 18th July, you said you would speak to the Midland railway company on the following Monday about the Birmingham Windsor Street rate from here, and that you would let me hear from you, but I have heard nothing. I am bound to say that I am not content to pay the present quoted rate":—*Held*, that such letter was a sufficient written notice to the railway company requiring them to abstain from or remedy the matter of complaint, and that the right to damages therefore arose from the date of that letter. *Sheffield Coal Co. v. London and North-Western Railway*, 10 Ry. & Can. Traff. Cas. 230—Ry. Com.

Equal Charge to all Persons—Carriage of Non-perishable Goods by Passenger Train—No Obligation to Carry—Through Rate—Including Collection and Delivery—Right of Person Delivering Goods at Station to Return of Cost of Collection.—Section 90 of the Railways Clauses Act, 1845, provides that all tolls by the special Act authorised to be taken shall be charged equally to all persons. Regulation 3 of Part V. of the schedule to the Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891, provides that the company shall not be under obligation to convey by

passenger train any merchandise other than perishables. A firm of carriers delivered to the company at one of their stations certain non-perishable goods for conveyance by passenger train, and the company duly forwarded them, charging a rate including collection, the company making no rate for such goods by passenger train which did not include collection. In an action by the carriers to recover that portion of the rate which represented the cost of collection,—*Held*, that, as the company were under no statutory obligation to carry the goods by passenger train, and no rate was imposed by statute in respect of such carriage, the company, who at the same time were not debarred from so carrying the goods, and had the right so to carry them, did not fall with respect to the carriage of the goods within the "equality" proviso of section 90 of the Railways Clauses Act, 1845, and that the carriers were therefore not entitled to recover back the cost of collection. *Stone v. Midland Railway*, 73 L. J. K.B. 392; [1904] 1 K.B. 669; 90 L. T. 194; 52 W.R. 491; 20 T. L. R. 225—C.A.

The expression "all tolls for the use of the railway" in section 203 of the Midland Railway Act, 1844, means all the tolls referred to in the group of sections in which that section is placed, and not all tolls in fact charged by the company for the use of the railway, and the section is therefore no wider in its application than section 90 of the Railways Clauses Act, 1845. *Ib.*

Rebate under Special Agreement—Publication of Rates in Rate Book under Section 14 of the Regulation of Railways Act, 1873.—Section 14 of the Regulation of Railways Act, 1873, enacts that "every railway company shall keep at each of their stations a book or books showing every rate for the time being charged for the carriage of traffic, other than passengers and their luggage, from that station to any place to which they book, including any rates charged under any special contract, and stating the distance from that station of every station, siding, or place to which any such rate is charged." Section 13 of the Railway and Canal Traffic Act, 1888, enacts, that "in cases of undue preference no damages shall be awarded if the Commissioners shall find that the rates complained of have, for the period during which such rates have been in operation, been duly published in the rate books of the railway company kept at their stations in accordance with section 14 of the Regulation of Railways Act, 1873." The Midland Railway Co. granted a rebate of 3*d.* per ton to traders who agreed to send a certain amount of coal traffic to Great Eastern stations in a year and pay for the carriage of the same punctually every month. In the rate books at various stations on the Midland Railway Co.'s line was inserted on the flyleaf at the beginning of the book a printed slip stating that "rebates are allowed to coal merchants from certain rates to stations in the Eastern Counties and upon certain conditions, the particulars of which may be obtained on application to the general manager":—*Held* that this general notice on the flyleaf of the rate book was not a sufficient publication of a lower rate in the rate book to relieve the railway company from liability under section 13 of the Railway and Canal Traffic Act, 1888.

Daddy v. Midland Railway, 10 Ry. & Can. Traff. Cas. 303—Ry. Com.

The applicants, who carried on the business of coal merchants at certain places situated on the system of the Great Eastern Railway Co., complained that the Midland Railway Co. had allowed to certain coal merchants, who were competitors in trade with the applicants, a rebate of 3*d.* per ton off the rates charged to such coal merchants for the carriage of coal from collieries situated on the system of the Midland Railway Co. to stations situated on the railway of the Great Eastern Railway Co., but had not allowed the applicants such rebate off the rates charged to them for the carriage of coal from collieries situated on the railway of the Midland Railway Co. to stations of the Great Eastern Railway Co., and the applicants alleged that thereby an undue preference had been given to the coal merchants to whom such rebate had been allowed over the applicants. The Midland Railway Co. admitted that they had allowed to certain coal merchants having coal depots on the system of the Great Eastern Railway Co., in respect of coal coming from collieries on the system of the Midland Railway Co., a rebate of 3*d.* per ton off the rate charged for the carriage of coal, but the Midland Railway Co. alleged that this was done only on condition that the coal merchants to whom such rebate was allowed sent in the course of a year from such collieries over the line of the Midland Railway Co. not less than a specified number of tons of coal, and also rendered the Midland Railway Co. certain services in paying carriage for such traffic, and that in consideration thereof the Midland Railway Co. were justified in allowing such rebate:—*Held*, that such circumstances did not justify any greater difference of charge being made by the Midland Railway Co. to the applicants and the other coal merchants than the sum of 1*d.* per ton. *Ib.*

Rebate on Sidings Rate—Onus of Proof—Evidence of Comparable Rates—Station Accommodation.—The applicants claimed under section 4 of the Railway and Canal Traffic Act, 1854, to be entitled to a rebate on the rates charged to them by the railway company, on the ground that the railway company provided no station accommodation for the applicants' traffic. The applicants consigned salt from their private sidings for carriage over the respondents' railway, and it was admitted that the railway company did not provide any station accommodation or perform any terminal services. The railway company denied that the rates charged included a station terminal at the initial end. The applicants contended that a presumption was raised that they were charged an initial station terminal by shewing—First, that several of the through rates were above the maximum, unless they included two terminals; and secondly, that the rates from the nearest station, which was within one mile of the applicants' sidings, for class B articles (among which salt would be classed) were lower than the special salt rates from the sidings, although the former were station-to-station rates and at the railway company's risk, the latter being at the applicants' own risk. It was admitted that no salt was in fact sent from the station, but only from the applicants' sidings:—*Held*, that there was no legal evidence

that a second terminal was included in the special salt rates charged to the applicants, and that, where the rates were not above the maximum allowed for conveyance *plus* one terminal, the Court would not assume (in the absence of express evidence or admission) that an illegal and second terminal had been included in that rate:—*Held*, further, that express evidence ought to be given to shew that the terminal was included, when the Court was asked to act on the view that it was so included. *Salt Union v. North Staffordshire Railway* (No. 1), 10 Ry. & Can. Traff. Cas. 179—Ry. Com.

Held (by the COURT OF APPEAL), that an applicant under section 4 of the Railway and Canal Traffic Act, 1894, must make out a *prima facie* case in support of the application, and that the applicants, by merely proving that they were charged the rates, and that the siding did not belong to the railway company, had not made out a *prima facie* case that the rates included a charge for station accommodation so as to place upon the railway company the onus of proving that the rates did not include a charge for station accommodation. *Ib.*—C.A.

Traders' Waggon—Railway Company exempted from Providing Them—Maximum Rates, including the Provision of Trucks by the Railway Company—Amount of Rebate.—Section 2 of the schedule to the North Staffordshire Railway Company's Order Confirmation Act, 1892, enacts that "the maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise trains; and, subject to the exceptions and provisions specified in this schedule, includes the provision of locomotive power and trucks by the company, and every other expense incidental to such conveyance not hereinafter provided for. Provided that—(a) . . . the company shall not be required to provide trucks . . . for the conveyance of . . . salt in bulk . . . ; (b) where, for the conveyance of merchandise other than merchandise specified in Class A of the classification, the company do not provide trucks, the rate authorised for conveyance shall be reduced by a sum which, for distances not exceeding fifty miles, shall, in case of difference between the company and the person liable to pay the charge, be determined by an arbitrator to be appointed by the Board of Trade. . . ." The difference under this section which had been referred by the Board of Trade to the Railway Commissioners for decision was as to the sum by which the rate authorised for the conveyance of salt in bulk by the railway company should be reduced, for distances not exceeding fifty miles, in respect that they did not provide trucks for the same:—*Held*, that the *quantum* of the rebate is a pure question of fact to be decided by the Commissioners as arbitrators, taking into consideration all the circumstances of the case, and that *prima facie* where a railway company are not required to provide a trader with trucks, the rebate for a trader's truck should be determined with regard, not to the cost to the trader, but to the sum which the conveyance rate may be deemed to include for the provision of trucks. *Salt Union v. North Staffordshire Railway* (No. 2), 10 Ry. & Can. Traff. Cas. 224—Ry. Com.

Increase of Coal Rates—Justification of Increase—Comparative Tables—Coal Waggon.—Section 1, sub-section 1 of the Railway and Canal Traffic Act, 1894, enacts that: "Where a railway company have either alone or jointly with any other railway company or companies, since the last day of December, 1892, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to shew that the rate or charge is within any limit fixed by an Act of Parliament or by any provisional order confirmed by Act of Parliament." Upon a complaint under the above section by colliery-owners that, whereas the rates and charges made by the railway company for the conveyance of coal were, prior to January 1, 1893, based and calculated upon the carriage of 21 cwt. to the ton, of which 1 cwt. was an allowance for "wastage," they were now based and calculated upon the carriage of 20½ cwt. to the ton, and that this admittedly resulted in an increase of 2½ per cent. upon the rate formerly charged to the applicants, and that such increase was unreasonable,—*Held*, that the railway company having shewn at least a proportional increase in the cost of working the traffic between the year 1877, when the original rates were fixed, and the year 1892, the increase of rate was reasonable; that the fact that since 1880 the railway company had supplied waggons for the mineral trade as carriers of minerals, for the use of which a separate rate was charged, did not necessitate the exclusion of this branch of their business from the general account (for purposes of comparison, in order to ascertain a reasonable conveyance rate), because the trader providing his own waggons was also benefited by the increased facility and greater economy with which the traffic was handled; and that the cost of providing relief men for mineral trains, which was necessitated by the shortened hours of labour, and the fact that such trains had to stand on one side for goods and passenger trains, was an item properly attributable to the mineral traffic, which must be worked subject to the ordinary conditions on a highway. *South Yorkshire Coal Owners' Assurance Society v. Midland Railway*, 10 Ry. & Can. Traff. Cas. 28—Ry. Com.

Held, also, that a comparison of expenditure and receipts in any two years is a fair method of comparison where no special disturbing elements can be proved to exist. For a comparison based on train mileage to be of value, it must be shown that the conditions of working the traffic in the two compared years have remained substantially constant; which was not the case in the years 1877 and 1892, since in the latter year there was a larger proportion of long-distance traffic, a mile of which brought in a smaller rate and was traversed at less cost than a mile of short-distance traffic. *Ib.*

Indirect Increase of Rates and Charges—Charge for Accommodation after Conveyance—Siding Rent.—A railway company, being bound to give a reasonable time to the trader, after conveyance, to take delivery, prior to 1894 allowed the traders four clear days for that

purpose, but calculated the four clear days not on one truck, but upon the average time that all the trucks of a particular trader occupied the railway company's sidings. After 1894 they allowed four days exclusive of the day of arrival, but calculated the time allowed on each truck and not on the average. This was complained of as an indirect increase of rate, which the railway company were called upon to justify, under section 1 of the Railway and Canal Traffic Act, 1894:—*Held*, that there was no indirect increase of the tonnage rate, because, under the former system, no particular ton of coal would have had greater accommodation as regards time than under the new system. *Manchester and Northern Counties Coal Traders' Federation v. Midland Railway*, 10 Ry. & Can. Traff. Cas. 121—Ry. Com.

Charge for Accommodation after Conveyance—Siding Rent—Liability as Carriers Ceasing.]

—Prior to February, 1895, the railway company's tonnage rates included the user of their sidings by the consignees (for coal trucks not belonging to the railway company) for an indefinite period. From March 1, 1895, the railway company made a charge of 6d. per truck per day as "siding rent" after four clear days had been allowed for the discharge of the coal. The applicants contended that this was an "indirect increase of a rate or charge" within the meaning of section 1 of the Railway and Canal Traffic Act, 1894, and had to be justified by the railway company. They further contended that the proposed charge was *ultra vires* as being a general condition applicable to the rates and charges authorised by the Railway Companies Rates, &c., Order Confirmation Act, 1892, and would require the sanction of Parliament:—*Held*, that the duty of a railway company as carriers ended after putting the merchandise in a position where the trader could take delivery, and leaving them there for such a reasonable time as would enable the trader, with ordinary appliances, to get his merchandise out of the truck. And that, although the convenience of the trader since March 1, 1895, had been curtailed, the four days was an attempt by the railway company to fix an extreme limit of time up to which they were content to bear the obligation of "carriers," and to deem it as covered by the conveyance rate; and that making a charge for something for which no charge had been made before (namely, warehouse accommodation) did not constitute an increase, direct or indirect, of any rate or charge. *Manchester and Northern Counties Coal Traders' Federation v. Lancashire and Yorkshire Railway*, 10 Ry. & Can. Traff. Cas. 127—Ry. Com.

Held, further, that the charge was not *ultra vires*, it being authorised by sub-section 4 of section 5 of the Railway Companies Rates, &c., Order Confirmation Act, 1892, which gave the right to charge for "the detention of trucks or the use of any accommodation before or after conveyance beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof." *Ib.*

Held, further, that the *quantum* to be paid by the trader to the railway company was a

question expressly reserved for the consideration of an arbitrator, and must be decided on the facts proved in each particular case. *Ib.*

Classification of Merchandise—Pitwood Consigned at Measurement Weight—"Timber at measurement weight"—Rate Diminishing According to Distance—Conveyance over Different Railways—Recurring Maximum Charge.]—The Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, confirmed and set out the classification of merchandise traffic and the schedule of maximum rates and charges of the railway. The schedule provided that weight, except as to stone and timber, when charged by measurement, should be actual weight. Measurement weight was estimated by allowing so many cubic feet to the ton, and was less than actual weight. In the classification of merchandise traffic, Class C included, among other items, "Pitwood, for mining purposes," and "Timber, actual machine weight"; and Class 1 included, among other items, "Timber, measurement weight." The rates in respect of Class C were lower than those in respect of Class 1. A timber merchant consigned by the railway a quantity of pitwood for mining purposes by measurement weight:—*Held*, that the pitwood was chargeable under Class 1. *Great Western Railway v. Caswell & Bowden*, 73 L. J. K.B. 834; [1904] 2 K.B. 508—Walton, J.

In the schedule of maximum rates and charges under the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, the rate per ton per mile for conveyance of merchandise of a given description on the railway was higher for the first twenty miles than for the next thirty miles. The schedule provided that any other railway company conveying merchandise on the railway should be entitled to charge and make the same rates as the Great Western Co. were authorised to make. The Great Western Co. carried a consignment of goods a distance of twenty-one miles, the first twenty miles being on their own railway and the remaining mile on another railway over which they exercised running powers:—*Held*, that they were entitled to charge the maximum rate applicable to the first twenty miles of a journey, not only in respect of the first twenty miles of the journey in question, but also in respect of the remaining mile. *Ib.*

Railway Commission.]—See RAILWAY.

Through Booking.]—Under section 2 of the Railway and Canal Traffic Act, 1854, the Railway Commissioners have power (upon proof that it is reasonable and in the interests of the public) to order through booking of both passengers and goods at the sum of the local rates charged on the two lines of railway constituting the through route. If the demand for such through booking is made *bona fide* by a member of the public, and *a fortiori* by a community, there is *ipso facto* a strong *prima facie* case of reasonableness and public interest (*per COLLINS, J.*). *Didcot, Newbury, and Southampton Railway v. London and South-Western Railway*, 10 Ry. & Can. Traff. Cas. 9—Ry. Com.

An order by the Railway Commissioners for through booking is not a matter of right. Such

an order necessarily involves an order for a through rate, although the through rate may be only the sum of the local rates of the several lines over which the traffic passes. Consequently an order for through booking can only be granted on the same considerations as would govern the granting of a through rate. *Didcot, Newbury, and Southampton Railway v. Great Western Railway*, 10 Ry. & Can. Traff. Cas. 1—C.A.

Through Rates—Reasonable in the Interests of the Public—Comparison of Through Rates over Routes Composed of the Lines of Different Railway Companies.]—In allowing or fixing through rates the Railway Commissioners will consider all the circumstances of the case, and one of the circumstances is, what powers the particular railway companies whose lines are part of the through route have of demanding rates. *Birmingham Corporation v. Manchester, Sheffield, and Lincolnshire Railway*, 10 Ry. & Can. Traff. Cas. 62—Ry. Com.

On an application to allow a through rate, it was proved that there was in existence a rate arranged between the parties which was virtually a through rate, and which rate was much lower than the sum of the local rates over the lines which constituted the through route. The through rate applied for involved a still further reduction of about 6d. :—*Held*, that under these circumstances the onus was upon the applicants to prove that the through rate which they proposed was a just and reasonable rate. *Ib.*

The proposed rate was over a route composed of three lines, which carried for about six, forty-five, and twenty-five miles respectively of the route. It was proved that there was an alternative route which was composed of two lines, and which passed for the same short distance of six miles over the line, which was common to both routes, and the entire residue of seventy-five miles over that of another company, and that there was an existing rate by the alternative route of 6d. less than the existing rate over the route for which a through rate was proposed :—*Held*, that it did not follow that because the rate over the alternative route was reasonable, and was smaller in amount for a slightly longer distance, the existing rate over the route composed of three railways, five miles shorter, and which was 6d. higher, was unreasonable. *Ib.*

— Right to Apply for Exceptional Rates.]—A canal company authorised by Act of Parliament to construct railways on their quays and land, and to charge reasonable tolls and charges for the use of the same within a maximum fixed by their Railway Charges Confirmation Act, 1893, although they are under no obligation to admit the public as carriers upon their lines under the Railways Clauses Act, 1845, are a "railway company" within the meaning of the Railway and Canal Traffic Act, 1888, and, whether express powers of carrying upon their lines have been given them or not, are competent to propose through rates under the 25th section of that Act. *Manchester Ship Canal v. Midland Railway*, 10 Ry. & Can. Traff. Cas. 54—Ry. Com.

When a railway company has agreed rates

from a port to inland towns with other companies in their joint interest, such rates should not be treated as local rates of that company, so as to compel them to carry to the common point from another port at rates equal, distance for distance, to such agreed rates. *Ib.*

— Reasonable Route—Point of Exchange—Sending Company's Claim to Long Run.]—On an application for through rates, the fact that the station where it is proposed to exchange the traffic is not, in any reasonable sense, a practicable one for that purpose will go to shew that the proposed route is not a reasonable route within the meaning of section 25, sub-section 5, of the Railway and Canal Traffic Act, 1888. The Court will consider not only the public interest in a competitive route, but also the right of a railway company to a long run in respect of traffic originating on its own system. *Plymouth, Devonport and South-Western Junction Railway v. Great Western Railway*, 10 Ry. & Can. Traff. Cas. 68—Ry. Com.

The Plymouth Co. applied, under section 25 of the Railway and Canal Traffic Act, 1888, for an order allowing through rates for goods traffic between the South-Western termini in London (Nine Elms and Waterloo) and Truro, Penzance, and other stations on the Great Western Railway in Cornwall, by way of Liddford and Plymouth North Road. The applicants' line was a double line twenty-two miles in length, which ran from Liddford (where it joined the South-Western Co.'s main line) to that company's station at Devonport, and was worked by the South-Western Co. From Devonport the South-Western Co. owned a junction line with the Great Western main line (from London to Cornwall), and they had running powers over the latter to the Plymouth North Road station. The proposed exchange of traffic between the two companies was to take place at Plymouth North Road station :—*Held*, that the proposed route with an exchange at Plymouth North Road station was not a reasonable route. *Ib.*

— Grouping London Stations—Termini a quo and ad quem the same—Competitive Company not Grouping.]—In applications under section 25 of the Railway and Canal Traffic Act, 1888, the Commissioners require evidence of public interest and reasonableness in favour of the proposed through rate and route adequate to outweigh the interference with the vested legal rights of railway companies. *Didcot, Newbury, and Southampton Railway v. London and South-Western Railway*, 10 Ry. & Can. Traff. Cas. 9—Ry. Com.

The Didcot Railway Co. applied for through rates via their railway for traffic between Southampton and the Great Western Co.'s stations in London at Poplar and Smithfield. The proposed route was that by which the Commissioners had already allowed through rates for traffic between Southampton and the Great Western station at Paddington (see 9 Ry. & Can. Traff. Cas. 210). The difference between that case and the present one was that in the former case traffic coming to Paddington could only be offered to the Great Western Co., whereas traffic coming to Poplar or Smithfield might also be offered to the South-Western Co., for that rail-

way company, equally with the Great Western Co., received and delivered traffic at both of those places. Poplar traffic for either the South-Western Railway or the Great Western Railway passed over the North London Railway, and for haulage between Poplar and Acton (Great Western) and Poplar and Kew Bridge (South-Western) each railway company paid a toll of 3s. 3d. a ton. To provide for this payment the South-Western Co.'s rates by rail from Poplar to Southampton were higher than from Nine Elms. The Didcot Co. proposed that the through rates from Poplar to Southampton *via* the Great Western and Didcot Railways should be the same as were charged from Paddington, on the ground that the Great Western had made their local rates from Paddington applicable to Poplar, Smithfield, and their other London stations. Smithfield traffic for the Great Western Co. was carried by that company over the Metropolitan Railway under running powers at a cost of 10d. a ton for the use of the line. The South-Western Co. had a receiving office at Smithfield, and carted all their traffic to and from Nine Elms. The Didcot Co. proposed that the through rates from Smithfield, as compared with those from Paddington, should be 10d. more for Classes A and B and for certain articles carried at special rates, and for all other traffic should be of the same amount. The applicants' proposal was not only to convey traffic to and from Paddington by a route belonging to three different railway companies and sixteen miles longer than the South-Western route, at the Nine Elms rates (which were admittedly low on account of sea competition), but to carry the traffic to and from Smithfield and Poplar four and ten miles further respectively at the same rates.—*Held*, that the through rates for traffic from Poplar to Southampton *via* the Great Western and Didcot Railways should be of the same amount as the existing South-Western rates between those places. And that the through rates for traffic from Smithfield to Southampton *via* the Great Western and Didcot Railways should be of the same amount as the rates from Paddington, plus the cost of the conveyance of the traffic between Smithfield and Paddington. *Id.*

— **Carriage over Lines of Different Companies—Carriage partly by Sea—Injury to Goods—Liability—Evidence.**—Goods were received from a merchant in Manchester by the Lancashire and Yorkshire Railway Co., under a through-booking contract, to be carried for the plaintiff and to be delivered to him in Limerick. The goods were carried from Manchester to Limerick, and there delivered to the plaintiff under an arrangement made between the various carrying companies concerned, by which the freight was divisible amongst them in proportion to the mileage traversed by each, but was to be collected by the defendants from the consignee. The goods were injured in transit, but there was nothing to shew on what part of the journey the injury occurred. In an action to recover damages from the defendants for breach of contract to carry from Manchester to Limerick,—*Held*, that there was no evidence that the through-booking contract was made by the Lancashire and Yorkshire Railway as agents of the defendants, and that therefore, in the absence of proof that the injury was done on

the defendants' line, the defendants were not liable. *Tuohy v. Great Southern and Western Railway*, [1898] 2 Ir. R. 789—C.A.

— **Line belonging to Dock Company—No Statutory Power of Railway Company to Run over Line.**—The dock company are the owners of the Millwall Extension Railway, which runs through their docks from Millwall Junction on the Great Eastern Railway. At the southern end of the Millwall Extension Railway is a station called the South Dock station. The dock company applied for an allowance of through rates for goods by a route from the South Dock station over their railway and the railways of the respondents to stations on the Midland system, the proposed rates being so fixed and apportioned that the traffic proceeding inland from the docks might be relieved from the charge which, the applicants alleged, was imposed on it for cartage. The Railway Commissioners were of opinion that, as the respondent companies had no statutory right to carry goods by locomotive power over the applicants' railway, there was no power to make an order for a through rate, and, further, they were of opinion that the applicants' proposal that the traffic should be taken over by the respondents at the point of junction of the applicants' railway with the Great Eastern Railway would involve such difficulties in the carrying of it out as to render it impracticable in any business sense.—*Held*, that the Commissioners were right on both grounds. *London and India Docks Co. v. Great Eastern Railway and Midland Railway*, 20 T. L. R. 371—C.A.

— **Workmen's Trains—Proper and Sufficient Workmen's Trains up to 8 a.m.—Reasonable Fares.**—Section 8 of the Cheap Trains Act, 1893, empowers the Board of Trade, where it has reason to believe that proper and sufficient workmen's trains are not provided for workmen at reasonable fares and times between 6 p.m. and 8 a.m., to refer the matter to the Railway Commissioners when required to do so by the railway company. By the Great Eastern Railway (Metropolitan Station and Railways) Act, 1864, s. 80, the Great Eastern Railway are required to run one stopping train daily each way, not later than 7 a.m. inwards or earlier than 6 p.m. outwards, on the lines between Liverpool Street and Edmonton and Liverpool Street and Walthamstow respectively, "for artisans, mechanics and daily labourers, both male and female, and having business daily in London," at fares not exceeding 1d. for the journey each way. The Great Eastern Co. voluntarily extended the Edmonton service of trains to Enfield, and ran a frequent service of trains between the hours of 5 a.m. and 8 a.m. at cheap rates for the benefit of workmen and other persons residing on the Enfield, Walthamstow, and Stratford branches of the railway and having employment in London. These trains were of two kinds—namely, first, Cheap trains run between the hours of 5 a.m. and 6.47 a.m., the fare charged by these trains being 2d. for a return ticket, and the last of these trains being timed to arrive at Liverpool Street Station not later than 6.47 a.m. Secondly, Cheap trains, by which workmen are allowed to travel at half the ordinary return fares (with a minimum of 4d.), which are timed to reach Liverpool Street Station after 6.47 a.m. and before 8 a.m. Upon

complaint that on the Enfield, Walthamstow, and Stratford branches of the Great Eastern Railway there were no trains provided for workmen at 2d. return fares, arriving in London later than 6.47 A.M., it was proved that the existing 2d. trains were overcrowded and could not accommodate all the workpeople requiring to come to London for their work, and that numbers of them had no alternative but to travel by the half-fare trains. It was also proved that the hours of labour have become later, in many cases not beginning until 8 A.M. or 9 A.M., so that workpeople, in order to have the benefit of the cheapest trains, had to travel by trains which brought them to London an hour, or even two hours, too soon. At the hearing, the railway company offered to add to the existing service of 2d. trains three new trains, which would be timed to arrive in London between 6.47 A.M. and 7 A.M.:—*Held*, that in addition to these trains, the railway company must run as an experiment at least two trains from Edmonton, two trains from Walthamstow, and one from Stratford, starting after 7 A.M. and arriving in London as near 8 A.M. as possible, at fares less than the half-fares charged at the present time, and that a reasonable fare to be charged by such trains would be 3d. return, except between Stratford and London, which should be 2d. return. *London Reform Union and Great Eastern Railway, In re*, 10 Ry. & Can. Traff. Cas. 280—Ry. Com.

As under the Cheap Trains Act, 1883, railway companies obtain a partial remission of passenger duty on certain conditions, one of which is the running of workmen's trains, the question of whether there is a remunerative profit from the fares by such trains is not a matter which the Court will consider. *Ib.*

The fact that an improved workmen's train service might relieve a congested district in London by inducing workmen to reside outside the metropolis, does not justify the Commissioners in ordering such an improved service. *Ib.*

Proof by a railway company of no profit, or even a loss, on running workmen's trains, is not sufficient answer to a complaint of the non-provision of "proper and sufficient workmen's trains" under the Cheap Trains Act, 1883. *Ib.*

Semble, that where two railway companies maintain a through passenger service between their systems by agreement with each other, but have no statutory running powers over each other's lines, the Commissioners have jurisdiction to order a proper service of workmen's trains to be provided for that through service. *Ib.*

— **Small Working-Class Population—No Profit to Railway Company—Running Powers by Agreement—Experimental Service.**—The Railway Commissioners will not order workmen's trains to be run under the Cheap Trains Act, 1883, unless there is proved to be in existence a class of workmen residing on the railway and requiring such a service—that is, they will not order trains to be run in advance of requirements. *London Reform Union and Great Northern Railway, In re*, 10 Ry. & Can. Traff. Cas. 293—Ry. Com.

— **Early Trains for Postmen—Benefit and Cost not Commensurate—Insufficient Numbers.**—The Court will only exercise their powers under the Cheap Trains Act, 1883, where the demand for accommodation is sufficiently large to bear some relation to the difficulty of giving that accommodation, and where there is some comparison between the benefit which will be afforded by an order of the Court for the accommodation asked for and the cost to the railway company of giving it. *Fawcett Association and London, Brighton, and South Coast Railway, In re*, 10 Ry. & Can. Traff. Cas. 299—Ry. Com.

Semble, that persons employed in the postal service as letter sorters and postmen are "workmen" within the meaning of the Cheap Trains Act, 1883. *Ib.*

— **Travelling on Public Service—Inspector of Weights and Measures—Police Officer.**—An officer of the police, who holds the additional appointment of inspector under the Weights and Measures Act, 1889, when travelling by railway in performance of his duties as such inspector, is not entitled to travel at a reduced fare under section 6 of the Cheap Trains Act, 1883. *Spencer v. Lancashire and Yorkshire Railway*, 67 L. J. Q.B. 465; [1893] 1 Q.B. 643; 78 L. T. 323; 46 W. R. 443; 62 J. P. 296—D. *And see* RAILWAY.

5. STATION ACCOMMODATION.

Station Accommodation and Terminal Services—Special Services at a Traders' Siding.—The applicants were the owners of a siding situated immediately to the north of the goods station at Panmure on the joint line of the Caledonian and North British Railway Companies, and about seventy-three chains from Carnoustie station and fifty-six chains from Barry station. The applicants complained, under section 4 of the Railway and Canal Traffic Act, 1894, that they were charged terminals for traffic to and from their works at Panmure Station, although the railway companies performed no terminal services and received and delivered the traffic on sidings not belonging to them. The applicants' allegation that their rates included charges for station accommodation and for terminal services was based on the fact that the rates for similar traffic from the two nearest stations to Panmure—namely, Carnoustie and Barry (where there were no private sidings and no traders performing terminal services for themselves)—were the same as those charged to the applicants, or differed in amount only in respect of difference of distance. The railway companies contended that what was not a charge for conveyance in the applicants' siding rates was a charge, not by way of terminals, as in the rates with which they were compared, but for services at or in connection with the sidings, such as marshalling, labelling, clerkage, providing sheets, &c., and that it cost them as much to render those services as it did to do the work which was done at such places as Carnoustie and Barry, and for which, when done, so far as it was not incidental to conveyance, terminals were allowed them. It was proved that whatever services the railway companies rendered at the applicants' private sidings at Panmure, they rendered also at or in connection with their own sidings at Carnoustie and Barry, and that there

was nothing special or extra in them. And, further, that at Carnoustie and Barry they did a good deal besides, inasmuch as they provided a station and labour to load and cover:—*Held*, that the special services the applicants received at the hands of the railway companies were not a satisfactory reason for the same rates being charged at the applicants' private sidings at Pannure as were charged at Carnoustie and Barry, and that the applicants were entitled to have lower rates than the rates in force for similar traffic at Carnoustie and Barry. The extent to which they should be lower to be determined by the amount presumably charged for terminals at that end, ascertained on the principle adopted in *Pidcock's Case* (10 Ry. & Can. Traff. Cas. 150), less the reasonable sum that might be found due to the railway companies for special services under section 5 of the schedule to the Rates, &c., Order Confirmation Act. *Tennant v. Caledonian Railway*, 10 Ry. & Can. Traff. Cas. 194—Ry. Com.

Where a railway company provide station accommodation, or perform terminal services, it is only reasonable to suppose that station and service terminals are equally with the charge for conveyance a component part of their rates. *Ib.*

Siding Rent—Reasonable Sum—Reasonable Time for Unloading—When Commences to Run.]—The Midland Railway Company's Rates &c. Order Confirmation Act, 1891, s. 5 of the schedule, provides that they may charge a reasonable sum by way of addition to the tonnage rate for certain services rendered to a trader at his request or for his convenience, including (*inter alia*) the use or occupation of any accommodation before or after conveyance beyond such period as shall be reasonably necessary for enabling the consignee to take delivery of the merchandise, and for services rendered in connection with such use and occupation. The Midland Railway Co. claimed under this section the sum of 6*d.* per truck per day as siding rent, at Sheffield, after the expiration of four clear days allowed for unloading:—*Held*, that 6*d.* per truck per day was a reasonable sum to apply to all traders at Sheffield and similar places, though it would not necessarily apply to other places—*e.g.* rural stations—where the cost of the construction of sidings might be less, and the cost of working might be more, in proportion to the quantity of traffic; and where the loss of business by the blocking of the siding might be greater or less according to circumstances. *Midland Railway v. Black*, 10 Ry. & Can. Traff. Cas. 142—Ry. Com.

In ascertaining the "reasonable sum" to be charged under this section the cost of maintenance should only be considered where it exceeds that which would be incurred if delivery were taken within the four days, and only those services in excess of those which would be otherwise performed are to be taken into consideration. Likewise the cost of accommodation is only a factor in cases where extra accommodation has to be provided owing to the trader's habitual delay in unloading. *Ib.*

Held, further, that four days, exclusive of the day on which the notice of arrival was given, was a reasonable period for unloading; that

although *prima facie* this time would not begin to run until the trucks were in the siding, handed over to the trader, ready for unloading, yet, if the trader were not ready to take delivery, the siding being blocked by him, the time ran from the moment the railway company were ready to send the trucks to the siding; while, if the railway company were in default, the trader would have his remedy under the contract for delivery. *Ib.*

Held, further, that the contention that when the railway company got the benefit of the expedition of traders in 90 per cent. of the traffic, which was unloaded within the four days, there should be some "set-off" to the traders as regards traffic detained after the four days, was untenable, since the period of four days was not a matter of right, and the character of the railway company would change after the four days had expired from that of a "carrier" to that of a "bailee," and that therefore the Court would not compel the railway company, directly or indirectly, to give the traders the benefit of a former system of "averaging" the number of days. *Ib.*

Siding "not belonging to the company"—Station Accommodation and Terminal Services—Clerkage—Signalling—Shunting—Unreasonable Delay in Forwarding Trucks.]—If the mode in which a junction with the siding of a private owner has been effected is such that a railway company need incur no greater expense in connection with it than is involved in stopping a goods train specially at the siding junction, and either uncoupling trucks there and depositing them in the siding clear of the points, or drawing out trucks ready marshalled and attaching them to the train, doing no work within the siding, and being paid for any special use of levers by signalmen in a signal box, there is then a mere delivery for which no extra payment is due. *Portway v. Colne Valley Railway*, 10 Ry. & Can. Traff. Cas. 211—Ry. Com.

The applicants were the owners of a private siding near the Halstead station of the Colne Valley Railway Co. Partly from the siding having only one line for both outgoing and incoming trucks, and partly from its joining the main line at a very short distance from where that line crosses a street in Halstead, on the level, so bringing the case under the rules of the Board of Trade as to the shunting of trains over a level crossing, and engines standing across the same, it was not possible for a goods train to stop at the siding junction and for its engine to uncouple a truck and deposit it in the siding or to draw a truck out and unite it to the train. All trucks to or from the applicants' siding had to be taken into the goods yard at Halstead Station and there prepared for despatch or delivery, a process which involved extra hauling and the provision of standing room. In connection with the applicants' siding traffic the railway company had to specially provide points and signals, and the levers which worked them were only required for such traffic. The railway company charged the applicants, on traffic to and from their siding, rates the same in amount as the rates charged as station to station, or collected and delivered rates, as the case might be, on similar traffic using the Halstead station. Upon an

application to the Commissioners under section 4 of the Railway and Canal Traffic Act, 1894, to determine what was a just and reasonable rebate to be made from the rates so charged to the applicants, the Court found that, in respect of the applicants' siding traffic, the Colne Valley and Halstead Railway Co. did not provide the accommodation nor render the services, or any of them, for which station and service terminals were chargeable, but that they rendered certain other services in respect of that traffic—namely, some clerkage, shunting and signalling, for which a payment ought to be made to them. The Court held that a reasonable and just allowance or rebate to be made from the rates charged to the applicants, in the circumstances above described, would be so much of each rate as is not applicable to, or charged for, conveyance, less the following sums: First a sum for clerkage equal to 30 per cent. of the charge the railway companies make in any rate as a station terminal at the Halstead end; secondly, a sum for shunting equal to the station terminal at the Halstead end; and thirdly, in respect of the cost of signals, being a cost bearing the same proportion to the cost of all the signals in the siding signal box as the number of siding levers bears to the whole number of acting levers in that box, multiplied in each case by the average number of times they are respectively daily worked, such sum as the cost so ascertained works out at per ton of the siding traffic. *Ib.*

Services Rendered at or in Connection with Sidings not Belonging to a Railway Company—Reasonable Charge for Station Terminal.—The tonnage rate authorised by section 2 of the Schedule to the Railway Rates and Charges Order Confirmation Act, 1892, is for conveyance by merchandise train and any work incidental to such conveyance, and for the performance of which it is reasonable to use the train engine (for example, when at a junction with the main line of either a station siding or a private siding, the train has to pick up or throw off trucks, the work of hauling or shunting the trucks over the points at the junction and over so much of the siding as the keeping of the main line clear of obstruction may require); but conveyance other than this off the main line does not come within section 2. *Manchester, Sheffield, and Lincolnshire Railway v. Pidcock*, 10 Ry. & Can. Traff. Cas. 150—Ry. Com.

A station terminal is for use of the accommodation or staff of a terminal station after conveyance is at an end; and goods arriving at a station to which they are consigned for delivery, and which upon arrival have to be hauled a greater or less distance to be in a position where they can be unloaded and delivery given, are liable to a terminal charge. *Ib.*

The respondents were the owners of a siding which had been held to be a siding not belonging to the railway company. The siding had no direct connection with the up and down main lines, being separated from them by the railway company's goods yard at Retford station. Traffic, therefore, to and from the siding had to pass over the station sidings, and the service of taking it across was done by the

railway company. This service was claimed to be one performed "at or in connection with" the traders' siding, and the railway company asked to be allowed to charge for it the same sum that they charged as a station terminal to traders who came under section 3 of the schedule:—*Held*, that such service might be charged for under section 5 of the schedule, even though it was a service which was involved in delivery, and which the trader could not himself perform. *Held*, further, that the railway company being relieved, by the provision of the siding, from the expense of finding standing room for trucks and space for loading and unloading, three-fourths of the sum which they charged as a station terminal at their Retford station, in respect of merchandise similar to the respondents' and liable to such terminal charge, was a reasonable sum to be charged to the respondents for services rendered by the railway company at or in connection with the respondents' siding at Retford. *Ib.*

Sidings Rates—Rebate on—Evidence.—Where the consignor of merchandise received by a railway company at a siding not belonging to the company applies to the Railway and Canal Commissioners under section 4 of the Railway and Canal Traffic Act, 1894, to determine what is a reasonable and just allowance or rebate in respect that the railway company do not provide station accommodation or perform terminal services at the siding, it lies upon the applicant to make out a *prima facie* case in support of the application. *Salt Union v. North Staffordshire Railway*, 67 L. J. Q.B. 889; [1898] 2 Q.B. 435; 79 L. T. 16; 47 W. R. 4—C.A.

Per A. L. SMITH, L.J.—The applicant must shew that the rates charged to him include a charge for station accommodation or terminal services at the siding. *Per RIGBY, L.J.*, and *VAUGHAN WILLIAMS, L.J.*—The applicant may prove his claim to a rebate independently of whether he is charged for the services or not. *Ib.*

Shunting—Signalling—Cost of Erecting Signal Cabins and Signals at Junction with Private Sidings.—A railway company cannot charge beyond the conveyance rate for anything done on their own lines which is probably incidental to conveyance or collection of traffic to or from private sidings, no matter how much the cost and trouble may be increased by the inconvenience of the sidings or the nature of the traffic, unless the defects or inconveniences are such as to relieve the railway company from their duty to deliver and collect. But a railway company may be entitled to make a service charge if they are required for the convenience of the siding owner to do work on his siding, and where they are so required, then, if by reason of the insufficiency of the siding, or otherwise, that work involves extra work on their own line, that extra work may be a ground for an extra charge. *North Staffordshire Railway v. Salt Union*, 10 Ry. & Can. Traff. Cas. 161—Ry. Com.

Reasonable Charge for Haulage—Sheeting—Marshalling—Time Occupied by Engine in Shunting Operations at Siding.—The railway

company claimed to be entitled under section 5 of the schedule to their Railway Rates and Charges (No. 25) Order Confirmation Act, 1892, to charge Messrs. Cowan a reasonable sum by way of addition to the tonnage rate for conveyance for services rendered by them to Messrs. Cowan at their request or for their convenience at or in connection with Messrs. Cowan's Low Mill sidings at Penicuik, and at or in connection with sidings not belonging to the railway company at Granton Harbour and Leith Harbour, but running into and connecting with their Granton station and their Leith goods station. Messrs. Cowan sent esparto grass in bales from Granton Harbour and Leith Harbour to their mills at Penicuik, connected by private sidings with the company's railway, the Low Mill siding where the esparto was delivered being about sixteen miles from the Leith and Granton stations. The rate charge was 5s. a ton, and the maximum charge for conveyance for that distance being 3s. 1d., the balance of the rate—namely, 1s. 11d.—was the charge for services other than conveyance. These services were—first, haulage over the harbour lines; secondly, use of Granton or Leith Docks station; and thirdly, services at the Low Mill siding. As to the first of these services it was proved that when a vessel arrived at the docks the esparto was loaded direct from it into the railway trucks by men employed and paid by the consignees, but the sheeting of the trucks was done by the railway company, and also the haulage of them by engine and horse-power over the harbour lines to their goods stations at Granton and Leith. The charge for this service was 6d. a ton. In this charge was included 1½d. per ton for the sheeting, being the full service terminal, and 1d. per ton for the supply of straw and the laying it in trucks to prevent injury to the esparto from dust and damp. The railway company alleged that as there was no obligation on a railway company to perform services outside its own line, the haulage they did on the harbour lines, which were not theirs, was not a service within section 5 of their Rates and Charges Act, 1892, and that they might charge what they pleased for doing it:—*Held*, that such service was within section 5, such haulage being not more either of an outside or a voluntary service than cartage or collection and delivery; and the haulage being a service at or in connection with a siding, it did not affect the question that the railway company might decline to perform it if they considered it unremunerative at the price fixed. *Held*, further, that 6d. per ton was a reasonable sum to be charged by the railway company to Messrs. Cowan for the haulage of trucks over the harbour sidings at Granton and Leith Harbours to the railway company's goods stations at Granton and Leith, and the sheeting of such trucks, and the supply and laying of straw in such trucks in respect of esparto traffic to their sidings at Penicuik. *Cowan v. North British Railway*, 10 Ry. & Can. Traff. Cas. 169—Ry. Com.

(2) As to the second of these services, it was proved that after the trucks had been loaded and brought into the Granton or Leith station they had, before being sent away, to be made up into a train with other trucks, and the marshalling of them for that purpose constituted the entire service rendered within the station in connection with the harbour lines.

For such work the company claimed to charge 13½d. a ton, or three-fourths of their maximum station terminal:—*Held*, that marshalling after loading and before conveyance was one of the duties for which provision was made in the station terminal, and that some proportion of that terminal would be the payment for it. And that a sum not exceeding 9d. per ton would be a reasonable sum to be charged by the railway company to Messrs. Cowan for what was done by them in dealing with Messrs. Cowan's traffic at the company's goods station at Granton or Leith. *Ib.*

(3) As to the third of these services being a service performed by the railway company in respect of the delivery of Messrs. Cowan's traffic to their Low Mill siding, the junction with which was within a quarter of a mile of the Penicuik station, it was proved that esparto or other traffic arrived at this siding daily by one or more trains, and that the average number of trucks left per train was about seven; and that the goods engine drew up as it approached the junction, and its engine put into the siding the trucks that were destined for it; and in addition to putting them clear of the main line, it put them into whichever set of rails near the points it was convenient to Messrs. Cowan to have them. A note was then taken of the number and contents of each truck by a checker employed by the railway company. For esparto thus delivered the railway company's charge was 3½d. per ton, and this they contended was not more than the cost of the extra time their engine and men were employed, distributed over the tonnage carried, came to per ton. This extra time they reckoned at fifteen minutes per train, but it was proved that the actual length of the stops did not average four minutes, leaving eleven minutes for time lost or reduced speed before and after stopping:—*Held*, that a railway company were not entitled to make a special charge for time occupied in the stopping and again starting of a train, for it was part of the service of delivery, which was provided for in the rate for conveyance; nor on the same ground could they make a special charge for so much of the actual time the train was at a standstill as it took to uncouple and put trucks past the points. *Held*, further, that if the time a train was detained at Low Mill siding (while its engine was occupied in shunting Messrs. Cowan's traffic) exceeded four minutes, the railway company would be entitled to charge Messrs. Cowan for time over the said four minutes during which the railway company's engine was occupied in shunting such traffic at the rate of 7s. an hour. *Ib.*

6. ARBITRATION OF DIFFERENCES.

Action to Recover Charges—Railway—Regulation—Difference—Arbitration.—It is a condition precedent to the reference to an arbitrator of a case between a customer and the railway company, under the London and North-Western Railway Order Confirmation Act, 1891, that there should have arisen a difference between the parties before action brought. In the absence of such difference the ordinary Courts have jurisdiction, and the finding of fact by a County Court Judge is conclusive on all subsequent tribunals. *London and North-Western*

and *Great Western Joint Railways v. Billington*, 68 L. J. Q.B. 162; [1899] A.C. 79; 79 L. T. 503—H.L. (E.)

"Any difference"—Charges in Addition to Tonnage Rate—Reasonableness of Time Allowed Free of Charge.—By section 5 of the Midland Railway Order Confirmation Act, 1891, "any difference" arising thereunder is to be determined by an arbitrator appointed by the Board of Trade:—*Held*, that all matters material and incidental to such a difference are within the scope of the reference, and that the arbitrator in estimating the charges to be made for services in addition to those covered by the tonnage rate must take into consideration the reasonableness of the time allowed under the tonnage rate itself before the extra charges attach. *London and North-Western Railway v. Donellan* (67 L. J. Q.B. 681; [1898] 2 Q.B. 7) approved. *Midland Railway v. Loseby*, 68 L. J. Q.B. 326; [1899] A.C. 133; 80 L. T. 93; 47 W. R. 656—H.L. (E.)

Siding Rent—Jurisdiction of Courts.—Section 5 of a provisional order confirmed by the London and North-Western Railway (Rates and Charges) Order Confirmation Act, 1891, provides: "The company may charge for the services hereunder mentioned"—that is, amongst others, "the detention of trucks, or the use or occupation of any accommodation before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof . . . and services rendered in connection with such use and occupation"—"when rendered to a trader at his request or for his convenience, a reasonable sum, by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." The railway company gave notice to a trader that four days would be allowed free of charge for the release of trucks consigned to him at one of their stations, and that after the expiration of the four days a charge of 6*d.* per day for every truck not so released and remaining at the station would be required. In an action by the company to recover the charge of 6*d.* per day in respect of trucks consigned to the defendant and remaining on the company's sidings beyond the limit of four days,—*Held*, that upon the true construction of the section in case of any dispute arising under it, the determination of the whole matter, and not merely of the reasonableness of the charges, was referred to the arbitrator, and that the jurisdiction of the Court to try the action was ousted. *London and North-Western Railway v. Donellan*, 67 L. J. Q.B. 681; [1898] 2 Q.B. 7; 78 L. T. 575—C.A.

CATTLE.

See ANIMALS and LOCAL GOVERNMENT.

CENSUS.

Statute.—63 & 64 Vict. c. 4 is the *Census (Great Britain) Act*, 1900.

CERTIORARI.

When Granted.—The writ of *certiorari* is the apt means for preventing the infliction or continuance of any wrong by any unwarranted assumption of jurisdiction. But the granting of the writ at the instance of a private person is a matter of discretion, and not *ex debito justitiæ*. *Rev v. Londonderry Justices*, [1905] 2 Ir. R. 318—C.A.

Auditor—Surcharge—Certiorari—Right of Court to Review Auditor's Decision on Fact.—The Court, upon an application for a writ of *certiorari* under section 247, sub-section 8 of the Public Health Act, 1875, by a person aggrieved by the disallowance of an auditor, has power to review the auditor's decision on the facts as well as on law. *Reg. v. Haslehurst*, (51 J. P. 645) followed. *Rev v. Carson Roberts; Lawrence, Ex parte*, 76 L. J. K.B. 1118; [1907] 2 K.B. 878; 96 L. T. 733; 71 J. P. 288; 5 L. G. R. 1017; 23 T. L. R. 491—D.

Quarter Sessions—Affirmance of Conviction at Petty Sessions—Unspeakable Order—Trespass in Pursuit of Game.—Where, on appeal from a conviction at petty sessions for trespass in pursuit of game, the chairman and Justices at quarter sessions simply affirmed the conviction with costs,—*Held*, that *certiorari* would not lie to bring up to be quashed the order of quarter sessions. Jurisdiction of the King's Bench Division over an appellate order of quarter sessions, which neither recites the evidence on which it is founded nor states a Case, considered. *Rev v. Galway Justices (No. 1)*, [1906] 2 Ir. R. 446—K.B. D.

Acquittal by Justices—Bias—Order—Voidable, not Void—Certiorari.—An order of acquittal made by a chairman and Justices of quarter sessions (assuming one of the Justices to have been biased) cannot be quashed on *certiorari*. The order of a biased tribunal is voidable only, not void. *Rev v. Galway Justices (No. 2)*, [1906] 2 Ir. R. 499—K.B. D.

In Licensing Cases.—See INTOXICATING LIQUORS.

Costs—Rule Absolute.—The High Court of Justice and the Court of Appeal have power to award costs on making a rule absolute for a *certiorari*. *London County Council v. West Ham Assessment Committee* (61 L. J. M.C. 210; [1892] 2 Q.B. 173) not followed. Principle of *Reg. v. County of London Justices* (63 L. J. Q.B. 301; [1894] 1 Q. B. 453) applied. *Rev v. Woodhouse*, 75 L. J. K.B. 745; [1906] 2 K.B. 501; 95 L. T. 399; 70 J. P. 485; 22 T. L. R. 608—C.A. See also JUSTICE OF THE PEACE and INTOXICATING LIQUORS.

CEYLON.

See COLONY.

CHAMBERS.

See PRACTICE.

CHAMPERTY.

Charitable Motive Induced by Religious Sympathy—Proceedings to Obtain Custody of Third Persons.]—A charitable motive induced by sympathy with the religious views of another person the object of the charity is none the less such a charitable motive as comes within the recognised exceptions to the law against maintenance forbidding one person to support that other in his lawsuit. *Holden v. Thompson*, 76 L. J. K.B. 889; [1907] 2 K.B. 489; 97 L. T. 138; 23 T.L.R. 529—D.

Sed quare, per PHILLIMORE, J., whether the law against maintenance has any application to cases involving questions of the custody of the person. *Ib.*

Maintenance — Trade Union — Instigating Member to Bring Action for Libel—Reasonable and Probable Cause—Paying Costs of Action—Common Interest.]—The objects of a trade union, as stated in the rules, were the raising of funds for mutual benefit by the contributions of the members, which were to be applied (*inter alia*) to giving legal aid to members when necessity arose in their relation with employers; and in cases of a dispute arising between members and their employers, or unlawful treatment of members by their employers, the executive committee were, if they considered the merits of the case justified such a course, to provide legal aid for the members. A member of the union was dismissed by his employer without a week's notice, and in answer to a letter written to him by the general secretary of the union the employer stated that the member was discharged for dishonesty. The union took proceedings on behalf of the member to recover a week's salary in lieu of notice, and the employer paid the amount. The executive committee of the union then obtained the member's consent to bring an action for libel against the employer, founded upon his letter to the general secretary, and brought an action and employed their own solicitors, whose costs they paid. The action was dismissed with costs. The employer sued the union to recover his taxed costs of the action for libel:—*Held*, that the union had instigated the plaintiff to bring the action, for which there was no reasonable or probable cause; that the union had wrongfully maintained the plaintiff in the action, having no common interest; and that therefore the union were liable. *Semble*, there was nothing in the rules of the union to justify the action; but even if there was, the rules could not justify an act which would be wrongful if done by an individual. *Greig v. National Amalgamated Union of Shop Assistants*, 22 T. L. R. 274—Lord Alverstone, C.J. And see CONTRACT; ILLEGALITY.

CHARGE, FLOATING.

See COMPANY.

Land, on.]—See LIEN.

CHARGING ORDER.

Creditor, by.]—See EXECUTION.

Solicitor, for Costs of.]—See SOLICITOR.

CHARITY.

1. *General Principles*, 222.
2. *What is*, 223.
3. *Mortmain*, 233.
4. *Failure of Objects*, 236.
5. *Administration*, 238.
 - (a) *Cy-près*, 239.
 - (b) *Scheme*, 240.
6. *Trustees*, 241.
7. *Charity Commissioners*, 243.
8. *Law Officers*, 246.

1. GENERAL PRINCIPLES.

Charitable Gift—Secret Trust.]—A testator's wishes relating to the use of his property for the benefit of the public, communicated to his devisee in his lifetime and accepted by him, will not be enforced as a secret charitable trust where the true intention was not to impose a binding obligation, but to invest the devisee with the same freedom and irresponsibility in carrying out the testator's wishes which the testator himself exercised in his lifetime, making him as it were the *alter ego* of the testator. *Pitt-Rivers, In re; Scott v. Pitt-Rivers*, 71 L. J. Ch. 225; [1902] 1 Ch. 403; 86 L. T. 6; 50 W. R. 342; 66 J. P. 275—C.A.

Conditional Gift—Perpetuity.]—An immediate gift to charity is valid, although the particular application of the fund directed by the will may not of necessity take effect within any assignable limit of time, or may never take effect at all except on the occurrence of events in their essence contingent and uncertain; while, on the other hand, a gift in trust for charity which is conditional upon a future and uncertain event is subject to the same rules as any other estate depending on its coming into existence upon a condition precedent. *Swain, In re; Monckton v. Hands*, 74 L. J. Ch. 354; [1905] 1 Ch. 669; 92 L. T. 715—C.A.

Where, subject to a prior life interest, a testator's residuary real and personal estate is by the will devoted to charity as from the testator's death, a direction to postpone the payment of the charitable gift until the formation of a reserve fund, directed without any limit of time to be accumulated out of income as an increment to the charitable fund, is not a condition precedent to the charitable gift coming into effect so as to render the gift void as a perpetuity. *Martin v. Mangham* (13 L. J. Ch. 392; 14 Sim. 230) and *Chamberlayne v. Brockett* (42 L. J. Ch. 368; L. R. 8 Ch. 206) followed and applied. *Ib.*

Bequest without Reference to Age or Poverty—Perpetuity—Condition.]—The testator made the following gifts: "I bequeath to the Vintners' Company . . . the portrait of" a named person "to be hung up by them in a conspicuous part of their common hall and always retained

in that position. And upon condition that they accept the said bequest of the said portrait with the obligation aforesaid I bequeath to the said company the sum of 4,000*l.* . . enjoining the said company out of the income of the said sum of 4,000*l.* to keep in due and proper repair the said portrait, cleaning and re-gilding its frame not less than once in every four years, the surplus of the said income to be applied . . . for the benefit of individuals" answering a particular description without any reference to age or poverty, "and if applied by way of annuity, no single annuity to exceed 50*l.* per annum":—*Held*, that the gift of the picture was valid, the condition imposed being a condition subsequent, but that no part of the gift of the 4,000*l.* legacy could be supported as a charitable gift, and therefore it failed wholly, as infringing the rule against perpetuity. *Gassiot, In re; Fladgate v. Vintners' Co.*, 70 L. J. Ch. 242—Cozens-Hardy, J.

2. WHAT IS.

Royal Theatrical Fund.—The Royal General Theatrical Fund Association is a charity. Sir G. JESSEL's decision to that effect in *Spiller v. Maude* (32 Ch. D. 158*n*) approved of. That case was not overruled or intended to be overruled by *Cunnack v. Edwards* (65 L. J. Ch. 801; [1896] 2 Ch. 679). *Lacy, In re; Royal General Theatrical Fund Association v. Kydd*, 68 L. J. Ch. 488; [1899] 2 Ch. 149; 80 L. T. 706; 47 W. R. 664—Stirling, J.

"Charitable and benevolent" Institutions—Validity.—A bequest in trust for such "charitable and benevolent" institutions as certain persons shall determine is a good bequest. *Sutton, In re; Stone v. Att.-Gen.* (54 L. J. Ch. 613; 28 Ch. D. 464), followed. LORD COTTENHAM's interlocutory, disapproved in *Ellis v. Selby* (4 L. J. Ch. 69; 1 Myl. & Cr. 286) of *Jemmit v. Verril* (Amb. 585*n.*), not adopted. *Best, In re; Jarvis v. Birmingham Corporation*, 73 L. J. Ch. 808; [1904] 2 Ch. 354; 53 W. R. 21—Farwell, J.

"Charitable, educational, or other institutions of the town of K."—Testator by his will bequeathed a fund "upon trust for such charitable, educational, or other institutions of the town of K., and also for such other general purposes for the benefit of the town of K., or any of the inhabitants thereof, as my trustees shall in their absolute uncontrolled discretion think fit." And he desired, without in any way binding his trustees thereto, that the following institutions should be carefully considered by them in such distribution—namely, first the K. Memorial Hospital; secondly, the K. Grammar School; and thirdly, the K. Public Free Library:—*Held*, that the benefits conferred by the gift were limited to general and public purposes of the town of K. and the persons dwelling in that town, and that the whole of the gift was a valid charitable gift. *Dolan v. Macdermot* (L. R. 5 Eq. 60; L. R. 3 Ch. 676) followed. *Allen, In re; Hargreaves v. Taylor*, 74 L. J. Ch. 593; [1905] 2 Ch. 400; 93 L. T. 597; 54 W. R. 91; 21 T. L. R. 662—Swinfen Eady, J.

"In charity or works of public utility"—Uncertainty—Bequest "for the benefit or hos-

pitality" of company.—A testator bequeathed to the company of C. and the company of A. the sum of 5,000*l.* each, to be invested in such securities as the master and court of assistants of such companies might select, the revenue to be expended at the option of the master and court of such companies, as to two-thirds in "charity or works of public utility," and as to the remaining one-third for "the benefit or hospitality of the respective companies":—*Held*, that "or" was used disjunctively, and that the whole of the two-thirds might be applied for purposes which were not charitable, and therefore that the gift failed as to two-thirds. But, *held*, the gift of one-third was a gift of income for the absolute benefit of the companies, and that they were absolutely entitled to one-third. *Langham v. Peterson*, 87 L. T. 744; 67 J. P. 75—Swinfen Eady, J.

For such Charitable, Benevolent, or Religious Objects as Trustees Select.—A testatrix directed that the residue of her estate should be applied by her trustees "at their discretion from time to time towards such charitable, benevolent, or religious objects or purposes within the city of Aberdeen as they themselves shall institute or select":—*Held*, following *Blair v. Duncan* (71 L. J. P.C. 22; [1902] A.C. 37) and *Grimond v. Grimond* (74 L. J. P.C. 85; [1905] A.C. 124), that the direction was void for uncertainty. *Shaw's Trustees v. Esson's Trustees*, 8 F. 52—Ct. of Sess.

Gift to such Charitable Institutions as Trustees may Determine—Pure and Impure Personality—Proceeds of Sale of Real Estate.—Where under the will of a person dying before the passing of the Mortmain and Charitable Uses Act, 1891, a mixed fund, consisting of pure and impure personality and the proceeds of sale of real estate, is given to trustees to apply to such charitable institutions and objects as they may determine, and in such manner as they may think fit, the gift is a valid gift to the trustees of both the pure and impure personality and the proceeds of the sale of the realty, and confers on them a power to appoint to any charitable object that they think fit. If the trustees appoint to objects that can take the property in question, the appointment will be valid; but if they appoint to objects which cannot take—e.g. if they appoint impure personality to institutions not exempted from the provisions of the Charitable Uses Act, 1735—the appointment will to that extent fail. *Lewis v. Allenby* (L. R. 10 Eq. 668) discussed. *Piercy, In re; Whitwham v. Piercy*, 67 L. J. Ch. 297; [1898] 1 Ch. 565; 78 L. T. 277; 46 W. R. 503—C.A.

Quære, per VAUGHAN WILLIAMS, L.J., whether if the trustees appointed to objects which could not take, that would be an exercise of their power in such a sense that they could not subsequently appoint to objects that could take. *Ib.*

"Such charitable or public purposes as my trustee thinks proper."—A bequest to be "applied for such charitable or public purposes as my trustee thinks proper" is too vague and uncertain for any Court in England or Scotland to administer as a charitable gift. *Blair v. Duncan*, 71 L. J. P.C. 22; [1902] A.C. 37; 86 L. T. 157; 50 W. R. 369—H.L. (Sc.).

Bequest to Vicar and Churchwardens—To be Applied “as they shall in their sole discretion think fit”.—A testatrix gave a legacy of 400*l.* to the vicar and churchwardens of Kingston “to be applied by them in such manner as they shall in their sole discretion think fit”.—*Held*, that the gift was not void for uncertainty, but was a good and valid charitable gift to the parish for ecclesiastical purposes. *Thorner v. Wilson* (28 L. J. Ch. 145; 4 Drew, 350) followed. *Garrard, In re*; *Gordon v. Craigie*, 76 L. J. Ch. 240; [1907] 1 Ch. 382; 96 L. T. 357; 23 T. L. R. 256—Joyce, J.

“Charitable or religious institutions and societies”.—Selection of Objects by Trustees—Uncertainty.—A bequest to trustees to divide a testator’s residue among such “charitable or religious institutions and societies” as they might select, *held* void for uncertainty. *Grimond (or Macintyre) v. Grimond*, 74 L. J. P. C. 35; [1905] A. C. 124; 92 L. T. 477; 21 T. L. R. 323—H. L. (Sc.)

“For the charitable purposes agreed upon between us”.—Evidence Limiting Trust—Admissibility.—A testatrix by her will gave a sum to C. “for the charitable purposes agreed upon between us.” C. gave evidence that the testatrix had told him that she intended to leave him a legacy, the income of which he was to apply for certain charitable purposes during his life, and he was to dispose of the principal after his death as his own property. C. did not claim any beneficial interest in the legacy.—*Held*, that C.’s evidence was admissible to show the charitable purposes intended, but not to limit the gift to the income only of the legacy during his life, which was in contradiction of the will, and that a scheme must be directed for the whole legacy. *Huxtable, In re*; *Huxtable v. Crawford*, 71 L. J. Ch. 876; [1902] 2 Ch. 793; 87 L. T. 415; 51 W. R. 282—C. A.

For “rebuilding and equipment of hospital”.—“Under the direction of my executors”.—Building nearly Completed before Death of Testatrix—Validity of Gift—Cy-près.—A testatrix gave a legacy “towards the rebuilding and equipment” of a hospital “to the satisfaction and under the direction” of her executors. At the death of the testatrix the hospital was almost entirely rebuilt, though not equipped. The directors did not at any time direct the rebuilding or equipment.—*Held*, that the executors could not give directions for works already completed, but that if they gave their assent to proposed works of which they had a general knowledge they might apply the legacy towards such works when properly executed. *Unite, In re*; *Edwards v. Smith*, 75 L. J. Ch. 163; 54 W. R. 358; 22 T. L. R. 242—Kekewich, J.

Held, also, that “equipment” meant everything required to convert an empty building into a hospital. *Ib.*

Held, also, that, no limit of time being fixed, the discretion of the executors remained exercisable until the hospital was fully rebuilt and fully equipped. *Ib.*

Leasehold House given to Trustees to Carry on School—House for Storage and Distribution of Books to Publishers.—A bequest to trustees of a

leasehold house, where the testatrix had established a school for religious teaching and elementary education, the expenditure on which exceeded the fees, with a direction to the trustees to carry on the school, *held* to be a good charitable gift. A bequest to trustees of a leasehold house, which had been used by the testatrix and which was to be used by the trustees for the storage of books, written by certain persons, the house being in the occupation of a person who lived there rent free in consideration of his distributing the books to the publishers when required for sale, with a direction to the trustees to pay the rent of the house, *held* not to be a good charitable gift. *Hawkins, In re*; *Walrond v. Newton*, 22 T. L. R. 521—Swinfen Eady, J.

“Ecclesiastical charity”.—Parish Councils—Appointment of New Trustees—“Church or denomination”.—“Members thereof as such”.—Church of England—Churchwardens.—The words “as such” in section 75, sub-section 2 (e) of the Local Government Act, 1894, shew that no charity is an “ecclesiastical charity” within that clause unless, upon the true construction of the instrument of endowment, its benefits are exclusively confined to members of a particular church or denomination. *Ross’ Charity, In re*; *Perry Almshouses, In re*, 68 L. J. Ch. 66; [1899] 1 Ch. 21; 79 L. T. 366; 47 W. R. 197; 63 J. P. 52—C. A.

Section 14, sub-section 2 of the Local Government Act, 1894, applies to the case of a non-ecclesiastical charity, the endowment of which is vested in churchwardens alone. *Ib.*

“Ecclesiastical charities” under the Local Government Act, 1894, are not confined to charities for the spiritual or religious benefit of a church, but include eleemosynary charities. *Ib.*

A rentcharge payable to churchwardens to be laid out by them for the benefit of six widows of the parish “whom they should judge the properest objects to receive the same, with preference to those who, not being disabled by infirmity or sickness, were most constant in their attendance on the public service of the church,” is not an “ecclesiastical charity” within section 75, sub-section 2 of the Local Government Act, 1894, and the parish council has power to appoint new trustees of it in the place of the churchwardens. *Ib.*

An endowed charity for poor aged persons “who shall have attended Divine service at the church of the parish of their respective residences every Sunday for the last five years, and been partakers of the Holy Communion, and lived a godly, righteous, and sober life to the glory of God’s holy name,” is an “ecclesiastical charity” within section 75, sub-section 2 of the Local Government Act, 1894, and the power to appoint trustees thereof is not vested in the parish council. *Ib.*

To Christian Brethren.—A bequest of “100*l.* sterling to the Christian Brethren, in trust of A. B. and C. D. one year after my death,” is a valid charitable gift. *Brown, In re*; *Paden v. Finlay*, [1898] 1 Ir. R. 423—M. R.

Old and Worn-out Clerks of Firm.]—A gift to form a fund for the purpose of pensioning off the "old and worn-out clerks" of a firm is a good charitable bequest, and the Court will direct a scheme for its administration. *Gosling, In re; Gosling v. Smith*, 48 W. R. 300—Byrne, J.

Home of Rest for School Teachers.]—A gift for the support of a Home of Rest for Lady Teachers, in which each lady is to pay a small sum for board and lodging, is a good charitable bequest. *Estlin In re; Prichard v. Thomas*, 72 L. J. Ch. 687; 89 L. T. 88—Kekewich, J.

Corps of Commissionaires—"To aid in purchase of barracks or in any other way beneficial to the corps"—**Voluntary Association—Charity—Perpetuity.]**—A gift to a perpetual institution not charitable is not necessarily bad. The gift is good if it is not subject to any trust that will prevent the existing members of the association from dealing with it as they please, or if it can be construed as a gift to or for the benefit of the individual members of the association. If the gift is one which by the terms of it, or which by reason of the constitution of the association in whose favour it is made tends to a perpetuity, the gift is bad. *Clarke, In re; Clarke v. Clarke*, 70 L. J. Ch. 631; [1901] 2 Ch. 110; 84 L. T. 811; 49 W. R. 628—Byrne, J.

The Corps of Commissionaires is a voluntary association with a somewhat special constitution for the benefit of able-bodied and disabled soldiers and sailors alike, which is mainly supported by the subscriptions of the members and intended for their benefit; and although there are funds appropriated to the benefit of the corps which, taken separately, may be considered as charities, the corps as at present constituted would not appear to be a charity within the legal meaning of that expression. *Id.*

A gift to the committee for the time being of the corps "to aid in the purchase of their barracks or in any other way beneficial to that corps" is good on the ground either that some of the objects of the corps are charitable, or else that it does not tend to a perpetuity, inasmuch as the committee for the time being of the corps can deal with it in any way they please for the benefit of the corps. *Dictum in Cocks v. Manners* (40 L. J. Ch. 640; L. R. 12 Eq. 574) approved and applied. *Dutton, In re; Peake, ex parte* (48 L. J. Ex. 350; 4 Ex. D. 54); *Amos, In re; Carrier v. Price* (60 L. J. Ch. 570; [1891] 3 Ch. 159); *Clark's Trusts, In re* (45 L. J. Ch. 194; 1 Ch. D. 497); *Thomson v. Shakespear* (29 L. J. Ch. 276; 1 De G. F. & J. 399); and *Carne v. Long* (29 L. J. Ch. 503; 2 De G. F. & J. 75) discussed and distinguished. *Id.*

To Persons Named "or their successors"—Charitable Institutions—Official Position.]—A testator who died in 1886, and whose estate consisted of realty and chattels real only, bequeathed legacies to M. D., H. M., and A. C., "Nazareth House Hammersmith, or their successors," to E. M. and M. L., "of the Convent of the Assumption Wellington Road Bromley by Bow or their successors," and to other individual legatees, each described as of a certain charitable institution, or his successor." At the date of the will and the death

of the testator the various legatees were to the testator's knowledge members and holders of official positions in the respective communities mentioned.—*Held*, that the legacies were given to the legatees as holders of offices in and for the benefit of the associations in which they held office, and that, as the purposes of those associations were charitable, the gifts were indistinguishable from the gift "to the Sisters of the Charity of St. Paul at Selley Oak" in *Cocks v. Manners* (40 L. J. Ch. 640; L. R. 12 Eq. 574), and were void. *Delany, In re; Conoley v. Quick*, 71 L. J. Ch. 811; [1902] 2 Ch. 642; 87 L. T. 46; 51 W. R. 27—Farwell, J.

"Missionary objects"—Uncertainty—Power of Selection—Nature of Missionary Work of Donee of Power.]—A testatrix directed her trustees to pay trust moneys to M., to be applied by him "for such missionary object or objects at home, abroad, or in the colonies as he shall in his absolute discretion select." M. was known by the testatrix to have been engaged in assisting Christian missions in foreign countries and abroad.—*Held*, that the Court was entitled to have regard to the nature of the work of M., and, that being so, that the testatrix had used the word "missionary" in its popular sense, and the gift was not void for uncertainty. *Scott v. Brownrigg* (9 L. R. Ir. 246) not followed. *Kenny, In re; Clode v. Andrews*, 97 L. T. 130—Warrington, J.

Local or Scottish Charitable Institutions—Selection—Uncertainty.]—A testator gave his whole estate to certain named trustees, and to any other persons whom he might afterwards appoint, or who might be assumed into the trust, and to the acceptors and survivors, and to the heirs of the longest liver of them as trustees, and to the assignees of the said trustees or their forebears, and, after reciting that it was his wish to bestow the residue of his estate "in the form of donations and bequests of a benevolent and charitable nature," he bequeathed legacies to certain charitable institutions in Glasgow, and thereafter directed his trustees to realise the whole of his estate at such time as they might think proper, and "at any time or times, or from time to time, as and when the said residue or any part thereof becomes available, as they may deem proper, to pay over or divide the said residue, or any part or parts thereof, to or amongst such local or Scottish charitable institutions and schemes already constituted, or which may hereafter be constituted . . . as they may select, or any one or more of such institutions and schemes, and that at such time, in such manner, or in such proportions, all as they in their absolute discretion may deem proper"—*Held*, that the bequest of residue was not void for uncertainty. *Dick's Trustees v. Dick*, [1907] S. C. 953—Ct. of Sess.

Bequest to Regiment—Officers' Mess—Gift for Maintenance of Library—Efficiency of Army—Public Benefit—Relief of Taxation.]—A bequest to the officers' mess of a particular regiment for the maintenance of a library for the use of the officers of the mess for ever is a good charitable gift within the Statute of Elizabeth, on the ground that, the mess being an integral part of the regiment, the gift was directly a public benefit by increasing the efficiency of

the army, in which the public is interested, not only financially, but also for the safety and protection of the country. *Quære*, whether the gift might not also be supported as charitable within the statute on the ground that it would be in relief of taxation in so far as applied to the maintenance of the officers' mess. *Good, In re; Harington v. Watts*, 74 L. J. Ch. 512; [1905] 2 Ch. 60; 92 L. T. 796; 53 W. R. 476; 21 T. L. R. 450—Farwell, J.

Gift of Houses for Use of Former Officers during their Life—Perpetuity.—A gift of houses for the use of old officers (that is, ex-officers) of a regiment at a small rent during their life is void for perpetuity. *Good, In re; Harington v. Watts*, 74 L. J. Ch. 512; [1905] 2 Ch. 60; 92 L. T. 796; 53 W. R. 476; 21 T. L. R. 450—Farwell, J.

Vegetarian Society—Food Reform.—A gift by will of a sum of money to certain persons, to be applied as they might in their absolute discretion think best "in furtherance of the principles of food reform as advocated by the vegetarian societies of Manchester and London,"—*Held*, a good charitable gift. *Cranston, In re* ([1898] 1 Ir. R. 431), followed. *Slatyer, In re; Howard v. Lewis*, 21 T. L. R. 295—Joyce, J.

The objects of Vegetarian Societies may be fairly described as charitable within the principle of *deceased* cases. *Cranston, In re; Webb v. Oldfield*, [1898] 1 Ir. R. 431—C.A.

Burial Grounds Provided for Members of Society of Friends—Bequest of Money to Keep in Order such Grounds—Advancement of Religion.—A gift of money for the purpose of providing or of keeping in good order a burial-ground, although that burial-ground may not be a parish churchyard, and although it may be connected with the meeting-house of or for the benefit of members of a particular religious community, may be supported as a good charitable gift as being one for the advancement of religion. A bequest, therefore, of money for the purpose of keeping in good order certain burial-grounds provided for the Society of Friends, and in particular the grave of the testator's late wife, which was in one of the grounds, is a good charitable gift. The direction as to the grave of the testator's wife only imposes a special obligation ancillary to the repair of the graveyards, and does not create a separate trust. *Income Tax Commissioners v. Pemsel* (61 L. J. Q.B. 265; [1891] A.C. 531) applied. *Vaughan, In re; Vaughan v. Thomas* (83 Ch. D. 187), considered and explained. *Manser, In re; Att.-Gen. v. Lucas*, 74 L. J. Ch. 95; [1905] 1 Ch. 68; 92 L. T. 79; 53 W. R. 261—Warrington, J.

Advowson—Gift to Church Patronage Trust—Object of Trust to Present Fit Persons to Livings—Application for Leave to Retain Property.—Trusts declared concerning an advowson under which there are no *cestuis que trust*, except by inference the public, and where the trusts are in substance merely that the legal owners of the advowson, their heirs and assigns, shall take care to present fit and duly qualified persons to the living as vacancies occur—which is the duty imposed by the law on every owner

of an advowson—are not good charitable trusts. The intention of the creator of the trusts to improve by that means the choice of the parson to be presented to the living is not sufficient to make them charitable trusts. The observations of the Lords Justices in *Hunter, In re; Hood v. Att.-Gen.* (66 L. J. Ch. 545; [1897] 2 Ch. 105), to the supposed effect that trusts of an advowson directed to narrowing the choice of clergymen to be presented to the living to men holding particular religious views in the Church of England were good charitable trusts, discussed, and the case on that ground distinguished. *Church Patronage Trust, In re; Laurie v. Att.-Gen.*, 73 L. J. Ch. 712; [1904] 2 Ch. 643; 91 L. T. 705; 53 W. R. 85; 20 T. L. R. 713—C.A. Affirming, 73 L. J. Ch. 77; [1904] 1 Ch. 41; 89 L. T. 505; 52 W. R. 106; 68 J. P. 64; 20 T. L. R. 52—Buckley, J.

Semble, that if the trust had been to present a person of a particular type of religious thought within the pale of the Church of England there would have been a charitable trust within the Act. *Ib.* (*Per* Buckley, J.)

Purchase of Advowsons or Presentations—No Trust Declared of such Purchase—Uncertainty—Failure of Gift.—Where, in a testamentary bequest, charitable purposes are mixed up with other purposes of so indefinite a nature that the Court cannot execute them, or where the description includes purposes which may or may not be charitable, and a discretion is vested in the trustees, the whole gift fails for uncertainty. *Hunter v. Att.-Gen.*, 68 L. J. Ch. 449; [1899] A.C. 309; 80 L. T. 732; 47 W. R. 673—H.L. (E.)

Peal of Bells—Bequest to Ringers.—A bequest to the ringers for the time being of the parish church of C. who should ring a peal of bells from six to seven in the forenoon on each 29th of May, in commemoration of the happy restoration of the monarchy to England is a good charitable gift. *Pardoe, In re; McLaughlin v. Att.-Gen.*, 75 L. J. Ch. 455; [1906] 2 Ch. 184; 94 L. T. 567; 54 W. R. 561; 22 T. L. R. 452—Kekewich, J.

Maintenance of Headstones.—A bequest for the erection and maintenance of headstones to the graves of any persons who at their death were resident as pensioners in the almshouses at C., and who should be buried in the churchyard of C., is a good charitable gift. *Manser, In re; Att.-Gen. v. Lucas* (74 L. J. Ch. 95; [1905] 1 Ch. 68), applied. *Ib.*

Such "public charities and institutions" as Trustees should think Worthy—Uncertainty.]—A bequest of residue in trust for "such public charities and institutions or for such charitable purposes for the public advantage or benefit" as the trustees should in their absolute discretion consider worthy and fitting objects to receive the same is a good charitable gift. *Grimond v. Grimond* (74 L. J. P.C. 35; [1905] A.C. 124) distinguished. *Ib.*

Residue to be Divided amongst such Charitable Institutions Connected with County of L. as Trustees think Expedient—Uncertainty.—A testator directed his trustees to divide the residue of his estate in such proportions as they

might consider proper "amongst such charitable institutions connected with the county of Lanark as they may consider expedient":—*Held*, that the bequest was not void for uncertainty. *Cleland's Trustees v. Cleland*, [1907] S.C. 591—Ct. of Sess.

Trust for Support and Education—Objects to have Specified Names—Uncertainty.—A testator devised all his real and personal estate to trustees upon trust "to pay towards the support and education in Ireland of any Roman Catholic boy or boys, man or men, of the surname of O'Laverty or Laverty, O'Lafferty or Lafferty, being between the ages of eleven years complete and twenty-three years complete, until such boy or man shall have obtained a trade or profession, such sums as said trustees may think proper." Absolute discretion was given to the trustees as to the selection of recipients and the discontinuance of any payment to them for their "support or education." They were also empowered to accumulate and invest the interest, the profits of which were to be applied "in the same manner as those of the original shares or funds—viz. for the support of boys or men of the above-mentioned surnames, under the circumstances before mentioned":—*Held*, that the gift was not charitable, and therefore failed. *Laverty v. Laverty*, [1907] 1 Ir. R. 9—Barton, J.

Bequest for Relief of Class who have Shewn Sympathy in Pursuit of Science—Uncertainty.—A testator directed his trustees to employ the residue of his estate "in instituting and carrying on a scheme for the relief of indigent bachelors and widowers, of whatever religious denomination or belief they may be, who have shewn practical sympathy, either as amateurs or professionals, in the pursuits of science in any of its branches, whose lives have been characterised by sobriety, morality, and industry, and who are not less than fifty-five years of age, or of aiding any scheme which now exists or may be instituted for that purpose":—*Held*, first, that the bequest was charitable; and secondly, that it was not void for uncertainty. *Murdoch's Trustees v. Weir*, [1907] S.C. 185—Ct. of Sess.

Direction for Erection of Statues and Towers—Encouragement of Young and Rising Artists.—A testator directed the income of his heritable estate to be used in erecting—first, statues of himself and other members of his family, and secondly, artistic towers, on his estates, declaring that his wish was to encourage young and rising artists, and that for that purpose prizes were to be given for the best plans of the proposed statues and towers:—*Held*, that this was not an educational or charitable bequest. *McCaig v. Glasgow University*, [1907] S.C. 231—Ct. of Sess.

Gift for Repair of Inclosure Round a Grave.—Bequest of 50*l.* to be invested and the dividends to be applied in keeping the inclosure round a grave in order and repair held to be void. *Toole v. Hamilton*, [1901] 1 Ir. R. 383—M.R.

Repair of Churchyard—Validity—Mortmain—Act of Parliament—Implied Repeal.—The gift by a testatrix of "any little money left" for the repair of a churchyard is a valid charitable bequest of her residue under the Mortmain and

Charitable Uses Act, 1891, and is not limited to the sum of 500*l.* by virtue of the Gifts for Churches Act, 1803. *Douglas, In re*; *Douglas v. Simpson*, 74 L. J. Ch. 196; [1905] 1 Ch. 279; 92 L. T. 78; 21 T. L. R. 140—Kekewich, J.

Legatee to Give Undertaking to Keep Burial Vaults in Order.—Bequest of 500*l.* to the treasurer of the Society of St. Vincent de Paul, at L., for the benefit of the poor of L., "on condition that the committee of said society shall undertake in writing to my executors to have the railing and iron-work of the two vaults in St. L.'s cemetery . . . painted once in every three years."—*Held*, a valid bequest. *Roche v. McDermott*, [1901] 1 Ir. R. 394—M.R.

"Religious purposes."—A testator bequeathed to his trustees a sum of money, upon trust, to invest it, and apply the income for such religious purposes as his trustees and the Bishop of C. for the time being should, in their uncontrolled discretion, think fit. By a clause in the will immediately preceding this bequest, the testator bequeathed a like sum of money to his trustees for the benefit of such charitable institutions connected with the counties of C. and D., as his trustees and the Bishop of C. for the time being should in their uncontrolled discretion think fit, irrespective of creed:—*Held*, that the words "religious purposes" meant religious purposes which were charitable, and that the bequest was not void for uncertainty. *Arnott v. Arnott*, [1906] 1 Ir. R. 127—M.R.

Grimond v. Grimond (74 L. J. P.C. 35; [1905] A.C. 124) is a decision upon Scotch law, and does not affect the rule laid down in *White v. White* (62 L. J. Ch. 342; [1893] 2 Ch. 41) and earlier cases, that a bequest for a religious purpose is *prima facie* a bequest for a charitable purpose. *Ib.*

Political and Religious Objects Combined—Validity.—A devise for "the furtherance of Conservative principles and religious and mental improvement" is a valid charitable gift. *Scowercroft, In re*; *Orinrod v. Bishop's Itchington (Vicar)*, 67 L. J. Ch. 697; [1898] 2 Ch. 638; 79 L. T. 342—Stirling, J.

Voluntary Association—Inn of Chancery—Property Held to Intent it should always be used as Inn of Chancery.—By a deed dated in 1618, after a statement that the messuage known as Clifford's Inn had been for many years theretofore used "as an Inn of Chancery for the furtherance of the study and practiss of the Comon Lawes of this Realme of England," and that the grantors had an honourable intent and care that it should continue to be so used, the same messuage "principally for that purpose and consideration," and in consideration of 600*l.* paid to the grantors by the Society of Clifford's Inn, was assured to the use of certain named members of the society to the intent that the same messuage should retain its ancient name and "be employed as an Inn of Chancery for the good of the gentlemen of that Societe and the benefytt of the common welthe as aforesaid":—*Held*, that the property was subject to a charitable trust, and could not be sold by the members of the society for their own benefit. *Smith v. Kerr*, 71 L. J. Ch. 369; [1902] 1 Ch. 774; 86 L. T. 477—C.A.

Inn of Chancery—Proceeds of Sale—Settlement of Scheme—Dependency of Inn of Court—Clifford's Inn—Inner Temple.—Upon the application of the Honourable Society of the Inner Temple to intervene and attend all proceedings connected with the settlement of a scheme relating to the trust fund which had arisen from the sale of Clifford's Inn, on the ground that Clifford's Inn was a dependency of the Inner Temple and had been under the control of that society in all educational matters for several centuries,—*Held*, that, on the evidence before the Court, the Inner Temple had no paramount right to be regarded as persons in the position of trustees of the fund, with power to administer it as they thought fit, and further that no useful purpose would be served by the Court exercising its discretion in favour of the Inner Temple and granting the application. *Smith v. Kerr* (No. 2), 74 L. J. Ch. 763—Farwell, J.

"Charitable or Emigration uses."—See *Sidney, In re; Hingeston v. Sidney*, 77 L. J. Ch. 296; [1908] 1 Ch. 488—C.A.

Devise—"Charitable or other purpose."—See *Harbison, In re; Morris v. Larkin, post*, WILL.

3. MORTMAIN—INTEREST IN LAND.

Gift of Land by Will—Trust for Sale—"Land."—A testator gave all his real and personal estate upon trust for conversion, the income to be paid during the lifetime of his wife to her and to certain charities, the estate to be ultimately divided between the charities. He directed that no part of his freeholds or leaseholds should be sold during his wife's life without her consent:—*Held*, that the reversionary interest given to the charities was not "land" within the meaning of the Mortmain and Charitable Uses Act, 1891, but that the immediate terminable interest in the income of land was; and, consequently, that the latter interest, not having been sold within a year of the testator's death (and no application for an extension of time having been made within the year), had vested by force of the Act in the official trustee of charity lands. *Ryland, In re; Roper v. Ryland*, 72 L. J. Ch. 277; [1908] 1 Ch. 467; 88 L. T. 456; 51 W. R. 345—Byrne, J.

Personal Estate arising from Land—Power of Trustees to Retain Land Unsold after Expiration of Year.—Where real estate is devised to trustees on trust for sale, and the proceeds directed to be paid to a charity, "land" has not been "assured by will to or for the benefit of any charitable use" within the meaning of section 5 of the Mortmain and Charitable Uses Act, 1891, the charity taking no benefit in anything except "personal estate arising from land." Consequently sections 5 and 6 of the Act do not apply, and the trustees are not obliged to apply to the Court under section 5 to extend the time for sale beyond the period of one year from the testator's death. *Sidebottom, In re; Beeley v. Waterhouse*, 71 L. J. Ch. 662; [1902] 2 Ch. 389; 87 L. T. 57; 50 W. R. 611—C.A. s.p. *Wilkinson, In re; Esam v. Att.-Gen.*, 71 L. J. Ch. 663n; [1902] 1 Ch. 841; 87 L. T. 40—Kekewich, J.

A charity cannot be relieved by means of a devise on trust for sale from the provisions of the Mortmain and Charitable Uses Acts, 1888 and 1891, against the holding of land by charities. The trustees cannot postpone the sale indefinitely and hold the land for the benefit of the charity. They must sell within a reasonable time from the death of their testator unless they get the leave of the Court under its general jurisdiction to postpone the sale. *Sidebottom, In re; Beeley v. Waterhouse, supra*.

The provisions of section 8 of the Act of 1891 as to the retainer by a charity of land assured by will for the benefit of any charitable use do not apply to land devised on trust for sale for the benefit of a charity. *Ib.*

Bequest to be Laid Out in Purchase of Land and Erection thereon of Model Dwellings to be Let to Poor at Low Rents—"Charitable uses."—A testator, who died in 1900, devised and bequeathed his residuary real and personal estate to trustees upon trust to sell and convert and to stand possessed of the proceeds upon trust from time to time to purchase land in populous places and to erect upon the land so purchased model dwellings, and to let the same to the poor at low rents:—*Held*, that the testator had manifested a general charitable intention to provide model dwellings for the poor, and therefore that the effect of striking out the direction to purchase land in accordance with section 7 of the Mortmain and Charitable Uses Act, 1891, was not to put an end to the whole charitable trust. *Held*, therefore, that the residuary gift was valid. *Sutton, In re; Lewis v. Sutton*, 70 L. J. Ch. 747; [1901] 2 Ch. 640; 85 L. T. 411; 66 J. P. 39—Buckley, J.

The words "the charitable uses" in section 7 of the Act of 1891 have the same meaning as the words "the purposes of the charity" in section 8 of the Act. *Ib.*

Semble, the Working Classes Dwellings Act, 1890, is not an Act dealing with charity matters. *Ib.*

Devise for Sale—Extension of Time—Jurisdiction of Court.—The Court has jurisdiction under section 5 of the Mortmain and Charitable Uses Act, 1891, to extend the time for the sale of land devised by will to a charity for a reasonable period beyond the period of one year limited by that section; and the interests of the charity with regard to the present and probable future value of the land may be taken into consideration in determining as to the exercise of the jurisdiction. *Sidebottom, In re; Beeley v. Sidebottom*, 70 L. J. Ch. 448; [1901] 2 Ch. 1; 85 L. T. 366—C.A.

Condition Precedent—Perpetuity—Statutes of Mortmain.—A testator, who died in March, 1894, by his will dated in July, 1893, after devising his residuary real estate to trustees upon trust for sale, and to hold the proceeds upon the trusts declared of his residuary personal estate, gave the sum of 10,000*l.* to his trustees upon trust to transfer the same to trustees to be appointed by them, or the trustees for the time being of his will (such appointed trustees to be not less than three or more than six in number),

to be held by them upon trust, "as soon as any land shall at any time be given or obtained for the purpose, to employ the same in erecting almshouses," in a certain parish for the deserving poor of that parish, without regard to religious denomination, and in making weekly or other periodical allowances to the inmates of such almshouses; and he empowered the trustees so appointed, in conjunction with the trustees of his will, to make rules for the regulation and maintenance of such almshouses. And, after giving other charitable and general legacies, the testator gave all his residuary personal estate to his trustees upon trust for sale and conversion, and to pay debts and legacies, and hold the residue of the moneys upon trust, to pay or transfer the same to trustees to be nominated and appointed by the trustees of his will, upon trust, "as soon as any land shall at any time be given or obtained for the purpose, to employ the same in erecting and maintaining" a certain orphanage or institution; and the will contained directions for the management and regulation of such institution:—*Held*, that the language of the will did not constitute a condition precedent to the gifts, but was introduced for the purpose of mere machinery so as to avoid the provisions of the Statutes of Mortmain; and that the principle to be applied to the present case was that explained in *Chamberlayne v. Brockett* (L. R. 8 Ch. 206). *Held*, therefore, that without prejudice to any question, if land could not be obtained, there must be a declaration that the sum of 10,000*l.* and the residue were well given to charities; and that special trustees thereof must be appointed as directed by the will, and liberty given to apply. *Gyde, In re; Ward v. Little*, 79 L. T. 261—C.A.

Money to Found a School—Validity of Gift.—A testator by his will directed his trustees to lay out and employ the residue of his estate in founding at a certain town a school for all trades connected with the building and fitting out of steam and sailing ships:—*Held*, that the gift involved the acquisition of land and the building thereon of a school-house, and was therefore void. *Hopkins v. Phillips* (3 Giff. 182) followed. *Vere, In re; Carter v. Brown*, 22 T. L. R. 273—Swinfen Eady, J.

Gift to Charity of Interest and Remainder in Impure Personalty—Change of Investment to Pure Personalty before Falling into Possession—Failure of Gift.—By his will, made in 1889, a testator gave to a charity property, including his interest in remainder, expectant on the determination of his parents' life interests, in the trust funds comprised in their marriage settlement. He died in 1890. At the date both of his will and of his death 500*l.*, part of the trust funds, was properly invested on mortgage of real estate; but in 1902, when the life interests determined, the 500*l.* had been called in and was represented by a sum of Consols:—*Held*, that, as regards the 500*l.*, the testator was disposing of an interest in land, although his interest was in remainder, and that the gift to the charity therefore failed as regards this sum. *Prichard's Settlement, In re; Playne v. Twisden*, 88 L. T. 197—Joyce, J.

Parties to Summons—Mortmain and Charitable Uses Act, 1891.—On a summons under

section 8 of the Mortmain and Charitable Uses Act, 1891, to sanction the retention of land for the purposes of a charity after the expiration of the year from the testator's death, the Official Trustee of Charity Lands, and not the Charity Commissioners, should be made a defendant. *Church Patronage Trust, In re; Laurie v. Att.-Gen., supra.* (Per Buckley, J.)

4. FAILURE OF OBJECTS.

Gift of Land for a College—Change of Circumstances—Scheme—Cy-près—Land Claimed as Reverting to the Crown.—Where there is an immediate gift for charitable purposes, the gift is not rendered invalid by the fact that the particular application directed cannot immediately take effect within any definite limit of time, or may never take effect at all. *Wallis v. Solicitor-General for New Zealand*, 72 L. J. P.C. 37; [1903] A.C. 173; 88 L. T. 65—P.C.

In an action for the administration of the trusts of a settlement not void on the face of it, a defendant cannot in his defence impeach the settlement itself; if he desires to have it set aside he must attack it openly by action or counterclaim. *Id.*

In 1848 leading natives of New Zealand gave land to the bishop for the establishment of a college. The cession was unreservedly sanctioned by the Governor, and in 1850 a Crown grant, with a plan, was issued. No college, however, was built, and the land was let, and its rents and profits accumulated. The neighbourhood having become unsuitable for a school or college, the trustees in 1897 prepared a scheme and communicated with the law officers. The Solicitor-General declined to approve the scheme, on the ground that Ministers desired to consult Parliament on the subject of such trusts. Nothing, however, having been done, the trustees applied to the Court for the approval of the scheme. The Solicitor-General opposed, claiming that the property had reverted to the Crown, and, in the alternative, submitted a scheme which ignored the original trusts. This scheme was rejected, and a fresh scheme was adopted by the Court and assented to by the trustees. The Solicitor-General appealed, contending that the *cy-près* doctrine was not applicable. The COURT OF APPEAL allowed the appeal, and held that the land had reverted to the Crown, on the grounds—first, that her late Majesty had been deceived in the grant; and secondly, that the trust had come to an end. Decision of the COURT OF APPEAL reversed on both grounds. *Id.*

Gift to a School—Discontinuance of Weekday School—Continuance as Sunday School—Lapse—Construction of Will.—A testatrix by her will gave "to St. Andrew's School, Heybridge, Essex, 400*l.*" among other charitable legacies. The school had been founded by her brother many years prior to her death by a deed-poll, whereby he had voluntarily, "and more especially for promoting the welfare of the inhabitants of the parish," granted the site and schoolhouse to the vicar of the parish for the time being as trustee upon trust for educational purposes, the religious part to be according to Church of England principles. An elementary day school was carried on there until September, 1900,

when the Board of Education refused to recognise it, and it remained closed on weekdays for nine months, when the managers of another elementary day school obtained leave to use it at a nominal rent for an infants' school. The testatrix died in February, 1905. Throughout the whole of these periods of time the school was used continuously on Sundays only as a Sunday school under the control of the vicar of the parish:—*Held*, that the school had not wholly ceased to exist, and that therefore the gift had not lapsed. *Waring, In re; Hayward v. Att.-Gen.*, 76 L. J. Ch. 49; [1907] 1 Ch. 166; 95 L. T. 859—Kekewich, J.

Repair of Roads—Roads Taken Over by Local Authority.—Where a testator has given the income of a fund for the charitable object of maintaining a road, the object of the charity does not fail because the road has been taken over by a county council or other local authority who are bound to maintain it. The local authority are entitled to have such income paid to them to be applied in maintaining the road. *Att.-Gen. v. Day*, 69 L. J. Ch. 8; [1900] 1 Ch. 31; 81 L. T. 806; 64 J. P. 88—North, J.

Church of England School—"Supported by voluntary subscriptions"—"Becoming subject to the control of a school board"—**Local Education Authority.**—A testator, who died in 1891, bequeathed bank shares to the managers for the time being of a Church of England elementary school, on trust to apply the income towards the annual expenses of the school so long as it should be "supported by voluntary subscriptions as now and heretofore in addition to the Government grant," but in the event of it "ceasing to be so supported or becoming subject to the contrl of a school board," then to the vicar and churchwardens of the parish for repair or improvement of the fabric of the church. The school stood on private land, and had been provided by voluntary effort. Up to the testator's death it had been supported by voluntary subscriptions, but mainly by him, in addition to the Parliamentary grant and an endowment. Since his death there had been no voluntary subscriptions, the endowment, together with the trust fund and the Government grants, being substantially sufficient for carrying on the school. The managers had, however, incurred a small debt of 60*l.*, for which they were liable to their bankers. Upon a summons taken out after the passing of the Education Act, 1902, to determine whether the trust was still available for the benefit of the school, or whether the gift over had taken effect,—*Held*, upon the construction of the will and the Act, that the school had neither ceased to be supported by voluntary subscriptions nor become subject to the control of a school board, and that the gift over had not come into effect. *Beard, In re; Butlin v. Harris*, 73 L. J. Ch. 176; [1904] 1 Ch. 270; 90 L. T. 274; 52 W. R. 312; 68 J. P. 141; 2 L. G. R. 320; 20 T. L. R. 163—Byrne, J.

Bequest of Annuity for Support of National Schools—Trust Deed—Gift over if Funds Necessary for Carrying on Schools should be Raised under Powers of any Act of Parliament—Perpetuity.—A testatrix, who died in 1900, by will dated in 1891 bequeathed to her trus-

tees a sum sufficient when invested to produce a yearly sum of 20*l.*, and she directed them to pay such yearly sum to the treasurer for the time being of certain National schools so long as they should be carried on under the conditions contained in a deed of trust dated in 1873 and the funds necessary for so carrying them on should be supplied by voluntary contributions, and she declared that the bequest should not take effect but should be null and void in certain events—*inter alia*, if the funds necessary for carrying on the school should be raised under powers for that purpose contained in any then present or future Act of Parliament, and that upon the happening of such event the payment of the yearly sum should cease, and the fund purchased should fall into her residuary estate. By the deed of 1873 it was declared that the schools should be conducted according to the principles and designs of the National Society. Subject to certain superintendence by the principal officiating minister of the parish, the control and management of the schools and premises and the funds and endowments thereof were vested in and exercised by a committee consisting of such minister and certain other persons being communicants:—*Held*, first, that on the coming into operation of the Education Act, 1902, the schools ceased to be any longer carried on under the conditions contained in the trust deed of 1873; and secondly, that, as regarded the gift over, there was no infringement of the rule against perpetuities, for the Court was entitled to look at the will in order to ascertain whether the event had happened on which the yearly sum was to cease and determine; that on the coming into operation of the Act of 1902 the event contemplated by the testatrix had happened; and that therefore the fund producing the yearly sum fell into the residue. *Randell, In re; Randell v. Dixon* (57 L. J. Ch. 899; 38 Ch. D. 213), followed. *Blunt's Trusts, In re; Wigan v. Clinch*, 74 L. J. Ch. 33; [1904] 2 Ch. 767; 91 L. T. 687; 53 W. R. 152; 68 J. P. 571; 2 L. G. R. 1295; 20 T. L. R. 754—Buckley, J.

5. ADMINISTRATION.

Elementary School—Endowments—Transfer of Income to School Board—Transfer of Corpus to Official Trustees—Action for Account—Certificate of Charity Commissioners—"Relief sought adversely to any Charity."—Where by an arrangement under section 23 of the Elementary Education Act, 1870, the income of an endowment of an elementary school is transferred for the benefit of a school board, the latter becomes a *cestui que trust* of a charitable trust; and if after such transfer the *corpus* of the endowment is transferred to the official trustees of Charitable Funds, who thereafter receive the income, the certificate of the Charity Commissioners under section 17 of the Charitable Trusts Act, 1853, is necessary before proceedings can be taken by the school board against the official trustees for an account of the income received by them and for execution of the trust, as such relief is not sought adversely to the charity within the meaning of section 17. *Llanbadarn-fawr School Board v. Official Trustees of Charitable Funds*, 70 L. J. K.B. 307; [1901] 1 K.B. 430; 84 L. T. 311; 49 W. R. 363—C.A.

Inhabitants of "Parish"—Several Townships—Separate Rating—Separate Overseers and Churchwardens—Exemption from Church Rates.—The primary meaning of the word "parish" is the ancient ecclesiastical parish. Where the parish originally included several townships the fact that some of these townships have from time immemorial maintained their own churches, been exempt from church rates for the maintenance of the mother church, and appointed their own churchwardens, does not prove that such townships are not included in the parish or that the inhabitants thereof are not entitled to share in a charity for the poor of the parish. *Sandbach School and Almshouse Foundation, In re*; *Att.-Gen. v. Crewe*, 70 L. J. Ch. 604; [1901] 2 Ch. 317; 84 L. T. 815; 49 W. R. 647—Farwell, J.

The fact that a township is separately rated to the poor is in cases within the Poor Relief Act, 1862 (which provides for the appointment in certain cases of separate overseers for each township), of no weight as evidence that it is a separate parish. *Ib.*

(a) CY-PRÈS DOCTRINE.

Charitable Gift—Benefit of Inhabitants.—A testatrix bequeathed 3000*l.* "for the benefit of the Mann Institute." There was no legally constituted charity of this name capable of receiving a legacy; but the testatrix had erected a building, known by this title, on land of her own, with a view to benefiting the inhabitants of the parish, and had leased it out at nominal rents, partly for the purpose of public meetings, partly for the purpose of a working men's club. This building, however, at the time of her death, remained the property of the testatrix:—*Held*, that the intention to benefit the inhabitants of the parish was a charitable purpose with which the actual uses to which the building had been hitherto put were in no wise inconsistent. *Held*, also, that the legacy was given in pursuance of this general charitable intention, and must therefore be applied under the *cy-près* doctrine in the furtherance of similar ends. *Mann, In re*; *Hardy v. Att.-Gen.*, 72 L. J. Ch. 150; [1903] 1 Ch. 232; 87 L. T. 734; 51 W. R. 165—Farwell, J.

Gift to Non-existent Charity—General Charitable Intention—"Charitable institution."—Where a gift is made to a charitable institution which has never had any existence, the Court, which always favours charities, is more ready to infer a general charitable intention than the contrary, and will lay hold of even small indications on the face of the will as shewing that the testator intended that the gift should be for a purpose rather than for a person, namely, the particular charity mentioned. *Clergy Society, In re* (2 K. & J. 615), and *Maguire, In re* (39 L. J. Ch. 710; L. R. 9 Eq. 632), followed. *Davis, In re*; *Hannen v. Hillyer*, 71 L. J. Ch. 459; [1902] 1 Ch. 876; 86 L. T. 292; 50 W. R. 378—Buckley, J.

Testatrix bequeathed a number of pecuniary legacies to various blind, orphan, deaf and dumb, sick, and other charitable institutions, including a legacy of 500*l.* to the "Home for

the Homeless," and directed that in case of doubt as to the charitable institutions intended to be benefited the decision should rest absolutely with her executor. And she declared that the residue of her estate should be rateably divided among the various "charitable institutions" which were beneficiaries under her will. No charitable institution known as the "Home for the Homeless," or bearing any similar title, existed at the date of the will or previously thereto. *Held*, that, having regard to the position in which the gift occurred in the will with reference to the other gifts, and to the provision as to the decision of the executor in cases of doubt, the testatrix had shown a general charitable intention, and that the legacy of 500*l.* was therefore effectual. *Held* also, that the institution or authority which would take and give effect to the legacy was within the words "charitable institutions" in the gift of the residue, and would be entitled to a rateable proportion of it under the residuary gift. *Ib.*

Voluntary School—Church of England School Closed for Want of Funds—Charity—Cy-près—Scheme—Lease to Local Education Authority.—A building held on trust to carry on a Church of England school was closed in 1882, there being no need for such a school in the parish:—*Held*, on action brought for administration of the trusts, that an enquiry whether the building could be used for the purpose of a Church of England school should be directed, and that, if upon enquiry it was found that it was not practicable to so use the building, then a scheme should be settled to carry out the trusts *cy-près*. Such a scheme might properly provide for the letting of the building for a limited period to the local education authority for use for educational purposes. *Att.-Gen. v. Edalji*, 97 L. T. 292; 5 L. G. R. 1085; 71 J. P. 549—Swinfen Eady, J.

(b) SCHEME.

Endowed School—Right of Appeal—Persons "directly affected" by Scheme.—The right of appeal to the Queen in Council, given by section 39 of the Endowed Schools Act, 1869, against any scheme passed under the Act to "any person or body corporate directly affected by such scheme" is confined to those who have a personal and individual interest as distinct from the general interest which appertains to the whole community among whom the endowment works. *Colchester Grammar School, In re*, 67 L. J. P.C. 86; [1898] A.C. 477; 78 L. T. 509—P.C.

The mere fact that the petitioners have boys at the school does not constitute such an interest, as section 13, which deals with vested interests, provides only for the vested interests of boys who were on the foundation when the Act passed—namely, August 2, 1869. *Ib.*

Petitioners other than those described in section 39 may make representations to the Education Department or to the Houses of Parliament, but they cannot appeal to the Queen in Council. *Ib.*

Home for Nurses—Supply of Nurses to Hospital—Private Nursing—Preponderating Control in Management of Home.—As the outcome of

a public appeal "to provide a means of training nurses in connection with Westminster Hospital for that charity in the first instance and later for nursing in private families," and of subsequent efforts, a freehold house was purchased and opened as the home of the institution, the property being vested in trustees. Differences afterwards arose between the home and the hospital as to the supply, &c. of nurses, and eventually the hospital authorities obtained the permission of the Charity Commissioners to bring the question before the Court. They submitted a scheme, settled by the Attorney-General, which was framed to secure as the primary object of the home the supply of a staff of nurses for the hospital and afterwards the provision of private nurses, the result of the scheme as proposed being to give the preponderating control of the affairs of the home to the hospital authorities. The Court sanctioned the scheme. *Westminster Training School and Home for Nurses, In re*, 20 T. L. R. 694—Kekewich, J.

Nomination of Almoner—Refusal by Council to accept Nominee—Scheme—Jurisdiction of Charity Commissioners—Mandamus.—The refusal by the governing body of a charity, managed under a scheme authorised by the Charity Commissioners under the Endowed Schools Act, 1869, to accept the nomination of a person to be a member of the council of that governing body, such nomination being required by the scheme, is not "a question affecting the regularity or the validity of any proceedings under the scheme" to be determined by the Charity Commissioners. An application for a *mandamus* to the Charity Commissioners to hear and determine such a matter is not a just and convenient course; the proper remedy is by an application, with the sanction of the Attorney-General, to a Judge at chambers under section 28 of the Charitable Trusts Act, 1853. *Reg. v. Charity Commissioners*, 66 L. J. Q.B. 321; [1897] 1 Q.B. 407—D.

Endowed School—Endowments excepted by the Endowed Schools Act, 1869, s. 14, sub-s. 1—Scheme—Donation Governors—Jurisdiction.—The object of section 14, sub-section 1 of the Endowed Schools Act, 1869, is to give effect to the intention of charitable donors of endowments made less than fifty years before the passing of the Act by preserving such endowments intact from any interference by the Charity Commissioners under the Act, and the Act with respect to such endowments leaves the jurisdiction of the Court wholly unaffected. *Att. Gen. v. Christ's Hospital Governors*, 65 L. J. Ch. 646; [1896] 1 Ch. 879—Chitty, J.

To sanction without the consent of the existing governing body of a charitable trust a scheme which ousts the governing body from its right of administering the trust, where the trust remains and is capable of being effectuated, and no breach of trust is shewn, is beyond the jurisdiction of the Court. *Id.*

6. TRUSTEES.

Ecclesiastical Charity.—J. S., by his will made in 1558, directed his executors to erect an almshouse for ten poor persons, and gave his

executors the rents of certain real estate for five years after his death, for the purpose of founding and maintaining the intended almshouses, and gave his residue to his executors on condition that they should procure the creation of a corporation to enable the corporators to take on themselves his real estate "for the finding of such poor persons." Some time after the death of the testator legal proceedings were taken and the money recovered from the executors was invested in lands at M. A deed was executed declaring the trusts of the property to be for the relief of poor, lame, and impotent people dwelling within A., "or otherwise to employ the same for the raising and maintenance of a school according to the statute in that behalf made so as and where the same should be thought convenient by the greatest number of inhabitants being also the most chargeable to the relief of the poor" until a charter of incorporation should be obtained. Until 1818 the income was applied in aid of the rates for the relief of the poor. In 1818 the vestry of A. resolved to erect a school, and since 1819 the rents of M. were applied in supporting the school which was then erected. The governors of the school, who were trustees, now retired, and the parish council appointed new trustees in their place. The churchwardens now petitioned against the decision of the Charity Commissioners that the parish council had power to appoint. They said in 1819 the income had been definitely appropriated to educational purposes, and trustees of the income of a permanent endowment of a school were in the same position as trustees of a school. Secondly, it was said that the charity was ecclesiastical:—*Held*, that section 66 of the Local Government Act, 1894, did not include trusteeship of property temporarily devoted to the use of the school. *Held* also, that the charity was not ecclesiastical. *Spendliffe's Charity, In re*, 83 L. T. 498—Cozens-Hardy, J.

Discretion of Trustees—New Trustees Appointed by the Court—Funds in Court—Jurisdiction to settle Scheme—Payment out of Court.—Where on the construction of a will the Court was of opinion that the original trustees who had been appointed had an absolute discretion as to the charitable objects and purposes to which the testator's property was to be applied by them, and that a similar discretionary power was vested in new trustees who had been appointed by the Court, it was *held*, on an application by such new trustees for payment out to them of funds in Court which they intended to apply to certain specified purposes, that while the Court possessed in such cases jurisdiction to settle a scheme, it would not, where intervention was unnecessary for the protection of the property, interfere with the discretionary power of the trustees, and that accordingly the funds should be paid out to them. *Warren v. Clancy*, [1898] 1 Ir. R. 127—C.A.

Power to Borrow—Overdraft at Banker's—"Charge" on Charity Estate.—The borrowing of money by trustees of a charity by means of an overdraft at their bankers is a "charge" of the charity estate within the meaning of section 29 of the Charitable Trusts Amendment Act, 1855, though the transaction is not carried out by means of any written document; and it cannot be lawfully made without the authority

of an Act of Parliament or a Court of competent jurisdiction, or under a scheme, or with the approval of the Charity Commissioners. *Fell v. Charity Lands (Official Trustee)*, 67 L. J. Ch. 385; [1895] 2 Ch. 44; 78 L. T. 474; 62 J. P. 804—C.A.

7. CHARITY COMMISSIONERS.

Power to Sell—Mission to the Jews—Voluntary Contributions—Purchase of Freehold House out of Donation—Conveyance to Trustees for Purposes of Mission—Power of Sale in Trust Deed—Proceeds to be Invested as Capital—Consent of Charity Commissioners to Sale.—A freehold house was in 1884 purchased by the founder of a Mission to the Jews out of money given to him in that year without any direction as to the particular charitable application of the money. The house was conveyed to him in fee-simple absolutely, and was used by him as a home for Jewish children. The mission was supported by voluntary subscriptions, and had no endowment. In 1885 the founder conveyed the freehold house, together with other property of the mission, to trustees upon trust that the same should be occupied and used for the purposes of the mission, the general or fundamental objects or purpose of which were described in a schedule to the trust deed. A power of sale was by the deed given to the trustees, and they were directed to invest the net proceeds of sale as capital. They were desirous of selling the freehold house:—*Held*, that the freehold house was an "endowment" within the meaning of section 66 of the Charitable Trusts Act, 1853, and that the charity was not within the exemption in section 62 as a charity wholly maintained by voluntary contributions, because it had under the trust deed property used for the purposes of the charity, although not actually producing income; and that even if it were a mixed charity it was not within the exemption, for by the terms of the deed the property could no longer be legally applied as income; and that consequently the trustees could not sell the freehold land without the approval of the Charity Commissioners under section 29 of the Charitable Trusts (Amendment) Act, 1855. *Clergy Orphan Corporation, In re* (64 L. J. Ch. 66; [1894] 3 Ch. 145), distinguished. *Att.-Gen. v. Mathieson*, 76 L. J. Ch. 682; [1907] 2 Ch. 383; 97 L. T. 450; 23 T. L. R. 754—C.A.

—Voluntary Contribution—Vendor and Purchaser—Sale of Charity Land—Consent of Board of Education.—An educational society which was ordinarily maintained out of—first, voluntary contributions; secondly, payments by or for scholars; thirdly, grants from the Board of Education; and fourthly, grants from local education authorities out of local rates, purchased land in 1886, and paid the purchase money partly out of voluntary subscriptions and partly out of the proceeds of a bazaar organised in 1886 for the purpose of putting the society in funds to enable it to discharge the debt owing in respect of the purchase price:—*Held*—first, that the property had been purchased with money which was applicable both as to capital and interest for general purposes, and was, under section 62 of the Charitable Trusts Act, 1853, exempt from the

jurisdiction or control of the Board of Education; secondly, that the society was a society wholly maintained by voluntary contributions within the meaning of section 62 of the Charitable Trusts Act, 1853. The property could therefore be sold without being subject to the provisions of section 29 of the Charitable Trusts Amendment Act, 1855. *Society for Training Teachers of the Deaf and Whittle's Contract, In re*, 76 L. J. Ch. 656; [1907] 2 Ch. 486; 97 L. T. 538; 71 J. P. 454; 23 T. L. R. 693—Neville, J.

Clergy Orphan Corporation, In re (64 L. J. Ch. 66; [1894] 3 Ch. 145), followed. *Stockport Ragged, Industrial, and Reformatory Schools, In re* (68 L. J. Ch. 41; [1898] 2 Ch. 687), discussed. *Ib.*

Dispute as to Objects—Decision of Charity Commissioners—Final Determination.—A question having arisen as to whether the income of a local charity was or was not exclusively applicable for church purposes, a letter was sent to the Charity Commissioners by the chairman of the parish council setting forth his contention upon the subject. The Commissioners, after receiving a report, wrote a letter in which they gave their opinion upon the question raised:—*Held*, that the letter constituted a determination within the meaning of the Local Government Act, 1894, s. 70, sub-s. 2, which, not having been appealed from within three months, was conclusive. *Att.-Gen. v. Hughes* 81 L. T. 679; 48 W. R. 150—Cozens-Hardy, J.

Lands Dedicated by Deed—Question as to the Person Entitled—Summons by Trustee—Charity Commissioners—Consent to Application Unnecessary—Construction.—Where there is a question as to lands, whether they are held upon charitable trusts or not, the trustee may apply to the Court to have the question determined without first obtaining the consent of the Charity Commissioners. *Shum's Trusts, In re; Prichard v. Richardson*, 91 L. T. 192—Farwell, J.

Sanction to Mortgage of Charity Lands—Consent of Charity Commissioners—"Endowment"—Funds Derived from "Voluntary Contributions"—"Cathedral, collegiate, chapter, or other schools."—The proviso at the end of section 62 of the Charitable Trusts Act, 1853 (which exempts certain charities therein enumerated from the jurisdiction of the Charity Commissioners), "that the said exemption shall not extend to any cathedral, collegiate, chapter, or other schools," does not exclude all schools from the exemptions in the section, but only cathedral, collegiate, chapter, and other schools of a similar kind. *Stockport Ragged, Industrial, and Reformatory Schools, In re*, 68 L. J. Ch. 41; [1898] 2 Ch. 687; 79 L. T. 507; 47 W. R. 166—C.A.

An industrial school whose income is derived partly from voluntary contributions and legacies, and partly from Government grants, contributions from school boards, and other public authorities, and which is possessed of land in the occupation of the school, is, as regards leasehold land with buildings erected thereon partly by means of savings of income, within the

jurisdiction of the Commissioners, and their consent is necessary to an application to the Court for leave to mortgage such land. *Ib.*

Royal Charter—Power of Sale—“Scheme legally established”—Land Registry—Entry of Restriction—Consent of Charity Commissioners to Alienation.—A hospital, incorporated under Royal charter and possessing thereunder full powers of management and an express power of sale, is not formed under “a scheme legally established” within the meaning of those words in section 29 of the Charitable Trusts Amendment Act, 1855, and must be entered in the Land Register with the restriction that no disposition of the estate of the hospital is to be registered without the consent of the Charity Commissioners, on an order of the Registrar. *Mason’s Orphanage and London and North-Western Railway’s Contract, In re* (65 L. J. Ch. 32, 439; [1896] 1 Ch. 54, 596), followed. *Att.-Gen. v. National Epileptic Hospital*, 73 L. J. Ch. 677; [1904] 2 Ch. 252; 91 L. T. 63; 20 T. L. R. 592—Kekewich, J.

Sale of Chapel—Consent of Charity Commissioners—Voluntary Contributions.—The trustees of the Welsh Calvinistic Methodist Connexion sold a chapel which was conveyed to them by an indenture dated October 31, 1879, to hold unto and to the use of themselves, their heirs and assigns, upon trust for the Connexion, and also upon trust to sell, exchange, mortgage, demise, or let the chapel; and it was declared that the trustees should hold the proceeds of sale upon trust for the Connexion. The consideration-money of the conveyance of October 31, 1879, was paid by the vendors out of moneys which they had borrowed on promissory notes signed by some of them, the principal and interest of which was afterwards paid out of a fund formed by voluntary contributions subsequently made or collected by members of the congregation.—*Held* (it being admitted that the proceeds of sale were applicable as income), that the money raised for the purchase of the chapel was not a donation or bequest unto and in trust for the charity, but was raised by voluntary contributions, and as such came within the exceptions in section 62 of the Charitable Trusts Act, and the consent of the Charity Commissioners to a sale was unnecessary. *Harding and Welsh Calvinistic Methodist Trustees, In re*, 92 L. T. 641—Buckley, J.

Registration under Companies Acts—Land Registry—Restriction—“Endowment”—Disposition of Property—Consent of Charity Commissioners.—Under its memorandum of association a charitable society incorporated under the Companies Acts, 1862 to 1890, had full power to purchase, lease, and acquire real or personal property, erect and maintain buildings, and sell, exchange, or deal with all its property. Appeals were from time to time made for donations to special objects of the charity, including one for the completion of new headquarters of the society. A large sum was obtained, and leasehold premises acquired. Upon an application to register the society as proprietor of these leaseholds under the Land Transfer Acts, 1875 and 1897,—*Held*, that the subscribers to the headquarters must be taken to have known that their contributions, although primarily applicable to this particular object, were given for

the general purposes of the society, and that there was no intention to take the money out of the control of the managing body; that there was no such “endowment” within the meaning of the Charitable Trusts Act, 1853, s. 66, as rendered the society amenable to the jurisdiction of the Charity Commissioners; that the society could therefore deal with the property within the powers of the memorandum of association, and was entitled to be registered in respect of the leaseholds without any restriction to the effect that no disposition of the land was to be registered without the consent of the Charity Commissioners. *Church Army, In re*, 75 L. J. Ch. 467; 94 L. T. 559; 23 T. L. R. 428—C.A.

Administration—Petition—Consent of Charity Commissioners—Exemption—“Any cathedral or collegiate church.”—The phrase “any cathedral or collegiate church” in section 62 of the Charitable Trusts Act, 1853, does not extend so as to include an endowment, indirectly connected with the cathedral church, but over which the dean and chapter have not any control; which does not form a portion of the capitular estates; and which is not held by them upon any trusts. *Dod’s Charity, In re*, 74 L. J. Ch. 260; [1905] 1 Ch. 442; 92 L. T. 260; 53 W. R. 314; 21 T. L. R. 242, 452—Swinfen Eady, J.

The minor canons of Chester Cathedral were entitled, independently of the dean and chapter, to the income of certain lands, the legal estate of which was not vested in the dean and chapter. The dean and chapter, however, were indirectly interested in this trust, in so far as every increase in the income of the trust relieved them, *pro tanto*, in their statutory duty of maintaining the income of the minor canons at a certain level:—*Held*, that this trust was not covered by the exemption in section 62 of the Charitable Trusts Act, 1853, and that it was necessary, accordingly, for the dean and chapter, under section 17, to obtain the certificate of the Charity Commissioners before they would be entitled to present a petition for the administration of the trust. *Ib.*

S. LAW OFFICERS.

Duty of, as to Charities—Intervention of Executive Government.—It is the duty of the law officers of the Crown to protect and not to attack charities, or to prevent their being carried into execution on the ground of prospective action by the Executive or the Legislature. *Wallis v. Solicitor-General for New Zealand*, 72 L. J. P.C. 37; [1903] A.C. 173; 88 L. T. 65—P.C.

CHARTER PARTY.

See SHIPPING and INSURANCE.

CHEMIST.

See MEDICAL PRACTITIONER.

CHEQUE.*See* BILL OF EXCHANGE.**CHILDREN.***Custody of.*—*See* INFANT and HUSBAND AND WIFE.*Employment of.*—*See* MASTER AND SERVANT.*Illegitimate.*—*See* BASTARDY.*Offences against.*—*See* CRIMINAL LAW.**CHINA.***See* INTERNATIONAL LAW.**CHOSE IN ACTION.***See* ASSIGNMENT.**CHURCH AND CLERGY.***See* ECCLESIASTICAL LAW.**CLUB.**

Power to Alter Rules—Fundamental Objects—General Meeting—Resolution—Validity.—Where a club was instituted, according to rule 2 of its body of rules, for the purpose of providing a ground for pigeon-shooting, polo, and other sports, and was managed by a committee under the rules, one of which required that any alteration of the rules should be adopted at a general meeting by a two-thirds majority, it was held that pigeon-shooting was not a fundamental object of the club, and that it was competent for the requisite majority to pass a resolution that pigeon-shooting should be discontinued, and thus to authorise the committee to discourage that particular sport. *Thellusson v. Valentia (Viscount)*, 76 L. J. Ch. 465; [1907] 2 Ch. 1; 96 L. T. 657; 23 T. L. R. 455—C.A.

—**Increase of Subscription—Dissentient Member—Injunction.**—Where the rules of a club contain no express provision for the making of amendments or alterations therein, the majority of members assembled in general meeting have no inherent authority, against the wishes of the minority, to alter the rules forming the written contract by which the members are bound; and a dissentient member, who has declined to pay an increased subscription, imposed at a general meeting, and who has been consequently posted as in default, will be entitled to an injunction to restrain the committee of the club from excluding him from its privileges. *Harington v. Sendall*, 72 L. J. Ch. 396; [1903] 1 Ch. 921; 88 L. T. 323; 51 W. R. 463—Joyce, J.

Trustees of Club—Dissolution—Liability of Members to Indemnify Trustees.—The members

of a club, who, from the nature of the case, are a perpetually changing body, are not liable, in the absence of any rule imposing such liability, to pay to the funds of the society, or to the trustees, or to any one else, any money beyond the subscriptions required by the rules of the club to be paid so long as they remain members. *Hardoon v. Belilios* (70 L. J. P.C. 9; [1901] A.C. 118) distinguished. *Wise v. Perpetual Trustee Co.*, 72 L. J. P.C. 31; [1903] A.C. 139; 87 L. T. 569; 51 W. R. 241—P.C.

Sale of Intoxicating Liquor.—*See* INTOXICATING LIQUORS.

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1. STATUTES.

Australian States.—7 Edw. 7 c. 7 is the *Australian States Constitution Act*, 1907.

British North America.—7 Edw. 7 c. 11 is the *British North America Act*, 1907.

Colonial Acts Confirmation.—1 Edw. 7 c. 29 (*the Colonial Acts Confirmation Act*, 1901) confirms certain Acts of New South Wales, Queensland, and Western Australia.

Colonial Loans.—62 & 63 Vict. c. 36 is the *Colonial Loans Act*, 1899.

Royal Niger Company.—62 & 63 Vict. c. 43 is the *Royal Niger Company Act*, 1899.

Transvaal Loan.—7 Edw. 7 c. 37 is the *Transvaal Loan (Guarantee) Act*, 1907.

Uganda.—63 & 64 Vict. c. 11 is the *Uganda Railway Act*, 1900.

— 2 Edw. 7 c. 40 is the *Uganda Railway Act*, 1902.

2. GENERAL PRINCIPLES.

Colonial Laws—Repugnancy.—The “repugnancy to the laws of England,” which by the Colonial Laws Validity Act, 1865, makes colonial legislation void, is repugnancy to such Imperial legislation only as by express terms or necessary intendment is made applicable to the colony, and does not otherwise restrict the powers of a Colonial Legislature. *Reg. v. Marais*; *Marais*, *Ex parte*, 71 L. J. P.C. 32; [1902] A.C. 51; 85 L. T. 363—P.C.

3. AFRICA.

(1) EAST AFRICA.

Zanzibar—Exterritoriality—Land Abroad Compulsorily Acquired by British Government—Ascertainment of Price—British or Local Law

—Judicial Notice of Foreign Law.—By the Zanzibar Order in Council, 1884, British subjects in civil and criminal matters are to have their cases tried by their own Consuls. In bankruptcy or on death their property is to be administered according to British law, and their houses may not be entered by the Zanzibar authorities without the Consul's permission:—*Held*, that these privileges do not confer on land purchased by a British subject the character of absolute extraterritoriality, and that the incidents of such land are governed by the law of its site. Consequently, when the land is compulsorily taken by the British Government under the Indian Land Acquisition Act, 1894, the owner is not entitled to compensation for the value of the buildings erected, without lawful authority, on behalf of the Government thereon, before the notice to treat, that being the rule of the Mohammedan law which prevails in Zanzibar. *Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co.*, 70 L. J. P.C. 25; [1901] A.C. 373; 84 L. T. 212—P.C.

Although by virtue of the treaty grant the British Sovereign becomes an authority in Zanzibar, exercising powers independently of the Sultan, Zanzibar remains foreign territory, and the British Sovereign acts in all respects as a Zanzibar authority; and a British Judge acting within these limits is a Zanzibar Judge, and bound to take judicial notice of the Zanzibar law, and not to treat that law as mere matter of evidence. *Ib.*

The Indian Land Acquisition Act, 1894, provides that land required by the Government is to be taken at its market value on a given day, and that the Court is not bound to give more because the object for which it is taken is likely to increase the value, or less because the same object is likely to add to the value, of the owner's remaining land:—*Held*, that the probable effects of a railway are not to be taken into consideration, except to the extent to which it is shewn that such speculations had actually affected the market price. *Ib.*

(2) SOUTH AFRICA.

(a) CAPE COLONY.

War Contribution.—3 Edw. 7 c. 27 is the *South African Loan and War Contribution Act*, 1903.

Crown Liabilities Act, 1888.—The Crown Liabilities Act, 1888, of the Cape of Good Hope, which gives power to sue the Prime Minister, does not confer the power on any Court of making a declaration of right against the Crown. *Cook v. Sprigg*, 68 L. J. P.C. 144; [1899] A.C. 572; 81 L. T. 281—P.C.

Deed of Family Arrangement—Prohibition of Alienation — Fideicommissum Conditionale — Mortgage.—A husband and wife, who were married in community, in an instrument dated 1881 declared to have bequeathed a sixth share of a farm to a son “for the sum of 300*l.* sterling with interest at six per cent. per annum, but after the death of the first dying of us the interest shall be decreased to three per cent. The said ground shall never be sold or parted

with in favour of a stranger, but shall permanently remain among legal heirs. This bequest shall be attached to the deed of transfer." This document was treated not as a bequest, but as a contract for sale, and the father and son made the declaration required by law of purchasers and sellers, and paid the transfer duty. The land was demarcated, and possession taken by the son. After the father's death his executors executed a transfer acknowledging the payment of the purchase-money. The son executed mortgages of the property, and the mortgagees had notice of the instrument of 1881:—*Held*, that the mortgages being mere charges, not passing the *dominium*, were not a breach of the prohibition of alienation in the instrument of 1881, inasmuch as the charge imposed by a mortgage can only be enforced by a judicial sale, and until such sale the property cannot be said to have been sold or disposed of. *Josef v. Mulder*, 72 L. J. P.C. 50; [1903] A.C. 190; 88 L. T. 72—P.C.

Insolvency—Secured Creditors—Registration—Preference.—By the law of the Cape of Good Hope the priorities of secured creditors in an insolvency are determined not by the dates of execution and registration of the several securities, but by the dates of the actual debts under such securities. Thus, a security earlier in point of date, but under which no advance has been made, must give place to one which was later, but given for an actual advance. *Standard Bank of South Africa v. Heydenrych*, 76 L. J. P.C. 73; [1907] A.C. 336; 97 L. T. 148; 23 T. L. R. 679—P.C.

Land—Title—Terms of Grant—Boundary—Diagram—Inconsistency between Grant and Diagram.—Where a diagram attached to a grant of land contradicts the unambiguous text of the title it must give way to the text; and although by proclamation before a title can be granted there must be a diagram, the proclamation gives the diagram no independent authority as limiting the terms of the grant. *Horne v. Struben*, 71 L. J. P.C. 88; [1902] A.C. 454; 87 L. T. 1—P.C.

Lands for Railway Purposes—Claim to take—Compensation—Construction of Statute.—It is a sound canon of construction that an intention to take away property without compensation should not be imputed to a legislature unless it be expressed in unequivocal terms. (*Western Counties Railway v. Windsor and Annapolis Railway*, 7 App. Cas. 178, followed.) Where it appeared that road commissioners claimed to expropriate without compensation the respondent's land for railway purposes on the ground that section 11 of Act IX. of 1858 effected a transfer to them of the rights derived by the Government from the Proclamation of 1813, and extended those rights so as to be applicable to the present case, — *Held*, that section 11 must receive a strict construction. Its language was satisfied by the transfer of the existing powers without any extension thereof. It would require a more direct expression of intention to create such a new power of expropriation for railway purposes without compensation as was claimed. *Commissioner of Public Works (Cape Colony) v. Logan*, 72 L. J. P.C. 91; [1903] A.C. 355; 88 L. T. 779—P.C.

(b) NATAL.

Contract—Fraud inducing Contract—Roman Law—Actio doli—Time within which Action must be brought.—Although by the strict Roman law a person induced by fraud to enter into a contract is put to his election between an *actio redhibitoria* to set aside the contract and an *actio quanti minoris* for the difference between what he ought to have had and what he has had—a limit of time for bringing either action being imposed—an *actio doli* will still lie after the lapse of such time, where the same fraud which has induced the contract has operated to deprive the plaintiff of his other remedies. *Douglas v. Sander*, 71 L. J. P.C. 91; [1902] A.C. 437; 86 L. T. 633; 50 W. R. 676—P.C.

Quare, whether an action of deceit in Natal is restricted by the conditions stated in the text of the Roman law. *Ib.*

Court—Special—"Acting" Judge—Jurisdiction.—An "acting" Judge appointed by the Governor at the request of the Chief Justice under the Natal Special Court Act, 1900, s. 28, is a Judge of the Supreme Court during the currency of his commission. *Reg. v. Marais*; *Marais, Ex parte*, 71 L. J. P.C. 32; [1902] A.C. 51; 85 L. T. 363—P.C.

Husband and Wife—Community of Goods—Post-nuptial Contract—Registration.—The effect of section 7 of Law 22 of 1863 (Natal), which provides that persons married in South Africa may, by registration, bring themselves within that law and thereby prevent community of goods attaching to their marriage, is imperative for all purposes, and a post-nuptial contract and bond executed in pursuance thereof purporting to abolish community of goods between the spouses parties thereto, *held*, in the absence of registration, to be inoperative. *Taylor v. Sturrock*, 69 L. J. P.C. 29; [1900] A.C. 225; 82 L. T. 97—P.C.

Joint Will of Spouses—Construction.—By a joint will husband and wife, between whom community of goods subsisted, provided that as soon as convenient his estate and effects should be realised, and as soon as might be after the testatrix's death certain specific legacies should be paid, and the residue of her effects, should she survive the testator, divided; but that in the event of her predeceasing her husband the residue should be divided as soon as convenient after the testator's death. The wife survived the husband. There were no specific legacies, and the wife gave a life interest to her husband in her residue:—*Held*, that the husband's legacies were not postponed until after the death of the testatrix, but were payable immediately. *Ib.*

Land—Fraudulent Sale—Title of Unregistered Purchaser to Sue to Set Aside.—The Roman-Dutch law of Natal, which requires proof of *dolus* to set aside a completed purchase in favour of an earlier contract, is practically the same as the English law relating to similar questions. S. sold a piece of land in Natal to the respondent, and received the purchase-money and handed over the title deeds, but the

respondent's title was never registered in Natal, and no formal transfer to him was made. S. died, and the appellant Crowley, professing to act as S.'s executor, sold the land to the other appellant, under an order of the Court which was improperly obtained by the suppression of material facts:—*Held*, that, although by the law of Natal a purchaser of land is not considered to be the owner until a regular legal transfer has been made to him, but only to have a contractual claim against the vendor, yet that the respondent was in a position to bring an action to set aside the sale. *Crowley v. Bergtheil*, 68 L. J. P.C. 81; [1899] A.C. 374; 80 L. T. 428—P.C.

Licensing Law—Decision of Town Council—Appeal—Certiorari.—It is not sufficient to sustain an application for a writ of *certiorari* to bring up, for the purpose of quashing, an order of the town council, to whom alone an appeal is given by statute from the decision of the licensing officer, that such officer is also clerk to the town council, not being a member thereof. *Vauda v. Newcastle Corporation*, 68 L. J. P.C. 39; [1899] A.C. 246; 79 L. T. 600—P.C.

Lunatic—Power of Attorney—Mortgage Bond Executed under Power of Attorney—Act done before Official Declaration of Insanity—Ignorance of other Party to Contract.—By the Roman-Dutch law, which prevails in Natal, the acts of an insane person, even before he has been judicially declared to be insane or a curator appointed, are absolutely void and not merely voidable, and are not made valid by ignorance of the insanity on the part of the person with whom the lunatic purported to deal. But a person may become a *negotiorum gestor* for a lunatic without any mandate, and may recover all sums legitimately expended on behalf of such lunatic. *Molynaux v. Natal Land and Colonisation Co.*, 74 L. J. P.C. 108; [1905] A.C. 555; 93 L. T. 59; 21 T. L. R. 645—P.C.

Mines—Royalties—Coal Mines Worked before Mines Act, 1899.—No royalty is due to the Crown in respect of coal raised after the passing of the Natal Mines Act, 1899, from collieries owned and worked under legislative authority before the passing of the Act. *Dundee Coal Co. v. Minister of Agriculture of Natal*, 75 L. J. P.C. 90; [1906] A.C. 511; 95 L. T. 316—P.C.

By section 2 of the Natal Mines Act, 1899, the repeal thereby effected of earlier laws and proclamations is not to affect any right, title, interest, or privilege acquired under any such law or proclamation. By section 25 mining is prohibited from Crown lands unless they be registered under the Act or otherwise lawfully held under previous laws or proclamations. Section 41 imposes a royalty on minerals extracted from Crown lands under licences granted in accordance with the Act, and section 42 extends the liability to private lands:—*Held*, that the appellants, who were owners of mines before the Act of 1899, and whose title was affirmed by previous legislation, were not liable to pay any royalty under the Mines Act, 1899. *Ib.*

Will—Construction—Bequest to Children—

Substitution—Fideicommissum.—The rule of Roman law in force in the colony of Natal, that where a parent has appointed children or remoter descendants as heirs, and directed that on their death their share should go over to another, such going over or substitution is subject to the tacit condition that the deceased child left no issue, is confined to the case of fideicommissary substitutions, and has no application to direct or ordinary substitution. *Galliers v. Rycroft*, 69 L. J. P.C. 124; [1901] A.C. 130; 83 L. T. 179—P.C.

A testator gave all his estate to his wife for the benefit of herself and his children during her life, and after her death directed that the same should be equally divided among his children, or such of them as might then be alive. One of the sons died before his mother, leaving a wife (to whom he left all his property) and one son:—*Held*, that neither the wife nor the son's son was entitled to the son's share, which was to be equally divided among the testator's other children. *Ib.*

(c) TRANSVAAL.

Judgment of High Court before Annexation—Appeal.—Section 16 of the Proclamation (Transvaal) No. 14 of 1902 gives no right of appeal where none existed before, and no appeal is allowed to the Supreme Court of the Transvaal from a decree of the High Court of the Republic from which at the time there was no appeal to any higher tribunal. *African Gold Recovery Co. v. Hay*, 73 L. J. P.C. 108; [1904] A.C. 438; 91 L. T. 214; 20 T. L. R. 598—P.C.

Patent—Jurisdiction.—The Transvaal Patent Act, No. 6 of 1887, gave jurisdiction to the High Court of the late Republic to order the cancellation of a patent in an action to which the Attorney-General was not a party. *Ib.*

Patent Cancellation.—The High Court of the Transvaal Republic had power under the Transvaal Patent Act, No. 6 of 1887, ss. 29 to 31, to cancel a patent in an action to which the Attorney-General was not a party. *Ib.*

(d) BECHUANALAND.

Mining Claim—Rules and Regulations of Company—Prospecting Licence—Registration—Forfeiture.—The mining rights conferred by a certificate of registration of the appellant company *held* not to be equivalent to a lease of the block referred to in the certificate or to fall under any category known to the Roman-Dutch law, but to be simply a matter of contract. Although under the prospecting licence, which is the first step in the acquisition of mining rights, no rent is payable, and Rule 8 only provides for forfeiture, on breach of the conditions, of the licence and the rights acquired thereunder, and there is no express rule imposing forfeiture for non-payment of rent, yet such forfeiture is necessarily implied, and particularly in rule 51, which enables the resident manager to condone a forfeiture "on payment of all rents, dues, fees and fines then due." *Tati Concessions v. Hepple*, 74 L. J. P.C. 92; [1905] A.C. 139; 92 L. T. 245; 21 T. L. R. 260—P.C.

Proclamation of Sovereignty, 1891—Concessions by Native Chiefs before Proclamation—Concessions Court—Power to Modify Previous Concessions.]—The appellants were the holders of a concession granted by native chiefs to their predecessor in title. The concession gave to the grantee the right to search for and win precious stones, gold, silver, platinum, and other minerals, over an area or areas chosen by the grantee not exceeding in the aggregate four hundred square miles. The grantee, in consideration of the punctual payment of rent and royalty, was to be "entitled to convert to his own use all precious stones and all minerals whatsoever found within the limits of the concession or demise." By proclamation of 1891, the territory in which the concession lay, up to that time a protectorate only, was annexed to the Crown. In 1893 the Bechuanaland Concessions Court was constituted to decide upon "the validity and scope" of concessions by native chiefs made before 1891. The Court allowed the appellants' claim "subject to all laws and regulations" in force in the territory. Those laws and regulations were contained in a proclamation of 1889, which excluded the right to precious minerals. The Supreme Court held that the appellants were not entitled to the precious minerals:—*Held*, that the decision operated as a modification and not an extinction of the concession, and was within the powers of the Court; that the right to prospect was not exclusive, and could be exercised effectively though not exclusive, and that the right to other than the precious minerals was not affected. *Yilander Concessions Syndicate v. Cape of Good Hope Government*, 76 L. J. P.C. 47; [1907] A.C. 186; 96 L. T. 275; 23 T. L. R. 298—P.C.

(e) BRITISH SOUTH AFRICA COMPANY.

Mining—Flotation of Claims—Mining Regulations.]—There is a "flotation" of the mining claims of a syndicate on their disposal at a profit to a substantial company; and there is nothing in the mining regulations of the British South Africa Co. which were in force in 1894 to require a different construction of the word. *Torra Exploring Syndicate v. Kelly*, 69 L. J. P.C. 115; [1900] A.C. 612; 83 L. T. 34—P.C.

3. WEST AFRICA.

Sierra Leone—Crown Suits Act.]—The Crown Suits Act, 1855, deals only with proceedings in the United Kingdom, and has not been imported into the colony of Sierra Leone by the ordinance of November 10, 1881. *Johnson v. Regem*, 73 L. J. P.C. 113; [1904] A.C. 817; 91 L. T. 234; 53 W. R. 207; 20 T. L. R. 697—P.C.

4. AUSTRALIA.

(a) COMMONWEALTH OF.

Constitutional Act.]—63 & 64 Vict. c. 12 is the *Commonwealth of Australia Constitution Act*.

Legislation of Separate States—Appeal to the King in Council from State Courts.]—Sections

73 and 74 of the Commonwealth of Australia Constitution Act, 1900, have not deprived and do not authorise the Commonwealth Parliament to deprive the subject of the right to appeal to his Majesty in Council, theretofore possessed, from decisions of the Courts of the several States. *Webb v. Outtrim*, 76 L. J. P.C. 25; [1907] A.C. 81; 95 L. T. 850; 23 T. L. R. 147—P.C.

An officer of the Commonwealth is liable to assessment in respect of his official salary for income tax imposed by the Legislature of the State in which he is resident. *D'Emden v. Pedder* (1 Comm. L. R. 91) and *Deakin v. Webb* (1 Comm. L. R. 585) overruled. *Ib.*

Commonwealth Customs—Breaking of Customs Seals.]—By section 127 of the Commonwealth Customs Act, 1901, ships' stores are only to be used (except as prescribed) for passengers and crew and for the ship's service after her departure from her last port of departure in the Commonwealth, and a penalty is attached to breach of the section. By section 192 goods sealed by a Customs officer are not to be opened without authority, and if a ship enters a port with such seal broken the master is liable to a penalty. Where such seals are broken between the arrival of a vessel in one port and her arrival in another, both penalties are incurred, whether or not they were broken in territorial waters or on the seas. *Peninsular and Oriental Steam Navigation Co. v. Kingston*, 72 L. J. P.C. 123; [1903] A.C. 471; 89 L. T. 222; 9 Asp. M.C. 433—P.C.

Customs and Excise Duties—Imposition—Exclusive Powers of Commonwealth Parliament—Powers of State Parliaments—Preference of One State over Another.]—By section 51 of the Commonwealth of Australia Constitution Act, 1900, the Commonwealth Parliament has powers with respect to taxation, but not so as to discriminate between States or parts of States. By section 90: "On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise . . . shall become exclusive . . . and all laws of the several States imposing duties of customs and excise . . . shall cease to have effect." By section 99: "The Commonwealth shall not . . . give preference to one State or any part thereof over another State or any part thereof":—*Held*, that the Parliament can make a Tariff Act retroactive and impose duties from the date of the preceding resolution; that section 90 does not prohibit the Parliament from imposing duties of Excise until uniform duties of Customs have been imposed; that there is no inconsistency in the co-existence of Excise duties imposed by the Commonwealth and similar duties imposed by the States even in the interval between the resolution passed by the Commonwealth Parliament and the Act giving effect thereto. By section 5 of the Excise Tariff, 1902, no duties are to be imposed on goods on which Customs or Excise duties have been imposed by State legislation or on which no Excise duty was in any State previously payable:—*Held*, that this constituted no discrimination between the States within the meaning of sections 51 and 99 of the Commonwealth Constitution Act, the inequality arising not from the action of the Parliament, but from the inequalities of

the duties previously imposed by the States themselves. *Colonial Sugar Refining Co. v. Irving*, 75 L. J. P.C. 54; [1906] A.C. 360; 94 L. T. 387; 22 T. L. R. 405—P.C.

(b) NEW SOUTH WALES.

Bankruptcy—Annulment of Act of Bankruptcy—Evidence—Rules.]—The statutes of New South Wales empower a Judge in his discretion to refuse to follow up an act of bankruptcy by issuing a sequestration order, but give him no jurisdiction to annul an act of bankruptcy or to declare that it was never committed. *King v. Henderson*, 67 L. J. P.C. 134; [1898] A.C. 720; 79 L. T. 37; 47 W. R. 157—P.C.

The power of the Court to frame rules is limited to rules "for the purpose of regulating any matter under" the principal Act. The 51st rule, which purports to confer a power to annul an act of bankruptcy, is no such "regulation," and is *ultra vires*. *Ib.*

Civil Servant—Pension—Service Continuous or Interrupted.]—To entitle a Civil servant to a pension under the New South Wales Civil Service Act, 1884, continuous service is not necessary, and two periods separated by an interval may be counted together to ascertain the amount to be allowed. But the service must be salaried, and persons employed by the Government and paid separately for each piece of work are not entitled to reckon, for purposes of pension, the period of such employment. *Walker v. Simpson*, 72 L. J. P.C. 58; [1903] A.C. 208; 88 L. T. 306—P.C.

Crown Lands—Conditional Purchase—Non-fulfilment of Conditions—Forfeiture.]—The Crown Lands Act, 1884, which repealed certain previous legislation, provided that complaints or questions as to the non-fulfilment of conditions attached to conditional purchases should, after enquiry, be reported upon by local land boards to the Minister. Section 20 provided that the decision on such questions by the boards should, after investigation in open Court, unless appealed from, be final. The Crown Lands Act, 1889, established a Land Court for the hearing of appeals and for other purposes:—*Held*, that the Act of 1889 did not take away the power of the Minister to declare a forfeiture, and that the land board had no judicial discretion to refuse to decide in favour of a forfeiture, as the question was one purely of fact. *Att.-Gen. for New South Wales v. Walters*, 67 L. J. P.C. 36; [1898] A.C. 460; 78 L. T. 272—P.C.

— Forfeiture — Provisional Reversal — Appeal—Special Case.] The provisional reversal under section 3 of the Crown Lands Amendment Act, 1891, of a forfeiture of a conditional purchase of lands under the Crown Lands Act, 1884 (though itself subsequently revoked), prevents the lands from being dealt with as Crown lands after the date of such provisional reversal till its revocation. A decision of the Supreme Court upon a Special Case stated by the local Court, on an appeal from a local Land Board, under the Crown Lands Act, 1889, is final and conclusive, and the question cannot be re-opened in any subsequent proceedings between the VOL. I.

parties. *Garnsey v. Flood*, 67 L. J. P.C. 131; [1898] A.C. 687; 78 L. T. 803—P.C.

— Application for Additional Conditional Purchase—Reservation for a Public Purpose—Reservation for Specified Purposes—Invalidity of Application.]—By the Crown Lands Act, 1884, s. 102, where land is reserved by notification for a public purpose, and such notification is revoked, such land is not to be sold until sixty days after the revocation. By the Crown Lands Act, 1895, ss. 10 and 11, notification of the setting apart of lands for holdings of a specified character is not to prevent such lands from becoming available for certain applications made within forty days of the notification:—*Held*, that there is no inconsistency between the two statutes, as they deal with reservations of land for different purposes; and lands released under section 102 of the Act of 1884 and set apart under the Act of 1895, s. 10, are subject to the double disability, and not available for applications until after the expiration of the sixty days under the former Act. *Colless v. Minister of Lands* (68 L. J. P.C. 9; [1899] A.C. 90) followed. *New South Wales Minister for Lands v. Harrington*, 68 L. J. P.C. 60; [1899] A.C. 408; 80 L. T. 604—P.C.

— Occupation Licence Renewal—Erroneous Notice of Non-Renewal—Subsequent Invalid Leases.]—The appellant, the holder of occupation licences of Crown Lands, applied to the Minister for Lands for a re-appraisal of the areas comprised in the licences. Before the re-appraisal a notification was published that where licence fees had not been paid within sixty days thereof licences should be deemed not to have been renewed, and the appellant's licences were specified at the old rates; and after the expiration of the sixty days the Minister inserted by error a notice in the *Gazette* that the appellant's licences had not been renewed. Subsequently, and before the Minister's approval of the re-appraisal, the appellant paid the licence fees at the old rates into the Treasury to a suspense account. The new appraisements were made and accepted by the Minister, who also approved the reversal of the "non-renewal" of the licences. Later, a notice appeared in the *Gazette* of the new appraisements, and the appellant, who had remained in possession, paid the difference between the old and the revised licence fees. After the Minister's approval, but before the publication in the *Gazette*, the respondent applied for and obtained annual leases of part of the appellant's holding:—*Held*, that the respondent's leases were invalid, as the lands were already under lease or licence within the meaning of the Crown Lands Act, 1884, when they were granted; that the notice in the *Gazette* announcing the new appraisements was the first and only notice which complied with the requirements of section 81, sub-section 2 of that Act, and that the appellant could not be treated as in default until after sixty days from the date thereof; that the 29th section of the Act of 1889, requiring that pending re-appraisal the previous fee should be paid, had no application to a re-appraisal made at the will of the Minister; and that by the Act of 1891, ss. 3 and 6, the Minister might reverse or waive any forfeiture already incurred. *O'Keefe*

v. Malone, 72 L. J. P.C. 73; [1903] A.C. 365; 88 L. T. 644—P.C.

— **Reservation by the Crown—Effect of Subsequent Grant by Crown without Reservation.**—In 1830 the “Trustees of the Clergy and School Lands in the Colony of New South Wales,” a body incorporated by royal charter, conveyed to D., the predecessor in title of the respondents, thirty-six acres of land expressed to be bounded “by the water of Port Jackson Harbour.” In the grant, however, of the land by the Crown to the corporation there was an exception of so much thereof “as may be within 100 feet of high water mark”; and this grant and exception were recited in the conveyance to D. The corporation having been dissolved, the Crown in 1840 granted the land—stated to be thirty-six acres—to the respondents’ predecessor in title. There was no mention in the grant of the exception of the hundred feet of sea-front, and if that space had been excepted the land would have been less than thirty-six acres:—*Held*, that the respondents were entitled to the land without exception of the sea-front, as the grant of 1840 was so worded as to remove the doubt as to D.’s title to the land as far as the water’s edge. *Att.-Gen. for New South Wales v. Dickson*, 73 L. J. P.C. 48; [1904] A.C. 273; 90 L. T. 213—P.C.

— **Crown Lease—Joint Lessees—Abandonment by One of Interest in the Lease—Conduct Amounting to Agreement or Licence.**—The respondent was one of three lessees of a mining lease. He acquired the interest of one of his co-lessees, and the third, in a letter which was proved by secondary evidence, said “I am out of it,” and in a subsequent letter, referring to a notice of cancellation for non-observance of the terms, wrote, “I am not able to do anything.” The respondent succeeded in avoiding cancellation, and subsequently found all the money for working the mine, which he sold:—*Held*, that there was such evidence of abandonment of interest by the co-lessee as amounted to an agreement or a licence, and that the respondent was entitled to the whole of the purchase-money. *Palmer v. Moore*, 69 L. J. P.C. 64; [1900] A.C. 293; 82 L. T. 166—P.C.

— **Suspension of Pastoral Lease—Amount of Compensation.**—The power of suspension of a lease or licence of Crown lands conferred by section 13 of the Mining Act, 1874, is unrestricted, and is solely vested in the Governor acting under the advice of responsible ministers. During suspension all the rights of the lessee or licensee are in abeyance, and the lessor, unfettered by the lease, is entitled to resume possession. *Cook v. Ricketson*, 70 L. J. P.C. 113; [1901] A.C. 588; 85 L. T. 1—P.C.

The compensation payable to a lessee or licensee in case of suspension is limited to a remission of rent, there being no provision under this Act for cases in which such compensation would be inadequate. *Ib.*

— **“Leasehold area”—“Resumed area”—Preferential Occupation Licence.**—Section 5 of the Crown Lands Act, 1895, provides that after the expiration of a pastoral lease, the lands theretofore subject to such a lease shall become a “resumed area” on notification, and not

before, in the *Gazette* to that effect, and shall cease to be a “leasehold area.” *Colless v. New South Wales Minister for Lands*, 68 L. J. P.C. 9; [1899] A.C. 90; 79 L. T. 505—P.C.

The appellant, who had been in occupation of a pastoral holding, but whose tenancy had expired, did not seek a renewal of his tenure, but obtained from the Crown a preferential occupation licence, under which he continued to occupy. Two days before the appearance of a notification under section 5 he applied for a conditional lease:—*Held*, that the land was not then available as a resumed area for the purpose of the application; that the application was not valid, and did not constitute a continuing offer capable of subsequent acceptance; and that the grant of a preferential occupation licence did not operate to convert a “leasehold area” into a “resumed area.” *Ib.*

— **Land Appeal Court—Jurisdiction—Special Case—Appeal to Supreme Court.**—By the Crown Lands Act, 1889, it is enacted that whenever a question of law arises in a case before the Land Court, that Court shall, if required by any of the parties, or may of its own motion, state a Case for decision by the Supreme Court. By the Rabbit Act, 1890, jurisdiction is conferred on the Land Court and Local Land Boards, and the procedure under that Act is, as far as possible, to follow the provisions of the Crown Lands Acts:—*Held*, that it is the duty of the Land Court to hear and determine a Special Case stated under the Rabbit Act, and if such Special Case does not state the question of law with sufficient precision, to remit it to the Land Court for amendment. *Hill v. Dalgety*, 67 L. J. P.C. 67; [1898] A.C. 343; 77 L. T. 541—P.C.

— **Powers of Local Land Boards—Jurisdiction of Land Appeal Court—Jurisdiction of Supreme Court—Case Stated on Points of Law.**—The decision of a Land Board on questions of fact referred to it by the Minister for Lands is subject only to appeal to the Land Appeal Court. Such appeal is a re-hearing on which fresh evidence may be admitted, and the Court has power to reject irrelevant evidence and to draw inferences of fact. *Minister for Lands v. Wilson*, 70 L. J. P.C. 100; [1901] A.C. 315; 84 L. T. 242—P.C.

The Minister for Lands has power to direct any local Land Board, whether within or outside the district in which the land in question is situated, to conduct an enquiry into any matters in question, and to order such enquiry to be held wherever he pleases. *Ib.*

— **Limitation of Actions—Nullum Tempus Act—Application to Colony.**—The Nullum Tempus Act, by which the Crown is disabled from suing or impleading any person in respect of lands or hereditaments where the right of the Crown has not first accrued within sixty years next before the commencing of such suit, is, by virtue of the Australian Courts Act, 1828, s. 24, by which “all laws and statutes in force within the realm of England” are to be applied in the Courts of New South Wales and Van Diemen’s Land, in force in New South Wales. *Att.-Gen. for New South Wales v. Love*, 67 L. J. P.C. 84;

[1898] A.C. 679; 78 L. T. 601; 47 W. R. 81—P.C.

Lunatic—Petition in Lunacy—Substituted Service of Petition—Service on Master in Lunacy—Dispensation from Examination of Lunatic.]—The effect of section 106, sub-section 2 of the New South Wales Lunacy Act, 1893, is that where personal service of a petition for a declaration of lunacy cannot be effected or is inexpedient, substituted service may be effected, either in manner prescribed by the Rules of Court or, in special circumstances, as may be ordered by the Court, and when such circumstances exist service on the Master in Lunacy is sufficient. The Court has jurisdiction under section 110 of the Act to dispense with any examination of the lunatic in cases where it would be inexpedient to examine him. *McLaughlin, In re*, 74 L. J. P.C. 70; [1905] A.C. 343; 92 L. T. 670; 21 T. L. R. 521—P.C.

Miner's Right—Application for a Lease—Interlocutory Injunction to Restrain Interference with such Right.]—Where a plaintiff has exercised a definite statutory right to apply for a lease, he is entitled to an injunction to restrain operations which may have the effect of injuring or destroying the subject-matter of his application while it is still pending. *Croudace v. Zobel*, 68 L. J. P.C. 47; [1899] A.C. 258; 79 L. T. 602—P.C.

—Practice—Appealable Value—Evidence of Value.]—The Mining Act, 1874, of New South Wales gives by section 115 a right of appeal from the District Court to the Supreme Court in cases where the amount involved is not less than 500*l.*—*Held*, that this right of appeal is not lost by the failure of the appellant in the Warden's Court or in the Mining Appeal Court to adduce evidence of value. The Supreme Court has itself jurisdiction to institute enquiry and decide on the evidence before it. *Scully v. Murn* (14 N.S.W. Rep. 289) overruled. *Falkners Gold-Mining Co. v. McKinnery*, 70 L. J. P.C. 116; [1901] A.C. 581; 85 L. T. 361—P.C.

Municipality—Contract—Disability of Civic Officer—Supply of Material to Undertaker—"Knowingly engaged or interested in"—Penalty.]—A municipal official who, without concert or previous arrangement, supplies materials to an undertaker, who uses them in the execution of a contract with a municipal body, is not "directly or indirectly or . . . knowingly engaged or interested in" such contract, so as to be liable to the penalty imposed by 2 Edw. 7, No. 35, s. 24. *Norton v. Taylor*, 75 L. J. P.C. 79; [1906] A.C. 378; 94 L. T. 591; 70 J. P. 433; 22 T. L. R. 450—P.C.

—Cost of City Improvements—Annual Payments over a Period of Years—Ascertainment of Persons Liable.]—By the Sydney Corporation Act, 1879, the "owner" of property for rating purposes is defined as "The landlord or person at the time receiving the rent for any premises whether on his own account or otherwise, or who shall claim to be the owner." By the Moore Street Improvement Act, 1890, the assessment book was to specify the amount which every owner of property within the improvement area would be required to pay "in

respect of his property," and the powers and provisions of the Act of 1879 were made applicable. The owners of property within the improvement area were to contribute not less than half the cost of the improvements, and the repayment of such cost was to be spread over a period of not more than one hundred years and of not less than fifty years:—*Held*, that the persons liable were the owners for the time being, and that the charge was not a personal charge on those who happened to be owners at the time when the assessment was made. *Sydney Municipal Council v. Terry*, 76 L. J. P.C. 65; [1907] A.C. 303; 97 L. T. 146—P.C.

—Municipal Abattoirs and Sale-yards—Imposition of Fees—Private Slaughter-house—By-law.]—Section 139 of the Sydney Corporation Act, 1879, by which, when municipal sale yards are established and by-laws made, the council may impose fees "in respect of any cattle intended for slaughter, yarded, or brought for sale by auction to any sale yards or premises in the city of Sydney or within the distance of 14 miles therefrom," does not apply to a person bringing his own cattle to his own private yard and lawfully killing them there. *Sydney Municipal Council v. Austral Freezing Works*, 74 L. J. P.C. 33; [1905] A.C. 161; 92 L. T. 280; 21 T. L. R. 295—P.C.

Public Works—Land Compulsorily Taken—Arbitration—Compensation Awarded—Trial by Jury—Costs.]—Where arbitrators have made an award for compensation in respect of land compulsorily taken, and the constructors by whom compensation is to be paid require a trial by a jury, and the jury award a sum less than the amount given by the arbitrators, though greater than that offered by the constructors, the landowner must, under section 116, sub-section 2 (b) of the Public Works Act, 1900, pay the costs both of the arbitration and award and of the action. *Pacific Co-operative Steam Coal Co. v. Railway Commissioners of New South Wales*, 73 L. J. P.C. 86; [1904] A.C. 795; 20 T. L. R. 718—P.C.

—Compulsory Acquisition of Property—Part of a House.]—Section 131 of the Public Works Act, 1900, which provides that in case of compulsory purchase of any house or other building or manufactory no party shall be required to sell a part only if he is willing and able to sell and convey the whole, is equally applicable whether the property is acquired by *Gazette* notification or by notice to the parties. *Williams v. Permanent Trustee Co.*, 75 L. J. P.C. 48; [1906] A.C. 249; 94 L. T. 354; 22 T. L. R. 363—P.C.

—Compulsory Purchase of Land—Valuation—Application to Court—Costs.]—By section 99 of the Public Works Act, 1900 (New South Wales), where land is taken compulsorily for public purposes and the Minister and the claimant do not agree, the claimant may bring an action against the Minister for compensation. If the amount recovered be a sum equal to or less than the amount of valuation notified to the claimant, the latter is to pay the costs of the action; but if it is a greater sum the costs are to be paid by the Minister. *Minister for Public Works v. Hart*, 73 L. J. P.C. 53; [1904] A.C. 259; 90 L. T. 104; 20 T. L. R. 213—P.C.

Land of the respondents was taken by official notification, which stated the compensation assessed by the Government valuers; the respondents asked for an addition to the sum in respect of an omitted item. No further valuation or official notification was made, but in a letter from the department the Minister's approval of a further payment was expressed. The respondent refused the offer and applied to the Court, which assessed the compensation at the amount of the increased offer of the Minister:—*Held*, that there was no statutory obligation to make a second valuation, that there was a sufficient though informal notification of the further offer, and that the respondents must bear the costs of the proceedings. *Ib.*

Real Property—Interest in Land.]—The term "interest in land" in the Real Property Act, 1862, includes equitable as well as legal interests, and for the purpose of enforcing a remedy against the assurance fund provided by the Act the equitable interest may be enforced although the legal claim is barred by limitation. *Williams v. Papworth*, 69 L. J. P.C. 129; [1900] A.C. 563; 83 L. T. 184—P.C.

Revenue—Income Tax—Income Earned Within Colony—Process of Production.]—Victoria companies with their head offices at Melbourne held lands in the colony of New South Wales, on which they conducted mining operations. Neither company made any contracts for sale in New South Wales, but both companies made net profits to a large amount. By the New South Wales Land and Income Tax Assessment Act, 1895, income tax is assessable on income (i.) "Arising or accruing to any person wheresoever residing from any profession, trade, employment or vocation carried on in New South Wales." (iii.) "Derived from lands of the Crown held under lease or licence." (iv.) "Arising or accruing . . . from any other source whatsoever in New South Wales." But by section 27 (iii.) no tax was to be payable on income earned outside the colony:—*Held*, that the companies were liable to income tax in the colony, as some of the processes in the production of the income—namely, the extraction of the crude ore from the soil and its conversion into a merchantable product—were carried on in New South Wales. *Tindal, In re* (18 N.S.W. L. R. 378), overruled. *Commissioners of Taxation v. Kirk*, 69 L. J. P.C. 87; [1900] A.C. 588; 83 L. T. 4—P.C.

Mode of Assessment—Company Holding Investments, but not Trading in Colony.]—By the Victorian Income Tax Act, 1895, s. 2, the word "person" includes every company except a company whose head office or principal place of business is in the colony, and the word "company" includes every corporate body howsoever or wheresoever incorporated or situated. By section 10 companies not having their principal office or place of business in the colony are to be assessed on the proportion of their total dividends represented by the amount of their receipts or assets and liabilities in the colony:—*Held*, that a company not trading in the colony, but holding investments therein, is taxable, not under section 10, but on the full income of their Victorian

investments, that section being applicable by clear implication, only to companies carrying on trade in the colony. *Scottish Provident Institution v. Commissioner of Taxes*, 70 L. J. P.C. 50; [1901] A.C. 340; 84 L. T. 241—P.C.

The holding of investments is not the trade of an insurance company, but a necessary incident of every business. *Ib.*

Compulsory Return of Income—Assessment by Commissioners in Default of Return.]—By the combined effect of the Land and Income Tax Assessment and of the Income Tax Acts, 1895, a tax is imposed on all incomes exceeding 200*l.*, incomes below that amount not being made liable to income tax. The Commissioners were to give notice requiring all persons liable to taxation to "furnish returns for the purpose of assessment of Land and Income Tax." By a regulation having the force of law "every person in receipt of income within the meaning of the said Acts" is required to make a return. If any person makes default in furnishing such return the Commissioners may make an assessment "of the amount on which, in their judgment, tax ought to be charged":—*Held*, that a return must be made of income whether or not it exceeded 200*l.*, and that in the absence of such return the Commissioners were entitled to make a default assessment. *Commissioners of Taxation v. Mooney*, 76 L. J. P.C. 64; [1907] A.C. 342; 97 L. T. 189; 23 T. L. R. 670—P.C.

In a case where the income was less than 200*l.*, and a default assessment had been made, ordered that the assessment should be reduced to a nominal amount, and that the appellants should pay the respondent his costs of appeal to the King in Council, as between solicitor and client. *Ib.*

Mutual Insurance Company—Exemption.]—A mutual insurance company, carrying on business with strangers for gain, and having no connection with Victoria except as owning property in the colony, is not entitled to the exemption given by the Income Tax Act (Victoria), 1895, s. 7 (e), to "all trusts, societies, associations, institutions, and public bodies not carrying on any trade or not being engaged in any trade for the purposes of gain to be divided among the shareholders or members thereof." The exemptions given by the Act to the bodies therein specified are confined to such bodies as are acting in and for the colony. *England v. Webb*, 67 L. J. P.C. 120; [1898] A.C. 758; 79 L. T. 131—P.C.

Deductions—Land Held under Lease from the Crown—Land Tax—Exemptions.]—The lessee of Crown lands which are exempt from land tax is not entitled to a deduction from income tax in respect of a sum representing the fair rental value of such land and the improvements thereon, such sum not being comprised among "Losses, outgoings including interest and expenses actually incurred . . . in the production of his income," and the only exemptions being in respect of land subject to land tax. *Commissioners of Taxation v. Antill*, 71 L. J. P.C. 81; [1902] A.C. 422; 86 L. T. 783—P.C.

The mode of assessing income tax under the Act is wholly different from that which prevails in the United Kingdom, inasmuch as, instead of collecting the tax under different schedules, the Act requires inclusive returns of income arising from any kind of property except land subject to land tax. *Ib.*

— **Land Tax—Exemption—Lands Used in Connection with Public Charitable Purposes—Glebe Land Let on Building Leases.**—Crown lands vested in trustees for parochial church purposes, partly let on building leases and partly waste, are not “used in connection with” public charitable purposes within the meaning of section 11, sub-section 5 of the Land and Income Tax Assessment Act (New South Wales), 1895, the exemption thereby conferred being confined to land in the actual use and occupation of the charitable body and not extending to the rents and profits derived from such land. The trustees having parted with the use and occupation of the land let on lease and of the waste lands there is no use or occupation for any purpose. *Commissioners of Taxation v. St. Mark's Glebe Trustees*, 71 L. J. P.C. 99; [1902] A.C. 416; 86 L. T. 629; 51 W. R. 33—P.C.

— **Partial Exemption from Taxation—Ascertainment of Taxable Amount—Deduction of Outgoings.**—By the Land and Income Tax Assessment Act, 1895, s. 28, every taxpayer is entitled to deduct from the taxable amount of his income “losses outgoings . . . actually incurred . . . in the production of his income.” By section 17, sub-section II., certain exemptions are granted from income tax:—*Held*, that, in order to ascertain the taxable amount the taxpayer is entitled to deduct the losses and outgoings necessary to produce his whole income, and not that part only which is subject to taxation. *New South Wales Commissioners of Taxation v. Teece*, 68 L. J. P.C. 8; [1899] A.C. 254; 79 L. T. 601—P.C.

— **Probate Duty—“Intent to evade the payment of duty”—Liability of Simple Contract Debt to Duty.**—The motive to evade payment of death duties is not the same thing as “intent to evade the payment of duty,” which, under section 115 of the Victorian Administration and Probate Act, 1890, makes gifts or assignments made by the donor during his life liable to duty on his death. The section applies only to transactions which are colourable and not real gifts. *Simms v. Registrar of Probates* (69 L. J. P.C. 51; [1900] A.C. 323) approved. *Payne v. Regem*, 71 L. J. P.C. 128; [1902] A.C. 552; 87 L. T. 84; 51 W. R. 351—P.C.

A statutory mortgage of land in New South Wales, held by a person domiciled in Victoria, is a simple contract debt in the latter colony, and there liable to probate duty. *Ib.*

— **Excess of Assessment—Application for Refund—Mandamus—Delay.**—A *mandamus* will not be granted for the purpose of recovering an excess of duty paid to the revenue, where there has been unreasonable delay in the application from the date at which it was ascertained that the amount charged was in excess of what was due. *Broughton v. New*

South Wales Commissioner of Stamps, 68 L. J. P.C. 36; [1899] A.C. 251—P.C.

— **Special Power of Appointment by Will.**—Probate duty is not, under the Stamp Duties Act of New South Wales, payable on property appointed in exercise of a special testamentary power, such property not forming part of the testator's estate or being liable to his debts. *Commissioners of Stamp Duties of New South Wales v. Stephen*, 73 L. J. P.C. 9; [1904] A.C. 137; 89 L. T. 511; 20 T. L. R. 63—P.C.

— **Sugar Duty—“Molasses, refined, in bond.”**—A process which simply removes foreign impurities from an article without producing any change in the article itself is not a process of refining for the purpose of differential duties as between the refined and the unrefined article. *Colonial Sugar Refining Co. v. Att.-Gen. for Victoria*, 70 L. J. P.C. 75; [1901] A.C. 544; 84 L. T. 787—P.C.

— **Wharfage and Tonnage Rates—Expired Crown Leases—Payments made Pending Applications for Renewal—Interest in Land.**—The Sydney Harbour Trust Act, 1900, s. 68, authorises the Commissioners to collect “at any wharf” vested in them “wharfage and tonnage rates according to the provisions contained in the Wharfage and Tonnage Act of 1880 and Acts amending the same.” The Act of 1880 authorised rates on two kinds of wharfs only:—*Held*, that the Act of 1900 was not so limited, but extended to every kind of wharf. *Lukey v. Sydney Harbour Trust Commissioners*, 73 L. J. P.C. 66; [1904] A.C. 382; 90 L. T. 743; 20 T. L. R. 532—P.C.

By section 27 of the Harbour Trust Act lands within the boundaries of the port were vested in the Commissioners “subject to the interest of any persons in such lands existing at the time of the passing of this Act”:—*Held*, that payments of money as “rent” after the expiration of leases and pending the decision of applications for renewal did not create an interest in the land. *Ib.*

— **Local Government—Rating—Gas Mains—Sewered and Unsewered Property.**—By section 5, sub-sections 1 and 3 of the Melbourne and Metropolitan Board of Works Act, 1897, property which, or any part of which, abuts on a street in which sewers have been laid, and any property, whether so abutting or not, which is connected with a sewer of the Board, is deemed to be a “sewered property.” By section 8, sub-section 6, a certain rate is to be levied on “sewered property,” and a certain lower rate is to be levied on unsewered property:—*Held*, that gas mains, inasmuch as they did not abut on a street in which sewers had been laid, were not sewered property, but were liable to be rated as unsewered property (there being only two categories recognised by the Act), and that the circumstance that they were not in their nature capable of deriving the same benefit from sewers as inhabited houses was no ground for relieving them from rates altogether and placing them in a new category not recognised by the Act. *Melbourne Board of Works v. Metropolitan*

Gas Co., 74 L. J. P.C. 120; [1905] A.C. 595; 93 L. T. 114; 21 T. L. R. 648—P.C.

— **Vermin Destruction—Vermin-proof Gates—Power of Landowners to Erect.**—By section 428 of the Local Government Act, 1890, the council of every municipality, except as thereafter or in any other Act of Parliament provided, is to keep roads open and free from obstruction. By sections 45 and 46 of the Vermin Destruction Act, 1890, shire councils may obtain loans for enclosing lands with a continuous wire netting or vermin-proof fence for the benefit of owners desiring assistance. Such lands form "special areas." By section 58 of the Vermin Destruction Act, owners may, with the consent of the shire council, enclose their land with a vermin-proof fence, having, when enclosing any road, swing gates covered with wire netting:—*Held*, that, notwithstanding section 428 of the Local Government Act, vermin-proof swing gates may be put across roads other than main roads by owners of land, whether adjoining owners or single owners, with the consent of the shire council, whether such lands are in special areas or not. *King v. Cheyne*, 69 L. J. P.C. 136; [1900] A.C. 622—P.C.

— **Appeal to County Court—Rating Appeal—Power to State a Case for the Supreme Court.**—By the Justices Act, 1890, s. 139, the Court of general sessions is in any case of appeal, if so required by any party to proceedings, to state the facts specially for the determination of the Supreme Court thereon, "any Act to the contrary notwithstanding." By the Local Government Act, 1890, s. 277, an appeal is given to the Court of General Sessions for any cause, and its decision is to be "final and conclusive on all parties." By the Local Government Act, 1891, s. 60, all rate appeals are transferred from the general sessions to the County Court, whose decision is to be "final and conclusive on all points"; and section 61 applies to rate appeals all the provisions of other Acts, and gives to County Courts all powers and jurisdictions possessed by Courts of general sessions "subject to the provisions of this Act":—*Held*, that the Local Government Acts did not take away from the County Court the power to state a Case possessed by the Court of general sessions. *Melbourne Tramway and Omnibus Co. v. Fitzroy Corporation*, 70 L. J. P.C. 1; [1901] A. C. 153; 83 L. T. 442—P.C.

Lunacy—Habeas Corpus—Right to a Jury.—In the Colony of Victoria an alleged lunatic has no right either on an application for a *habeas corpus* or under the sections of the Lunacy Act, 1890, relating to discharge, to have the question of his sanity ascertained by a jury. *Gregory, Ex parte*, 70 L. J. P.C. 19; [1901] A.C. 128; 83 L. T. 441—P.C.

Public Officers—"Officers' quarters"—Deductions for Rent.—The deductions from salary in respect of rent for the use as a residence of any Government building, authorized by section 186 of the Public Service Act (Victoria), 1890 (No. 1133), cannot be made in the case of public officers whose duties necessitate their residence on Government premises. *Rex v. Fisher; Rex v. Bull*, 72 L. J. P.C. 45; [1903] A.C. 158; 88 L. T. 74—P.C.

Tramway Company—Tramways Trust—Licences for Tramcars, Drivers, and Conductors—Liability of Company.—By its Act of 1883 the appellant company was authorised to make and work tramways with the consent of the local authorities affected. By an agreement scheduled to the Act municipal corporations were empowered to unite themselves into a trust, which was to exercise the powers of the constituent corporations. The trust was authorised to borrow money for the construction of a tramway which was to be let to the company for a term of years, the company to pay the interest and sinking fund, to keep the tramway in repair, and at the end of the term to restore it to the trust in good working order. The company was to provide the cars and pay the drivers and conductors. It was, however, to "be liable to no other payment to the trust or to the several corporations represented thereon for proportion of profits or otherwise howsoever except for municipal rates":—*Held*, that these words of exemption applied only to the tramway and not to the cars, which belonged not to the trust, but to the company, and that the latter was liable to pay the corporation licences for the cars, their conductors and drivers. *Melbourne Tramway and Omnibus Co. v. Kidney. Melbourne Tramway and Omnibus Co. v. City of Melbourne*, 74 L. J. P.C. 66; [1905] A.C. 358; 92 L. T. 584; 21 T. L. R. 425—P.C.

Trust—Trustee Company—Breach of Trust—Improper Investment.—The proviso in section 384 of the Companies Act, 1890, of Victoria, which empowers a trustee company to deposit any moneys of which it has control with any banking company or corporation fulfilling certain conditions, does not authorise such deposit as an investment, or enable a trustee company to deposit trust moneys with a bank in any case in which an individual trustee would not be justified in employing a banker. *Perpetual Executors and Trustees Association v. Swan*, 67 L. J. P.C. 141; [1898] A.C. 763; 79 L. T. 148—P.C.

— **Paid Trustee—Breach of Trust—Liability when Acting Honestly.**—The position of a joint-stock company which is paid for acting as trustee is widely different from that of a gratuitous trustee, and the difference must be taken into account in any claim for relief from the consequences of a breach of trust, although the company may have acted honestly and reasonably, and under professional advice. *National Trustees, Executors, and Agency Co. of Australasia v. General Finance Agency*, 74 L. J. P.C. 73; [1905] A.C. 373; 92 L. T. 736; 54 W. R. 1; 21 T. L. R. 522—P.C.

Section 3 of the Trusts Act (Victoria), 1901, gives no absolute right to relief in cases where a trustee, though guilty of a breach of trust, "has acted honestly and reasonably." It only empowers the Court to grant such relief in a proper case. *Ib.*

The *cestui que trust* is not debarred from relief by having accepted and acted upon an erroneous statement of law made by the trustee where both have been under a common mistake. *Ib.*

(c) QUEENSLAND.

Succession Duty—Retrospective Character—Construction.]—The Queensland Succession and Probate Duties Act Amendment Act, 1895, by which duty is chargeable in respect of all property within the colony, although the testator or intestate was not domiciled there, does not apply to the property of a person dying before the Act came into operation. *Harding v. Queensland Commissioners of Stamps*, 67 L. J. P.C. 144; [1898] A.C. 769; 79 L. T. 42—P.C.

The Succession and Probate Duties Act, 1892, which is modelled on the English Succession Duty Act, 1853, must be construed on the analogy of English decisions, in which it has been held that such duties are not chargeable on the property, locally situated in the United Kingdom, of persons not domiciled therein. *Id.*

Suit Pending when Act Passed taking away Right of Appeal—Act not Retrospective.]—Although the right of appeal from the Supreme Court of Queensland to his Majesty in Council given by the Order in Council of June 30, 1860, has been taken away by the Australian Commonwealth Judiciary Act, 1903, s. 39, sub-s. 2, and the only appeal therefrom now lies to the High Court of Australia, yet the Act is not retrospective, and a right of appeal to the King in Council in a suit pending when the Act was passed and decided by the Supreme Court afterwards is not taken away. *Colonial Sugar Refining Co. v. Irving*, 74 L. J. P.C. 77; [1905] A.C. 369; 92 L. T. 738; 21 T. L. R. 513—P.C.

(d) SOUTH AUSTRALIA.

Revenue—Succession—Non-testamentary Disposition—Covenant to Pay—“With intent to evade Payment of Duty.”]—By section 16 of the Succession Duties Act, 1898, a “deed of gift” is to include every non-testamentary disposition of property to take effect during the donor's lifetime. By section 17, property given under any such deed is, if the donor dies within three months of its date, to be chargeable with duty; and by section 27, if any person makes any kind of non-testamentary disposition, whether in writing or otherwise, of any property “with intent to evade the payment of duty,” property taken thereunder is to be liable to double duty. By a deed poll dated January 10, 1896, a man who died on December 25, 1897, covenanted to pay among his children 200,000*l.* and to pay interest thereon quarterly in advance at the rate paid by the Associated Banks in Adelaide on deposit at three months, provided such interest should not be less than 1*l.* 10*s.* per cent. Interest at 1½ per cent. was regularly paid until the testator's death:—*Held*, that there was, within the meaning of the statute, no intention to evade payment of duty, and that no duty was chargeable. *Simms v. Registrar of Probates*, 69 L. J. P.C. 51; [1900] A.C. 323; 82 L. T. 433—P.C.

(e) VICTORIA.

Book Debts—Unregistered Deed—Subsequent Registered Deed—Inconsistency—Construction.]

—The effect of section 3 of the Book Debts Act (Victoria), 1896, by which “no assignment or transfer” of book debts is valid unless registered, is only to invalidate the assignment and not to invalidate or affect the recitals and covenant for payment in an unregistered deed. *National Bank of Australasia v. Falkingham*, 71 L. J. P.C. 105; [1902] A.C. 535; 87 L. T. 90—P.C.

By a registered deed one of the respondents was declared to be liable in the books of the appellant bank, in a sum of money, and the firm of which he was a member were indebted in another sum, and he, “as to his said indebtedness,” and the firm, “as to their said indebtedness,” assigned certain moneys in the hands of the appellant bank:—*Held*, that there being no surplus to distribute the bank was entitled to repay itself the debt of the individual partner without ascertaining the value of his share in the partnership. *Id.*

Supply of Electricity—Uniformity of Charge.]—Provisions in an Act of Parliament regulating the supply of electricity which require uniformity of treatment towards all classes of customers are not inconsistent with the existence of two systems of charge, either of which every customer is free to adopt. *Att.-Gen. for Victoria v. Melbourne Corporation*, 76 L. J. P.C. 91; [1907] A.C. 469; 97 L. T. 500; 23 T. L. R. 753—P.C.

(f) WESTERN AUSTRALIA.

Mining Lease—Statutory Forfeiture—Notice.]—By clause 70 of the Regulations of 1892 then in force under the Goldfields Acts, 1836 and 1895, each application for the forfeiture of a lease was to be heard by the warden in open Court, and his report on evidence taken to be forwarded immediately to the Minister for the decision of the Governor-General:—*Held*, that the Governor-General's decision to cancel a lease was not operative until it was communicated to the lessee or the land declared vacant by some other overt act of the Governor. *Minister of Mines v. Harney*, 70 L. J. P.C. 38; [1901] A.C. 347; 84 L. T. 369—P.C.

Patent—Colonial Registration of British or Foreign Patent—Prior Publication or User—Amendment of Specification—Renewal Fees.]—Section 49 of the West Australian Patent Act, 1888, which provides that registration of a British or foreign patent in the mode prescribed shall have the effect of the grant of original letters patent, merely affords a machinery for the protection of patents so registered, but is subject to all the incidents and conditions applicable to letters patent. Thus common knowledge, user, or publication outside the colony subsequent to the date of the original patent, but prior to the registration, avoids the registration, except so far as they may be grounds of objection applicable to the original letters patent. *Australian Gold Recovery Co. v. Lake View Consols*, 70 L. J. P.C. 14; [1901] A.C. 142; 83 L. T. 541—P.C.

The renewal fees charged by the Second Schedule of the Act on letters patent are not payable in respect of the letters of registration. *Id.*

The recording by the Registrar of Patents in the colony of an amendment of a British specification has not the effect of an amendment of the specification in letters of registration of the British patent. *Ib.*

Registration of Titles—Wrongful Issue of Certificate—Liability of Registrar—Damages.]—

By a deed of feoffment in 1841 land was conveyed to trustees in trust for a married woman, her heirs and assigns, to her use, purposes, and designs as she should from time to time direct, and upon further trust in case of her death to grant and assign the same to such persons as she should appoint by will:—*Held*, that the trustees took the legal estate in fee, and that the special trust was not inconsistent with, but ancillary to the equitable fee-simple vested in the woman and secured to her the enjoyment of the property during her life and the power of disposing of it after her death. *Spencer v. Registrar of Titles*, 75 L. J. P.C. 100; [1906] A.C. 503; 95 L. T. 317—P.C.

By an indenture of 1842 the property was mortgaged by a deed ineffectual to pass the equitable fee, but passing the legal estate to the mortgagee. In 1846, by settlement on her second marriage, the property was conveyed upon trusts ultimately for sale and for the children of the marriage. The settlement was registered in the Office of Registration of Deeds in 1847. In 1848, by a deed, to which the husband and wife, the feoffment trustees, the feoffor, and the intending purchaser were parties, the mortgagee by the direction of the husband and wife, the husband by the wife's direction, the trustees at her request, and the feoffor conveyed the property to the purchaser to uses equivalent to the fee-simple. The deed was registered, and after the passing of the Transfer of Land Act, 1874, a certificate of title was given to the purchaser. The husband survived his wife and died in 1903. The appellant was their child:—*Held*, that the certificate had been wrongly issued to the purchaser, that the interests of the persons entitled in remainder under the settlement were unaffected by the conveyance, that the appellant's title to sue only commenced in 1903 when the trust for sale came into operation, and that he was not disqualified from recovering damages as trustee and beneficiary under the settlement by section 211 of the Western Australian Land Transfer Act, 1893. *Ib.*

5. BRITISH NORTH AMERICA.

(a) DOMINION OF CANADA.

Aliens, Expulsion of.]—Section 6 of the Alien Labour Act, 1897, whereby, in cases to which the Act is applicable, the Attorney-General of Canada is empowered to cause the arrest of an alien immigrant and his return to the country whence he came, is within the powers of the Dominion Parliament; and the fact that extra-territorial constraint must be exercised in effecting such expulsion does not invalidate the warrant authorising the same. *Att.-Gen. for the Dominion of Canada v. Cain*; *Same v. Gihula*, 75 L. J. P.C. 81; [1906] A.C. 542; 95 L. T. 814; 22 T. L. R. 757—P.C.

Appeal—Petition of Right.]—An appeal lies to

her Majesty from a decision of the Court of Queen's Bench for Lower Canada upon a petition of right. *Reg. v. Demers*, 69 L. J. P.C. 5; [1900] A.C. 103; 81 L. T. 795—P.C.

— Supreme Court of Canada—Admiralty—

Right to Appeal to the King in Council.]—By virtue of the Colonial Courts of Admiralty Act, 1890, an appeal lies without leave from the Supreme Court of Canada in Admiralty cases, notwithstanding section 47 of the Canadian Supreme and Exchequer Courts Act, 1875, by which the judgment of the Supreme Court is in all cases to be final and conclusive, subject to the exercise of the Royal prerogative. *Richelieu and Ontario Navigation Co. v. Cape Breton Steamship (Owners)*, 76 L. J. P.C. 14; [1907] A.C. 112; 95 L. T. 896; 23 T. L. R. 185—P.C.

— Practice.]—No appeal is allowed from the Supreme Court of Canada to the King in Council except by special leave, and such leave will not be granted "save where the case is of gravity involving matter of public interest or some important question of law, or affecting property of considerable amount, or where the case is of some public importance or of a very substantial character." *Prince v. Gagnon* (8 App. Cas. 103) approved. *Clergue v. Murray*, 72 L. J. P.C. 99; [1903] A.C. 521; 89 L. T. 373—P.C.

Where a litigant elects to go to the Supreme Court of Canada, having his choice whether he will go there or not, the Judicial Committee will not give him special leave except under special circumstances. *Ib.*

Concessions—Concurrent, by Corporation.]—A corporation granted a permission to certain persons to erect poles for the establishment of a system of electric light under certain specified conditions. Subsequently, by a by-law, confirmed by an Act of Parliament, the corporation granted to another person an exclusive privilege to construct an electric railway, and also for thirty-five years to establish a system of lighting and heating by electricity or otherwise; and the exclusive rights thus given were to be such as the city "possesses and as it has the right to grant this day." In an action by the latter person to obtain the revocation of the previous licence,—*Held*, that the by-law and confirmatory Act were not *ultra vires*, as the scheme which they authorised was a purely local undertaking and within the competence of the Provincial Legislature under section 92 of the British North America Act, 1867. *Held*, also, that the two concessions were not necessarily incompatible. The first was revocable at the city's pleasure, but not otherwise; and the second only amounted to an undertaking by the city not to convert the permission given by the first into a right. *Hull Electric Co. v. Ottawa Electric Co.*, 71 L. J. P.C. 58; [1902] A.C. 237; 86 L. T. 208—P.C.

Copyright—Works of Art—Extension of English Copyright to Colonies.]—The Copyright (Works of Art) Act, 1862, conferring on British subjects and persons resident in British dominions copyright in pictures, drawings, and photographs, is not applicable to any part of the British dominions outside the United Kingdom. *Graves v. Gorrie*, 72 L. J. P.C. 95;

[1903] A.C. 496; 89 L. T. 111; 52 W. R. 113—P.C.

The Canada Copyright Act, 1875, does not make the Canadian Act set out in the schedule an Imperial Act applicable to Canada. Copyright in Canada can only be obtained for paintings, drawings, and photographs by complying with the laws of that country. *Graves v. Gorrie*, 72 L. J. P.C. 95; [1903] A.C. 496; 89 L. T. 111; 52 W. R. 113—P.C.

Company—Liquidation—Action Brought on Behalf of Company—Liquidators Suing in the Wrong Form—Amendment.]—Under the Canadian Winding-up Act, 1886, and the Code of Civil Procedure a company in liquidation retains its corporate powers, including the power to sue, but such powers must be exercised through the liquidator under the authority of the Court, and the liquidator must join the company with himself in the action. But if the liquidator sues in his own name without joinder of the company, the Court has ample powers of amendment under articles 516 and 518 of the Code, which ought to be exercised. *Kent v. La Communauté des Sœurs de Charité de la Providence*, 72 L. J. P.C. 61; [1903] A.C. 220; 88 L. T. 275—P.C.

Courts—Provincial—Jurisdiction.]—The sale of land situated in one province cannot be conducted nor can possession be given by a Court in another province. Nor has either the Supreme Court of Canada or her Majesty in Council sitting in appeal any wider jurisdiction. *Great North-West Central Railway v. Charlebois*, 68 L. J. P.C. 25; [1899] A.C. 114; 79 L. T. 35—P.C.

Customs—Import Duties—Date of Importation.]—The time at which, under the Customs and Tariff Acts of Canada, goods for the purposes of custom duties are imported is when they are landed and delivered to the importer or to his order, or when they are taken out of warehouse, if, instead of being delivered, they have been placed in bond. *Canada Sugar Refining Co. v. Reg.*, 67 L. J. P.C. 126; [1898] A.C. 735; 79 L. T. 146—P.C.

Certain duties on sugar were imposed by the Tariff Act, 1895, which came into force on May 3, 1895. By the Customs Act, 1886, s. 25, the master of a vessel as soon as she is anchored or moored is to make a report of the goods on board to the collector. By section 31, if any vessel calls at a port of entry, but it is intended to convey its cargo to any other port, duties are to be paid, not at the first port, but at that at which the goods are to be landed. By section 34 every importer is to make due entry of the goods and land the same. By section 150 the importation is defined to have been completed from the time the vessel came within the limits of the port at which the goods ought to be reported. The appellants' vessel called at North Sydney on her way to Montreal on April 29, 1895. On May 2, before the arrival of the vessel, the appellants made entry at the Montreal Customs House of the goods, and a landing warrant was issued for the landing thereof duty free. On May 14, however, the collector of customs cancelled the free entry and claimed duty:—*Held*, that the importation

was not effected before May 3, as the report referred to in section 150 means the report to be made by the master under section 25, completed by the entry to be made by the importer under section 34. *Id.*

—Ship—Goods Subject to Import Duties—Registration.]—A foreign-built ship, which is made liable under the heading "Goods subject to duties" by item 409 in the schedule to the Customs Tariff (Canada) Act, 1897, is imported when it enters a Canadian port or harbour; and the imposition of the duty is not inconsistent with the registration sections of the Merchant Shipping Act, 1894, which are made applicable to the whole of the British dominions. *Algoma Central Railway v. Regem*, 72 L. J. P.C. 108; [1903] A.C. 478; 89 L. T. 109; 9 Asp. M.C. 431—P.C.

Debt—Notice of Transfer—"Signification"—Notarial Act.]—Notice of the sale or transfer of a debt, accompanied by a copy of the transfer, is sufficient "signification" within the meaning of article 1,571 of the Civil Code of Lower Canada, without the intervention of a notary. The institution by the transferee of an action against the debtor to recover the debt is of itself a sufficient signification of the act of sale, and there is nothing in the Code which requires signification of the sale and a delivery of a copy of the act of sale to be made at one and the same time. *Bank of Toronto v. St. Lawrence Fire Insurance Co.*, 72 L. J. P.C. 14; [1903] A.C. 59; 87 L. T. 462—P.C.

Extradition—Offences—Habeas Corpus—Warrant of Arrest—Release by Judge of One District of Prisoner Arrested in Another.]—By chapter 95, section 28 of the Consolidated Statutes of Lower Canada—incorporating section 27 of the Habeas Corpus Act of Lower Canada, 1857 (23 Vict. c. 57)—whenever a writ of *habeas corpus* has been refused by a Judge, no fresh application for the writ, unless new facts are stated, is lawful before such Judge or before any other Judge. The respondents were arrested for extradition offences by warrant of a Commissioner whose jurisdiction extended beyond the district to which he was assigned. Whilst temporarily in another district the respondents' discharge from custody was ordered by a Judge of that district:—*Held*, that the Judge had no jurisdiction to order such discharge. *United States of America v. Gaynor*, 74 L. J. P.C. 44; [1905] A.C. 128; 92 L. T. 276; 21 T. L. R. 254—P.C.

Gifts Inter Vivos—Validity.]—Article 762 of the Civil Code of Lower Canada, by which gifts *inter vivos* made during the supposed mortal illness of the donor are void whether or not followed by his death, "unless circumstances tend to render them valid (*si aucunes circonstances n'aident à les valider*)", does not apply to a case in which a testator was suffering for a protracted period from maladies which went on increasing in severity until the moment of death. *Archambault v. Archambault*, 71 L. J. P.C. 131; [1902] A.C. 575; 87 L. T. 404—P.C.

Indian Reserves—Proprietary Rights of Province—Choice of Lands Appropriated.]—Section

91, sub-section 24 of the British North America Act, 1867, by which the Parliament of Canada has exclusive legislative authority over "Indians and Lands reserved for the Indians," does not vest in the Government of the Dominion any proprietary rights in such lands or power by legislation to interfere therewith in infringement of the proprietary rights of the province in which the lands are situated. *Ontario Mining Co. v. Seybold*, 72 L. J. P.C. 5; 87 L. T. 449—P.C.

The choice and location of lands to be appropriated as Indian Reserves can only be effected by the joint action of the Provincial and Dominion Governments. But when such lands are surrendered by the Indians, the result is to vest them in the Crown for the beneficial use of the province whose grantees' title prevails over the title purported to be granted by the Dominion. *St. Catherine's Milling and Lumber Co. v. Reg.* (58 L. J. P.C. 54; 14 App. Cas. 46) followed. *Ib.*

Unauthorised Acquiescence of Officials.]—A province cannot be bound by the unauthorised acts of officers of departments. *Ib.*

Husband and Wife—Rights of—Separation as to Property—Mortgage of Wife's Property—Money Used for Husband's Purposes—Validity of Mortgage.]—The words "for her husband" in article 1,301 of the Civil Code of Lower Canada, which invalidates any obligation binding her separate property "for her husband," mean generally in any way for the husband's purposes as distinguished from those of the wife, and ignorance on the part of the obligee cannot avail him if in fact she bound herself for her husband. *Trust and Loan Co. of Canada v. Gauthier*, 73 L. J. P.C. 5; 89 L. T. 453—P.C.

Insolvency—Preferential Creditor—Builder's Privilege.]—The privilege of a builder as a preferential creditor of an insolvent estate constituted by the Code of Lower Canada, and the amending statutes, dates only from registration effected under article 2,103; and where work was completed during the currency of 57 Vict. c. 46, but in respect of which there was no registration until after the commencement of 59 Vict. c. 42, the privilege is governed by the provisions of the later statute, which limits its duration to one year. *Banque d'Hochelaga v. Stevenson*, 69 L. J. P.C. 139; [1900] A. C. 600; 83 L. T. 235—P.C.

The hypothecary privilege conferred by article 2,013 (l) in 59 Vict. c. 42 only arises on notice given to the proprietor in virtue of article 2,013 (g) in 59 Vict. c. 42, and registered according to article 2,103 of the original Code. *Ib.*

Lakes, Rivers, Harbours, Fisheries—Respective Rights of Dominion and Provinces.]—Whether a lake or river in Canada be vested in the Crown as represented by the Dominion or as represented by the province in which it is situated, it is equally Crown Property, and the rights of the public in respect of it, except as modified by legislation, are precisely the same. *Att.-Gen. for Canada v. Atts.-Gen. for Ontario, Quebec, and Nova Scotia*, 67 L. J. P.C. 90; [1898] A.C. 700; 78 L. T. 697—P.C.

There is a broad distinction between proprietary rights and legislative jurisdiction, and the latter may be vested in the Dominion Parliament without the transfer of any proprietary rights. Whatever proprietary rights were at the passing of the Dominion Act, 1867, possessed by the provinces, remain vested in them, except such as are by any of its express enactments transferred to the Dominion. *Ib.*

By the 108th section of the Act the public works and property of each province enumerated in the 3rd schedule are to become the property of the Dominion; the fifth item of the schedule being "Rivers and Lake Improvements." The true construction of this item is that the improvements only, and not the whole of the rivers, became vested in the Dominion. *Ib.*

In the same schedule "Public Harbours" are vested in the Dominion. That term includes whatever may be properly designated as a "harbour," and is not confined to those parts on which public works had been executed. But it does not follow that the foreshore on the margin of a harbour necessarily forms a portion thereof. That depends on the circumstances of each case. *Holman v. Green* (6 S. C. R. 707; 2 Cart. 147) overruled on this point. No proprietary rights, but only legislative jurisdiction, is conferred on the Dominion in relation to fisheries by the 91st section, although the power to legislate enables the Legislature to some extent to affect proprietary rights. Within such legislative power is the imposition of a tax by way of licence as a condition of the right to fish. *Ib.*

In so far as section 4 of the Revised Statutes of Canada, c. 95, empowers the grant of fishery leases in property not belonging to the Dominion, but to the provinces, it was *ultra vires*. *Ib.*

The Ontario Legislature had jurisdiction to enact section 47 of the Revised Statutes of Ontario, c. 24, except in so far as it relates to land in the harbours and canals, if any of the latter be included in the words "other navigable waters of Ontario." *Ib.*

On the true construction of section 91 of the British North America Act the enactment of fishery regulations is within the exclusive competence of the Dominion Legislature, although the legislation of provincial legislatures is not necessarily incompetent merely because it may have relation to fisheries. *Ib.*

The Dominion Parliament had jurisdiction to pass the Act entitled "An Act respecting certain works constructed in or over navigable rivers." *Ib.*

Mining—Placer Miners—Renewal of Grants—Mining Regulations.]—Under section 20 of the Statute Regulations made under the Dominion Lands Act, 1886, a placer miner holds on renewal under an annual grant in substitution for, not in continuation of, his original grant, and he has no absolute, but only a preferential, right to renewal. *Chappelle v. Regem*; *Rea v. Chappelle*; *Carmack v. Regem*; *Tweed v. Regem*, 73 L. J. P.C. 18; [1904] A.C. 127; 89 L. T. 513; 20 T. L. R. 74—P.C.

A renewal grant issued during the currency of an existing grant is liable to be affected by regulations not in force at the time of renewal, but coming into operation before the expiry of the existing grant. *Ib.*

The imposition by the Governor in Council of a percentage to be paid by a placer miner on the proceeds realised from his claim is not contrary to the terms of the grant giving the miner the exclusive right to such proceeds, or a tax requiring the authority of Parliament. It is a reservation out of the grant which it was competent for the grantor as owner in fee to make. *Ib.*

The condition expressed in section 91 of the Act that every order and regulation made by the Governor in Council shall have effect only after the same has been published for four successive weeks in the *Canada Gazette* is not fulfilled by publication in four successive weekly issues when the period of four weeks from the first issue has not expired. *Ib.*

Parliament—Dominion—Jurisdiction—Fore-shore—Harbour.—By section 108 of the British North America Act, 1867, public harbours in each province are within the legislative powers of the Dominion Parliament, and where a fore-shore is used for a harbour it must, in accordance with *Att.-Gen. for Canada v. Att.-Gen. for Ontario, Quebec, and Nova Scotia* (67 L. J. P.C. 90; [1898] A.C. 700), be regarded as part of a harbour. *Att.-Gen. for British Columbia v. Canadian Pacific Railway*, 75 L. J. P.C. 38; [1906] A.C. 204; 94 L. T. 295; 22 T. L. R. 330—P.C.

Provincial Crown Lands.—Under sections 91 and 92 of the British North America Act, 1867, which give the Dominion Parliament legislative authority over railways and other works extending beyond the limits of a province, the Dominion Parliament may dispose of provincial Crown lands for the purposes mentioned in those sections, and by section 18 (a) of the Canadian-Pacific Railway Act, 1881, that power has been exercised. *Ib.*

Consolidated Railway Act—Canadian-Pacific Railway Act, 1881.—The Consolidated Railway Act, 1879, which is incorporated in the Canadian-Pacific Railway Act, 1881, only applies where its language is not inconsistent with the special incorporating Act. *Ib.*

Dominion—Representation of the Provinces—Periodical Re-adjustments.—By the British North America Act, 1867, s. 5, Canada was to be divided into four provinces; by section 37 the House of Commons was to consist of 181 members in the proportions for the several provinces therein mentioned; by section 51 the representation of the four provinces was to be re-adjusted decennially in accordance with the results of the census, on the principle that Quebec was to have the fixed number of 65, and each of the other provinces such a number of members as would bear the same proportion to the number of its population as the number 65 bore to the population of Quebec, and on any such re-adjustment the number of members for a province was not to be reduced unless the proportion of the popu-

lation of the province to the "aggregate population of Canada at the then last preceding re-adjustment" were diminished by one twentieth part or upwards; by section 146 it was made lawful for the Queen by Order in Council to admit other colonies or provinces into the Union, and such Order in Council was to have the effect of an Act of Parliament of the United Kingdom:—*Held*, with respect to one of the four original provinces, that the words "aggregate population" were not confined to those four provinces, but included the population of the provinces admitted into the Union subsequently to the passage of the British North America Act. *Held*, also, in the case of a province admitted since the Act, that section 51 was not confined to the distribution of representatives between the four original provinces, and that there might be "re-adjustment" without alteration in a particular province, so that the representation of the province might be diminished, though at a previous decennial period there had been no increase. *Att.-Gen. for Prince Edward Island v. Att.-Gen. for Canada*; *Att.-Gen. for New Brunswick v. Att.-Gen. for Canada*, 74 L. J. P.C. 9; [1905] A.C. 37; 91 L. T. 636; 21 T. L. R. 25—P.C.

Provincial Legislature—Powers of Company Incorporated by Dominion Statute—Business Extending Beyond the Province.—It is not competent to a provincial Legislature to impose conditions precedent to the exercise of powers conferred by the Dominion Parliament upon an undertaking which extends beyond the limits of the province, such undertakings being under the exclusive jurisdiction of the Dominion Parliament. *Reg. v. Mohr* (7 Quebec L. R. 183; 2 Cartwright, 257) disapproved. *Toronto Corporation v. Bell Telephone Co. of Canada*, 74 L. J. P.C. 22; [1905] A.C. 52; 91 L. T. 700; 21 T. L. R. 45—P.C.

Liquor Traffic—Suppression of.—The Legislative Assembly of Manitoba had jurisdiction to enact the Liquor Act, 1900, of which the purpose is to restrict the consumption of liquor within the province without interfering with transactions between a person in the province and persons in another province or in a foreign country. Such power is given by section 92, sub-section 16 of the British North American Act, 1867. *Att.-Gen. for Ontario v. Att.-Gen. for the Dominion* (65 L. J. P.C. 36; [1896] A.C. 348) followed. *Att.-Gen. for Manitoba v. Manitoba Licence-holders' Association*, 71 L. J. P.C. 28; [1902] A.C. 73; 85 L. T. 591; 50 W. R. 431—P.C.

Provincial Legislatures—Powers of Dominion and of Provincial Legislatures.—A Provincial Legislature has no power to order work to be done on a railway which has been declared by the Dominion Parliament to be "for the general advantage of Canada"; such a power is, under the British North America Act, 1867, s. 92, sub-s. 10 (c), exclusively assigned to the Parliament of Canada. *Canadian-Pacific Railway v. Notre Dame de Bonsecours Parish* (*supra*) distinguished. *Madden v. Nelson and Fort Sheppard Railway*, 68 L. J. P.C. 148; [1899] A.C. 626; 81 L. T. 276—P.C.

Powers of Dominion and of Provincial

Legislatures.]—Although by section 92, sub-section 10 of the British North America Act, 1867, railways which extend beyond the limits of a Province are subject exclusively as railways to the legislative authority of the Dominion, such railways do not cease to be part of the Provinces in which they are situated nor are they in other respects exempted from the jurisdiction of Provincial Legislatures. Matters of purely local concern, having no relation to the structure of the railway, are within the local jurisdiction. *Canadian-Pacific Railway v. Notre Dame de Bonsecours Parish*, 68 L. J. P.C. 54; [1899] A.C. 367; 80 L. T. 434—P.C.

The appellant company was required by the respondents to clear out a certain ditch on the line within the parish, and the effect of the operation would not alter the structure of the ditch or the railway:—*Held*, that the order was within the competence of the parish to make. *Ib.*

— **Railways—Civil Rights.]**—In cases in which it is equally competent for the Parliament of Canada and for the Provincial Legislatures to make laws, and a conflict arises, the legislation of the Dominion Parliament must prevail. *Grand Trunk Railway v. Att.-Gen. for Canada*, 76 L. J. P.C. 23; [1907] A.C. 65; 95 L. T. 631; 23 T. L. R. 40—P.C.

By section 92, sub-section 13 of the British North America Act, 1867, "Property and Civil Rights in the Province" are within the powers of the Provincial Legislatures. By sub-section 10, "Railways . . . connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province," are excepted from the powers of Provincial Legislatures:—*Held*, that an Act defining the relations of a railway company and its servants was ancillary to railway legislation, and, though affecting the civil rights of those servants, was within the competence of the Parliament of Canada. *Ib.*

— **Legislation Ultra Vires—Naturalisation and Aliens.]**—An enactment by a Provincial Legislature that no Chinaman shall be employed in mines is beyond its competence, inasmuch as by the British North America Act, 1867, s. 91, sub-s. 25, legislation with respect to "naturalisation and aliens" is reserved exclusively to the Parliament of the Dominion. *Union Colliery Co. of British Columbia v. Bryden*, 68 L. J. P.C. 118; [1899] A.C. 580; 81 L. T. 277—P.C.

Railway Company—Statutory Powers—Damage Caused by Sparks from Engine—Liability apart from Negligence.]—A corporation acting under statutory powers is not liable in damages for injury done in the due exercise without negligence of those powers. In this respect the law of Quebec is the same as that of England, and is not affected either by the Civil Code of Lower Canada or the Railway Act of Canada, 1888. Neither section 92 nor section 288 of that Act imposes liability for injury caused by a proper user of the railway—the former referring to compensation and not to damages in an action, and the latter dealing with wholly different questions. *Canadian-Pacific Railway v. Roy*, 71 L. J. P.C. 51; [1902] A.C. 220; 86 L. T. 127; 50 W. R. 415—P.C.

— **Statutory Rules—Construction—Dispensing Power of Railway Committee.]**—Where in each of several provisions in a general Act of Parliament dealing with railways a certain precaution is imposed for the prevention of accidents, and in one provision a limited dispensing power is given to omit such precaution, the dispensing power must be confined to the particular provision in which it occurs, and cannot be extended so as to exonerate a company from liability for an accident arising from the absence of such precaution under one of the other provisions. *Grand Trunk Railway of Canada v. Washington*, 68 L. J. P.C. 37; [1899] A.C. 275; 80 L. T. 301—P.C.

— **Dominion Lands Granted to—Grant by Way of Subsidy—Reservation of Mines and Minerals.]**—Dominion lands granted to a railway company by way of subsidy under the Railway Land Subsidies Act, 1890, are not subject to the reservation of mines and minerals, except gold and silver; and such lands are not governed by the Dominion Lands Act, 1886, or the Regulations of 1889 made thereunder, as that Act and the Regulations apply only to sales of Dominion lands for settlement and occupation. *Calgary and Edmonton Railway v. Regem*, 73 L. J. P.C. 110; [1904] A.C. 765; 91 L. T. 301; 20 T. L. R. 770—P.C.

Sale of Land—Payment of Price by Installments—Insolvency of Debtor—Right of Creditor to Repayment before Expiration of Time.]—Where a company has bought land of which the purchase-money is to be paid by instalments and has been placed in liquidation by its directors on account of its inability to meet its obligations, and has also been unable to find a purchaser of the land, the vendor is entitled under article 1,092 of the Civil Code to bring an action for the whole balance of purchase-money before the stipulated time for payment arrives. *Kensington Land Co. v. Canada Industrial Co.*, 72 L. J. P.C. 66; [1903] A.C. 213; 88 L. T. 711—P.C.

Temperance Act—Construction.]—By section 15 of the Canada Temperance Act, 1864, "every prosecution shall be commenced within three months after the alleged offence." By section 17, "Two or more offences by the same party may be included in any such complaint"; but the maximum penalty in such case is one hundred dollars:—*Held*, that the effect of the two sections is not that a fine of one hundred dollars is to cover all the offences committed within three months of the complaint, and that section 17 is permissive, and not imperative. *Wentworth v. Mathieu*, 69 L. J. P.C. 11; [1900] A.C. 212; 82 L. T. 161—P.C.

(b) BRITISH COLUMBIA.

Corporation—Roads and Bridges—Adoption by Corporation—Negligence—Liability.]—Where a statute enacts that roads and bridges are originally vested in the Province, but may be adopted by a municipality—no special form of adoption, however, being necessary—acts done and authority exercised by a corporation in respect of such roads and bridges will, in the absence of evidence to the contrary, be taken as proof of adoption. *Victoria Corporation v.*

Patterson; Victoria Corporation v. Lang, 68 L. J. P.C. 128; [1899] A.C. 615; 81 L. T. 270—P.C.

A bridge within the limits of the appellant corporation gave way and persons were drowned. The jury found that the proximate cause of the accident was the defective condition of a beam into which, some years previously, an officer of the corporation had bored holes. There was evidence that for a considerable time the corporation had undertaken the care and management of the bridge:—*Held*, as matter of legal inference from the facts found, that the corporation had adopted the bridge, and were, therefore, liable for damages in respect of the accident. *Ib.*

Electoral Law—Exclusion of Japanese from Franchise—Competence of Provincial Legislature—Naturalisation.—Although by section 91, sub-section 25 of the British North America Act, 1867, the subject of “naturalisation and aliens” is exclusively reserved for the Parliament of the Dominion, the consequences of either alienage or naturalisation are not so reserved, and it is within the competence of a Provincial Legislature to exclude aliens from the franchise, each province having, by section 92, sub-section 1, the power of making laws in respect of its constitution. *Union Colliery Co. of British Columbia v. Bryden* (68 L. J. P.C. 118; [1899] A.C. 580) distinguished. *Vancouver City Collector of Voters or Cunningham v. Tomey Homma*, 72 L. J. P.C. 23; [1903] A.C. 151; 87 L. T. 572—P.C.

Land—Conflicting Claims to Public Lands—Transfer of Lands in British Columbia to Canada.—*Held*, on the evidence, that certain land called Deadmah’s Island, lying on the coast of British Columbia, was originally and was subsequently maintained as a military reserve, remained accordingly Imperial property at the time of the British North America Act, 1867, and was transferred to the Dominion by the Home Government by a despatch in 1884. *Att.-Gen. of British Columbia v. Att.-Gen. of Canada*, 75 L. J. P.C. 114; [1906] A.C. 552; 95 L. T. 571—P.C.

Grant of Mines and Minerals—Grant by Dominion Government—Subsequent Statutory Grant of Same Land by Provincial Government.—A grant of land was made by the Dominion Government in 1887 to the respondents, a company incorporated by an Act of British Columbia. The land had been vested in the Dominion Government by a Provincial Act of 1888. The same land was granted in 1904 under a Provincial Act of 1904 to the appellant. Under the Act of 1904 any settler who had occupied or improved land within the area in question before the Provincial Act therein mentioned of 1888, and fulfilled the conditions there specified, was entitled to a free grant thereof. The appellant was such a settler and had fulfilled the statutory conditions:—*Held*, that the appellant’s title, including the mines and minerals, superseded that of the respondents, and that the British Columbia Legislature had power to enact the statute of 1904. *McGregor v. Esquimalt and Nanaimo Railway*, 76 L. J. P.C. 85; [1907] A.C. 462; 97 L. T. 223—P.C.

Revenue—Income Tax—Payment by Results.]

—Under the Assessment Act, 1897, income tax is chargeable on sums exceeding one thousand dollars in respect of all profits and gains derived from personal exertions, whether such profits and gains are fixed or fluctuating, certain or precarious; the returns to be made under section 32 (e) being on “income, whether derivable from salary or otherwise.” *Att.-Gen. of British Columbia v. Ostrum*, 73 L. J. P.C. 11; [1904] A.C. 144; 89 L. T. 509; 20 T. L. R. 64—P.C.

Private Act—General Act—“Unrecorded water.”—Private Acts conferring special rights and imposing special obligations for special purposes are not overruled by general legislation, the application of which might interfere with the rights granted and the obligations imposed by the private Acts. *Esquimalt Waterworks Co. v. City of Victoria Corporation*, 76 L. J. P.C. 75 [1907] A.C. 499; 97 L. T. 492; 23 T. L. R. 762—P.C.

By section 2 of the British Columbia Water Clauses Consolidation Act, 1897, “Unrecorded water shall mean all water . . . not held under or used in accordance with a record under this Act, or under the Acts repealed hereby . . . and shall include all water for the time being unappropriated or unoccupied, or not used for a beneficial purpose.”—*Held*, that water which has been ascertained and appropriated and by private Acts vested in a corporation for the discharge of obligations which might on due notice be imposed upon the corporation, but have not yet been imposed, is not “unrecorded water” within the meaning of the Act. *Ib.*

Yukon Territorial Act—Final Judgment.—In an action by executors against the appellant to recover certain sums of money due to their estate, the Judge of the Territorial Court, at the request of the plaintiffs, selected one of the items, and adjudicated on the evidence taken that the action in respect thereof be dismissed:—*Held*, that this was, within the meaning of the Yukon Territorial Act, 1899, s. 8, a final judgment in respect thereof, notwithstanding that the remaining items in suit were referred and the costs were reserved. No appeal therefrom to the British Columbia Court lay after the expiration of twenty days. *McDonald v. Belcher*, 73 L. J. P.C. 91; [1904] A.C. 429; 90 L. T. 735—P.C.

(c) MANITOBA.

Swamp Lands—Transfer to Manitoba—Date of Vesting.—By section 4 of the Revised Statutes of Canada, 1886, c. 47, s. 4, “All Crown lands in Manitoba which are shewn to the satisfaction of the Dominion Government to be swamp lands shall be transferred to the Province, and enure wholly to its benefit and uses”:—*Held*, that such lands became vested in the Province not from the date of the statute, but from that of actual transfer. *Att.-Gen. for Manitoba v. Att.-Gen. for Canada*, 73 L. J. P.C. 100; [1904] A.C. 799; 91 L. T. 300; 20 T. L. R. 769—P.C.

(d) NEWFOUNDLAND.

Whaling Industry Act, 1902—Duty—Receipt—Licence.—A receipt for a licence duty payable under the Whaling Industry Act, 1902, and

signed by the Minister of Marine and Fisheries, is not the equivalent of an actual licence, which must be granted by the Governor in Council; and where the actual licence which is expressed to supersede the receipt is for a narrower area than that which is specified in the application, there is no obligation on the Government and no implied contract to grant a licence co-extensive with the application. *Newfoundland Steam Whaling Co. v. Newfoundland Government*, 73 L. J. P.C. 69; [1904] A.C. 399; 91 L. T. 153; 20 T. L. R. 566—P.C.

(e) NOVA SCOTIA.

Practice—Certiorari—Special Leave to Appeal—Canada Temperance Acts.—The Canada Temperance Act, 1886, empowers the tribunal thereby constituted, "before whom any prosecution for an offence" against the Act "is brought" to issue a search warrant and make a destruction order as therein described. The Canada Temperance Amendment Act, 1888, re-enacted this provision, with the omission of the words referring to a prosecution:—*Held*, in a case where a search warrant had been issued and a destruction order made without any previous prosecution, that a writ of *certiorari* could not be issued to bring the warrant and order into Court, and that the case was not one in which special leave to appeal ought to be granted. *Townsend v. Cox*, 76 L. J. P.C. 98; [1907] A.C. 514; 97 L. T. 620—P.C.

(f) ONTARIO.

Assessment—Real Estate—Electric Cars.—The electric cars and apparatus and plant of a tramway company are not assessable as real estate under an Act which includes under the terms "land," "real property," and "real estate" things "erected upon or affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty." *Kirkpatrick v. Bank of Montreal* (2 Ont. L. R. 113) disapproved. *Toronto Railway v. Toronto Corporation*, 73 L. J. P.C. 120; [1904] A.C. 809; 91 L. T. 541; 20 T. L. R. 774—P.C.

Appointment of Queen's Counsel—Patents of Precedence.—By the combined effect of the British North America Act, 1867, and the Revised Statutes of Ontario, 1877, c. 139, it is competent to the Lieutenant-Governor of Ontario to appoint Queen's Counsel and to grant patents of precedence for the province to members of the provincial Bar. *Att.-Gen. for Canada v. Att.-Gen. for Ontario*, 67 L. J. P.C. 17; [1898] A.C. 247; 77 L. T. 539—P.C.

Observations on the appointment of Queen's Counsel and the grant of patents of precedence in England. *Ib.*

Contract—Payments in Arrear—Interest.—By the Ontario Judicature Act, 1897, s. 113, "interest shall be payable in all cases in which it is now payable by law or in which it has been usual for a jury to allow it." The effect of this enactment is that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default

should make compensation by payment of interest, it is incumbent upon the Court to allow interest for such time and at such rate as the Court may think right. *Toronto Railway v. Toronto City*, 75 L. J. P.C. 86; [1906] A.C. 117; 93 L. T. 646; 22 T. L. R. 32—P.C.

Common School Fund—Rights and Liabilities of Provinces inter se—Arbitration—Jurisdiction of Arbitrators.—A Common School Fund for the purpose of education was established by an Act of the old Province of Canada of 1850, and lands were set apart in what is now the Province of Ontario for the purposes of the fund. Questions having arisen between the Provinces of Ontario and Quebec in respect of the administration of the fund, arbitrators were appointed under statutes of the Dominion and of the Provinces to consider (*inter alia*)—first, the ascertainment and determination of the amount of the principal of the fund and the method of computing interest; and secondly, the amount for which Ontario was liable, and also the value of the school lands which had not yet been sold. In an action by Quebec against Ontario a claim was made for a specific sum representing the uncollected purchase-moneys of lands sold by Ontario to which no title had as yet been granted:—*Held*, that the claim, being in effect against a trustee for wilful neglect and default, was not within the submission to arbitration. *Att.-Gen. for Ontario v. Att.-Gen. for Quebec*, 72 L. J. P.C. 9; 87 L. T. 453—P.C.

Indian Reserves—Proprietary Rights of Province—Choice and Location of Lands Appropriated.—Section 91, sub-section 24 of the British North America Act, 1867, by which the Parliament of Canada has exclusive legislative authority over "Indians and Lands reserved for the Indians," does not vest in the Government of the Dominion any proprietary rights in such lands or power by legislation to interfere therewith in infringement of the proprietary rights of the province in which the lands are situated. *Ontario Mining Co. v. Seybold*, 72 L. J. P.C. 5; [1903] A.C. 73; 87 L. T. 449—P.C.

The choice and location of lands to be appropriated as Indian reserves can only be effected by the joint action of the Provincial and Dominion Governments. But when such lands are surrendered by the Indians, the result is to vest them in the Crown for the beneficial use of the province whose grantees' title prevails over the title purported to be granted by the Dominion. *St. Catherine's Milling and Lumber Co. v. Reg.* (58 L. J. P.C. 54; 14 App. Cas. 46) followed. *Ib.*

Unauthorised Acquiescence of Officials.—A province cannot be bound by the unauthorised acts of officers of departments. *Ib.*

Lease Granted by Municipality—Exemption from Taxation—Covenant in Lease—Liability of Lessee.—By section 7 of the Ontario Assessment Act, 1892, exemption from taxation is conferred upon property belonging to a municipality "but not when occupied by any person as tenant or lessee." By section 20 taxes may be recovered from either the owner, tenant, or occupier, saving his recourse against any other person:—*Held*, that the lessee of land belonging to a municipality was liable to pay taxes with-

out recourse to the corporation, and that the latter were entitled to have a covenant inserted in the lease for the payment of taxes by the lessee. *Canadian-Pacific Railway v. Toronto Corporation*, 74 L. J. P.C. 15; [1905] A.C. 33; 91 L. T. 703; 21 T. L. R. 44—P.C.

Patent — Expiry — “Foreign patent.”—By section 8 of the Canadian Patent Act, 1892, “if a foreign patent exists the Canadian patent shall expire at the earliest date on which any foreign patent for the same invention expires”:—*Held*, that the expiration of the Canadian patent takes effect if there be co-existence at any time between the Canadian and the foreign patent, and that it is not necessary that there should be such co-existence either at the date of the application for or the date of the grant of the Canadian patent. A British patent is, within the meaning of the Act, a foreign patent. *Dominion Cotton Mills Co. v. General Engineering Co. of Ontario*, 71 L. J. P.C. 119; [1902] A.C. 570; 87 L. T. 186—P.C.

Agreement between Corporation and Railway Company — Extension of Lines — Powers and Rights of Corporation and Railway.—The respondent company, under an agreement with the Toronto Corporation, confirmed by an Act of Parliament, acquired for a term of years the property in and the right to work the street railways of the city:—*Held*, on the construction of the agreement, that neither the corporation nor the company had any street railway powers within new territorial additions to the city made during the term. *Toronto City v. Toronto Railway*; *Toronto Railway v. Toronto City*, 76 L. J. P.C. 57; [1907] A.C. 315; 96 L. T. 794; 23 T. L. R. 480—P.C.

The agreement provided that the company should be required to lay down such extensions and new lines as might be recommended by the city engineer and approved by the city council, and that on the company's failure to do so the privilege of laying down such new lines and extensions might be granted by the council to any other person or company, and that the company in such case should have no right to compensation against the city:—*Held*, that the only remedy of the corporation for failure on the company's part to lay down such new lines was the right to grant the privilege to another person or company; that it was for the company, and not for the engineer or council, to determine what new lines should be laid, what routes adopted and stopping places chosen on streets within the city as existing at the date of the agreement. *Ib.*

Railway — Enforcing Mortgage — Power of Sale.—A railway which is subject to the legislation of the Dominion of Canada can, under the provisions of the Dominion Railway Acts, 1883 and 1888, be sold in a suit by the trustees for bond-holders to enforce a mortgage on the railway company's railway lands and franchises. *Central Ontario Railway v. Trusts and Guarantee Co.*, 74 L. J. P.C. 116; [1905] A.C. 576; 93 L. T. 317; 21 T. L. R. 732—P.C.

Semble, a railway the powers of which are regulated exclusively by the law of a province cannot be so sold. *Ib.*

Sale of Gas Works to Municipality—“Works, plant, appliances, and property of the company used for light, heat, and power purposes”—**Franchise and Goodwill—Expropriation—Voluntary Agreement to Purchase.**—By statute the appellant company was protected against compulsory purchase by the respondent corporation until 1911; but by an agreement made in 1896 it was provided that, upon the city giving one year's notice, it should have the option of purchasing and acquiring all the works, plants, appliances, and property of the company used for light, heat, and power purposes, both gas and electric, at a price to be fixed by arbitration, and that, upon the acquisition by the city of the works, plant, and property, the company should cease to carry on its business. The city having exercised its option,—*Held*, that, in ascertaining the price to be paid by the city, the arbitrators were right in allowing nothing in respect of the earning power or franchise of the company and in refusing to add 10 per cent. to the price, inasmuch as it was not a case of expropriation, but of transfer of property under voluntary agreement. *Kingston Light, Heat, and Power Co. v. Kingston Corporation*, 20 T. L. R. 448—P.C.

Teachers, Exemption of, from Examination.—The exemption conferred by the Ontario Separate Schools Act, 1897, s. 36, upon “persons qualified by law as teachers” in the Provinces of Ontario and Quebec from the examination imposed on public school teachers generally is applicable only to the individuals who were so qualified at the passing of the British North America Act, 1867. *Brothers of the Christian Schools v. Minister of Education for Ontario*, 76 L. J. P.C. 22; [1907] A.C. 69; 95 L. T. 630; 23 T. L. R. 29—P.C.

Ultra Vires—Provincial Legislation—Criminal Law and Procedure—Lord's Day Profanation.—Section 91, sub-section 27 of the British North America Act, 1867, reserves, among the exclusive powers of the Dominion Parliament, “The Criminal Law . . . including the procedure in criminal matters,” and under this enactment the Ontario Lord's Day Profanation Act, which imposes penalties for breach of its provisions, was beyond the competence of the Provincial Legislature. *Att.-Gen. for Ontario v. Hamilton Street Railway*, 72 L. J. P.C. 105; [1903] A.C. 524; 89 L. T. 107—P.C.

(g) QUEBEC.

“Commercial matters”—Stock Exchange.—The purchase and sales of shares by stockbrokers on the instructions of a client who is not himself a dealer are “commercial matters” within the meaning of the Quebec Civil Code, and proof thereof may be made by oral testimony. *Forget v. Baatter*, 69 L. J. P.C. 101; [1900] A.C. 467; 82 L. T. 510—P.C.

“Commencement of proof in writing”—Evidence.—The deposition of a party to an action that he employed the other party to do “something” for him is a sufficient “commencement of proof in writing” to render admissible oral evidence to show what the actual transactions were. *Ib.*

Secondary Evidence — Absence of Notice to Produce.—Secondary evidence of the written records of transactions is not made inadmissible by the absence of notice to produce such records, and on failure of proof from the Civil Code or Code of Procedure or otherwise of a practice in the Quebec Courts to require such notice, no objection based on the absence thereof can be entertained. *Ib.*

Common School Fund—Rights and Liabilities of Provinces inter se—Arbitration—Jurisdiction of Arbitrators.—A Common School Fund for the purpose of education was established by an Act of the old Province of Canada of 1850, and lands were set apart in what is now the Province of Ontario for the purposes of the fund. Questions having arisen between the Provinces of Ontario and Quebec in respect of the administration of the fund, arbitrators were appointed under statutes of the Dominion and of the Provinces to consider (*inter alia*)—first, the ascertainment and determination of the amount of the principal of the fund and the method of computing interest; and secondly, the amount for which Ontario was liable, and also the value of the school lands which had not yet been sold. In an action by Quebec against Ontario a claim was made for a specific sum representing the uncollected purchase-moneys of lands sold by Ontario to which no title had as yet been granted:—*Held*, that the claim being in effect against a trustee for wilful neglect and default, was not within the submission to arbitration. *Att.-Gen. for Ontario v. Att.-Gen. for Quebec*, 72 L. J. P.C. 9; [1903] A.C. 39; 87 L. T. 453—P.C.

Contract by Correspondence — Construction—Agent.—The respondent by letter agreed "to sell and convey" certain property without mention of the purchaser, and gave "reasonable and sufficient time" to the appellant "for correspondence and communication with foreign and near correspondents . . . pending the arrangements by you for completing sale," offering "Two and a half per cent. commission payable to you on the said sum after completing sale." The appellant simply accepted "the offer and agreement therein":—*Held*, that the letters constituted an agency and not a vendor-and-purchaser agreement, under which the appellant was not regarded as himself the purchaser, but was to find a purchaser and earn a commission. *Livingstone v. Ross*, 70 L. J. P.C. 58; [1901] A.C. 327; 85 L. T. 382—P.C.

Crown Grant—Seignior—Exclusive Right of Fishing.—The purchaser of a seignior in whom were vested all the rights and privileges conferred by the original concession from the King of France, "avec droit de chasse, pesche et traite avec les sauvages dans toute l'étendue de la dite concession," is not entitled without more special words to the exclusive right of fishing along the foreshore of the lands granted. *Cabot v. Att.-Gen. of Quebec*, 77 L. J. P.C. 11; [1907] A.C. 511; 97 L. T. 618; 23 T. L. R. 762—P.C.

Husband and Wife—Claims made as Creditor of Wife's Estate and of Daughter—Evidence.—The appellant claimed large sums as creditor of the estate of his wife, who died in 1893, and of his daughter. The wife by her will gave all

her property to the respondent, her daughter. The appellant first launched his claims in 1894; but the allegations on which they were based were wholly inconsistent not only with the sworn statement which he made on his insolvency in 1876, in which his wife was entered as a creditor, but also with the statement made in 1893, for revenue purposes, in respect of his wife's will, under his instructions. The only evidence in support of the claims were his own statements in the pleadings:—*Held*, that the claims could not be sustained. *Eddy v. Eddy*, 69 L. J. P.C. 58; [1900] A.C. 299—P.C.

— "**Dons modiques.**"—By the law of Quebec no gift beyond *dons modiques* is permitted from a husband to a wife. The Court of Queen's Bench held that articles of the value of between 5,000 and 6,000 dollars, given during a married life of forty years, were such modest ones as the law would not interfere with, and their Lordships declined to dissent from those who dwelt in the society which the law affected. *Ib.*

— **Separation as to Property—Mortgage of Wife's Property—Money Used for Husband's Purposes—Validity of Mortgage.**—The words "for her husband" in article 1801 of the Civil Code of Lower Canada, which invalidates any obligation binding her separate property "for her husband," mean generally in any way for the husband's purposes as distinguished from those of the wife, and ignorance on the part of the obligee cannot avail him if in fact she bound herself for her husband. *Trust and Loan Co. of Canada v. Gauthier*, 73 L. J. P.C. 5; [1904] A.C. 94; 89 L. T. 453; 20 T. L. R. 15—P.C.

Insolvent Traders—Judicial Abandonment of Property — Landlord's Preferential Rights — Statute—Retroactive Effect of Legislation—Code of Civil Procedure.—The principle that legislation is presumed not to be retroactive cannot, in the case of an alteration in the general law, be extended to all the consequences of the original enactment. Thus it does not operate to preserve the privileges of the grantor of a lease in respect of the judicial abandonment of property by a trader where those privileges have been curtailed by legislation subsequent to the date of the lease. *Ross v. Beaudry*, 74 L. J. P.C. 106; [1905] A.C. 570; 93 L. T. 315; 21 T. L. R. 735—P.C.

By article 2,005 of the Civil Procedure Code, in the case of the liquidation of property in the Province of Quebec abandoned by an insolvent trader, the lessor's privilege extended to the whole of the rent due and certain further rent as therein specified. This article was amended by 61 Vict. c. 46, and this privilege was restricted to twelve months' rent due, with the same additions as in the original enactment. A lease was granted before the amendment, and the lessee judicially abandoned his property after the amendment:—*Held*, that the lessor's privilege was defined by the amendment, and not by the original law. *Ib.*

Land — Adjoining Owners — Flow of Water — Injury Caused by Works — Works Executed by Lessee and Intending Purchaser—Liability as between Owner and Lessee.—Where the owner of land by a deed of lease embodying an agreement of sale gives possession of the land

to another, who so deals therewith as to cause injury to the land of an adjoining proprietor, the latter is not entitled as against such first owner to damages or to an order to remove the cause of damage. *Kieffer v. Le Séminaire de Québec*, 72 L. J. P.C. 18; [1903] A.C. 85; 87 L. T. 484—P.C.

Municipal Corporation—By-law Guaranteeing Debentures—Approval by Ratepayers and Lieutenant-Governor.—By section 7 (c) of the Stadacona Water, Light, and Power Co.'s Act, 1897, any contract between a municipal corporation and a company for works authorised by the Act shall, if it involve "financial obligations" on the part of the corporation, only be valid when the by-law authorising such contract has been approved by the ratepayers and the Lieutenant-Governor in Council. By section 37 a corporation may guarantee by by-law the bonds of the company, provided that it be thereto authorised by petition of the majority in number and in value of the ratepayers of that portion of the municipality to which the company's operations extend:—*Held*, that the two sections must be read together, and that a by-law guaranteeing the debentures of the company was invalid, not having been approved by the majority of all the ratepayers and the Lieutenant-Governor, inasmuch as it involved "financial obligations," that term not being confined to direct financial obligations incurred by the corporation's constructing works itself. *Hanson v. Grand'mère Corporation*, 73 L. J. P.C. 105; [1904] A.C. 789; 91 L. T. 302; 20 T. L. R. 772—P.C.

Assessment Roll—Petition for Annulment of Assessment—Prescription—Interruption of Prescription.—By a special roll of the appellant city half the costs of street improvements was, in February, 1895, assessed on the proprietors of property on either side of the street. In the following August a number of proprietors filed a petition that the roll should be set aside on the ground of irregularity. The city did not answer or plead to the petition till October, 1899. Judgment was given for the city in June, 1900, and affirmed on appeal in June, 1901. In September, 1902, the lands of the respondents were seized by the sheriff for the amount claimed by the city. The respondents filed an opposition and pleaded prescription. By the city's charter, section 120, the right to recover any assessment is prescribed and extinguished unless within three years an action has been commenced for recovery thereof. By section 144 a contestation of an assessment roll must be brought within six months of the assessment:—*Held*, that the amount of the assessment became due on the filing of the roll; that the city's right of action was not suspended during the pendency of a contestation, and that therefore the right of the city to recover the amount was prescribed and extinguished. *Montreal City v. Cantin*, 75 L. J. P.C. 41; [1906] A.C. 241; 94 L. T. 357; 22 T. L. R. 364—P.C.

Negligence—Action for—Judgment or New Trial—Evidence—Function of a Court of Appeal—Master and Servant—Injury to Workman.—The function of the Court of Review in the Province of Quebec is, under the Civil Procedure Code, where an application is made for judgment or a new trial, the same as that of the

Court of Appeal in England. It is not its province to re-try the question, or to set aside the verdict if it is one which the jury might reasonably have found, even though a different result might have been more satisfactory to the Judge at the trial or to the Court of Appeal. *McArthur v. Dominion Cartridge Co.*, 74 L. J. P.C. 80; [1905] A.C. 72; 91 L. T. 698; 53 W. R. 305; 21 T. L. R. 47—P.C.

The proposition laid down in certain French decisions which are not binding in Quebec—that in an action for damages for negligence resulting in injury to the plaintiff there must be proof of a fault which certainly caused the injury—is not one of universal application. *Id.*

Private Association—Charge against Member—Opportunity of Defence—Montreal Police Benevolent and Pension Society—Rules—"Obliged to resign"—Claim to Gratuity or Pension—Rules of Society, 23, 45.—By rule 45 of the respondent association any member entitled by length of service to a gratuity or pension, who is dismissed from the force or obliged to resign, is entitled to have his case considered by the board of directors, and his right to a gratuity or pension determined by a majority of the board:—*Held*, that where a constable has been suspended, an enquiry has been ordered, and he sends in his resignation, he has been "obliged to resign" within the meaning of the rule. But *held* also, that the board in such a case must act on judicial principles, and give the constable an opportunity of defending himself. They cannot leave the question to a committee of their body, and then decide by a majority of the members of the whole association in general meeting on the committee's finding. *Lapointe v. L'Association de Bienfaisance et de Retraite de la Police de Montréal*, 75 L. J. P.C. 78; [1906] A.C. 535; 95 L. T. 479; 22 T. L. R. 768—P.C.

Railway—Damages for Death of Servant—Right of Action by Deceased's Representatives—Contracting Out by Deceased—Indemnity or Satisfaction.—By article 1056 of the Quebec Civil Code, where a person dies in consequence of the commission of an offence or quasi-offence without having obtained indemnity or satisfaction, his wife or relations have a right to recover damages from the guilty person:—*Held*, that, as in *Robinson v. Canadian-Pacific Railway* (61 L. J. P.C. 79; [1892] A.C. 481), article 1056 was decided to have conferred an independent and personal right of action on the widow and relatives, and not, as in Lord Campbell's Act, a right conferred on the representatives of the deceased only, decisions under Lord Campbell's Act are inapplicable to cases under article 1056. *Reg. v. Grenier* (30 Can. S.C. R. 42) overruled. *Miller v. Grand Trunk Railway*, 75 L. J. P.C. 45; [1906] A.C. 187; 94 L. T. 231; 22 T. L. R. 297—P.C.

The appellant was the widow of a servant of the respondent company who was killed through the company's negligence. He was a member of the company's provident fund, which included insurance on death; but under the rules the company did not contribute to the insurance. By one of them, the member, in consideration of the company's contribution to the fund, was to have no claim in case of

injury or death:—*Held*, that the appellant was not precluded from recovering damages on behalf of herself and children, inasmuch as the insurance money was no "indemnity or satisfaction" under article 1056, as the company did not contribute to the insurance fund, and the death bore no relation to the "offence or quasi-offence," since the insurance money would have equally had to be paid if the deceased had died a natural death. *Id.*

— **Street Railway—Contract between City and Railway—Percentage of Earnings Due to City—Outside Municipalities.**—By article 1018 of the Civil Code of Lower Canada, "All the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire Act." By a contract between a railway company and the City of Montreal the company was to pay to the city a certain percentage of the gross earnings "of its said railway"; it was to establish lines of railway "in the city," in the streets thereafter mentioned, and in such other streets as should be determined by the city council; in the case of annexation of outside municipalities the system was to be extended through such annexed territory. It was also provided that the company was every quarter to render to the city "a true and just account . . . of the whole of their gross earnings" and to allow inspection of the books and accounts by a person appointed by the city council. Outside municipalities had independent powers, and with them in case of extension separate arrangements had to be made:—*Held*, that the city was only entitled to a percentage of earnings within the city, and that its general power of inspection was only given to enable a proper adjustment of earnings. *Montreal Street Railway v. City of Montreal*, 75 L. J. P.C. 9; [1906] A.C. 100; 93 L. T. 678; 22 T. L. R. 60—P.C.

Succession Duty—Movable Property—Domicil of Testator.—The succession duty imposed on movables by the Quebec Succession Duty Acts are payable only on property which the successor claims under the law of Quebec, and are not payable on a succession devolving under the law of another province. *Lambe v. Manuel*, 72 L. J. P.C. 17; [1908] A.C. 68; 87 L. T. 460—P.C.

— **Testator Domiciled in Ontario Owning Property in Quebec.**—The Quebec Succession Duty Acts only impose a tax on property claimed under or by virtue of Quebec law, and not upon movable property locally situated in Quebec, but forming part of a succession devolving under the law of Ontario. *Lambe v. Manuel*, 87 L. T. 460—P.C.

Adjacent Owners—Injury by Works on Land—Damages—Right of Action.—The appellant and the respondents were owners of adjacent pieces of land. The respondents demised their land to B. under an agreement to sell, and B. took possession of the land and executed some works on it for his own benefit as an intending purchaser, and not for or by the direction of the respondents. The effect of such works was injurious to the appellant's land:—*Held*, that the appellant had no right of action against the respondents for damages for the nuisance to his land, and could not compel them to abate

such nuisance. *Kieffer v. Le Séminaire de Québec*, 87 L. T. 484—P.C.

Taxation—Educational Institution—Exemption.—Land owned by an educational institution, but not attached to any school or house of education, though parts of it were used for purposes of recreation by scholars and teachers, and from which a profit was derived,—*Held*, not to be entitled to the exemption from taxation conferred by article 712 of the Municipal Code of Quebec upon property of educational institutions not possessed solely by them for the purposes of revenue. *Séminaire de Québec v. Limouliou Corporation*, 68 L. J. P.C. 34; [1899] A.C. 288; 80 L. T. 331—P.C.

Transfer of Debt—"Signification"—Notarial Act.—Notice of the sale or transfer of a debt, accompanied by a copy of the transfer, is sufficient "signification" within the meaning of article 1,571 of the Civil Code of Lower Canada, without the intervention of a notary. The institution by the transferee of an action against the debtor to recover the debt is of itself a sufficient signification of the act of sale, and there is nothing in the Code which requires signification of the sale and a delivery of a copy of the act of sale to be made at once and the same time. *Bank of Toronto v. St. Lawrence Fire Insurance Co.*, 72 L. J. P.C. 14; 87 L. T. 462—P.C.

Water Company—Compulsory Powers of Appropriating Property—Procedure—Trespass—Injunction.—A public body with compulsory powers of appropriating a person's land or water rights or of acquiring some easement over his property cannot take land or interfere with the free use by the owner of his property without giving to the landowner notice to treat for some definite subject-matter. On failure by such body to comply with statutory directions a landowner whose property has been injuriously affected retains his ordinary right of action for trespass, and where the damages are of a substantial character is entitled to an injunction. In such a case there is no discretion in the Court to award damages only in lieu of an injunction. *Saunby v. City of London Water Commissioners*, 75 L. J. P.C. 25; [1906] A.C. 110; 93 L. T. 648; 22 T. L. R. 37—P.C.

6. CEYLON.

Arbitration—Judicial Order of Reference—Power to Withdraw.—Under the Civil Procedure Code of Ceylon it is not competent to either of the parties in an action to withdraw from a judicial order of reference granted by the Court on the application and with the consent of both parties; an arbitration in an action being a judicial proceeding from beginning to end, and the award having the effect of a judicial decree. *Aitken v. Fernando*, 72 L. J. P.C. 63; [1908] A.C. 200; 88 L. T. 179—P.C.

Decree for Default—Application to set Aside Decree—"Good and sufficient evidence"—Lunatic not so Found by Inquisition—Order of Master in Lunacy in England.—The order of a Master in Lunacy in England is *prima facie* evidence of the facts stated therein, and if uncontradicted

ought to be regarded as sufficient evidence, being made by a competent tribunal in a matter within its jurisdiction, not only in this country, but in all his Majesty's dominions. *Harvey v. Regem*, 70 L. J. P.C. 107; [1901] A.C. 601; 84 L. T. 849—P.C.

Such an order in such circumstances is "good and sufficient evidence" within chapter xii. article 87 of the Ceylon Civil Procedure Code of the inability of a defendant by reason of accident or misfortune to appear and shew cause against a decree absolute for default. *Ib.*

Intestate Estate—Suit for Partition or Sale—No Administrator Appointed.—The provision of section 547 of the Ceylon Civil Procedure Code, 1889, that no action is maintainable for the recovery of property included in the estate of a deceased person when such estate exceeds 1,000 rupees in value, without the grant of probate or administration, is obligatory, and cannot be waived by agreement. An action in which it is sought to recover a share of an intestate's property, which is alleged to have been irregularly alienated, is an action for the recovery of property, although in form it may be an action for partition only. *Ponnamma v. Arumogam*, 74 L. J. P.C. 102; [1905] A.C. 383; 92 L. T. 740; 21 T. L. R. 524—P.C.

Will—Attestation—Non-notarial Will—Unofficial Presence of Notary.—By the law of Ceylon a will may be attested either—first, in the presence of a licensed notary public and two or more witnesses; or secondly, "if no notary shall be present," in the presence of five or more witnesses:—*Held*, that the presence of a notary who does not act in an official capacity does not vitiate the execution of a will attested by five witnesses. *Perera v. Perera*, 70 L. J. P.C. 46; [1901] A.C. 354; 84 L. T. 371—P.C.

7. CHANNEL ISLANDS.

Public Right of Way—Dedication to the Public—Minority—Possessory Action—Limitation of Time.—In the Channel Islands the doctrine of dedication to the public is unknown, and a right of way, whether public or private, must be proved by grant or prescription. *Godfray v. Sark (Constables)*, 71 L. J. P.C. 116; [1902] A.C. 534; 87 L. T. 3—P.C.

The conveyance of land and of rights of user and occupation of land is a matter of record, and a "contrat," not necessarily in writing, is acknowledged by the parties before and attested by the Royal Court, and a minute embodying its terms is registered. *Ib.*

There is no Court which can decree specific performance of a private contract or which administers the English equitable doctrines of part performance, acquiescence by the vendor in the expenditure of money by the purchaser, or other similar equities. *Ib.*

The law and custom of Normandy, by which minors must assert in Court "*les saisines de leurs antecessours*," applies only to "*actions possessoires*," to recover possession of which the plaintiff has been unjustly deprived, and not to petitory or real actions in which the title is in

issue:—*Held*, that a right of way of which the public user had not been enjoyed for more than thirty years was not established. *Ib.*

Guernsey—Local Authority—Statutory Right—Obstruction to Public Place—Right to Remove Obstruction.—The appellants, in exercise of an alleged statutory right, placed their wires across the streets of which the respondents were the duly appointed guardians. The appellants failed to prove the existence of the statutory right, and the respondents removed the wires, whereupon the appellants brought an action for damages:—*Held*, that, even apart from evidence of the respondents' power to prohibit the stretching of wires across the street, or to remove them if placed without their consent, the action failed for want of proof of authority so to place the wires. *National Telephone Co. v. St. Peter Port, Guernsey (Constables)*, 69 L. J. P.C. 74; [1900] A.C. 317; 82 L. T. 398—P.C.

Jersey—Jurisdiction of Royal Court—Parish—Resolutions of Civil and Ecclesiastical Assemblies—Suit to Annul Resolutions—Laches.—The Royal Court of Jersey has jurisdiction to interfere where the civil assembly of a parish passes a vote for applying the funds under its control to purposes not warranted by law; but an application for the exercise of such jurisdiction must be made with due promptitude. *Roberts v. Ercout*, 74 L. J. P.C. 28; [1905] A.C. 61; 91 L. T. 809—P.C.

On February 4, 1903, the ecclesiastical assembly of a parish considered an architect's report with respect to necessary repairs of the church. On February 10 the civil assembly, taking cognisance of the proceedings of February 4, authorised the preparation of plans, specifications, and estimates, and the payment by the *connetable* of the preliminary costs. On August 12 the architect submitted an estimate, which on August 25 was accepted by the ecclesiastical assembly; and on September 3 the civil assembly voted the amount and resolved to issue a loan, the *trésor* funds being insufficient. On September 19 the appellant filed his suit against the *connetable* for a declaration that the vote and resolution for a loan were illegal. The Superior Number, affirming the order of the Inferior Number of the Royal Court, dismissed the suit:—*Held*, that, as the proceedings formed a continuous sequence from February to September, of each step in which the appellant was aware, he was too late in complaining. *Ib.*

—Validity of Will—Undue Influence—Evidence of Executors—Evidence of Relations and Parochial Authorities.—In an action to set aside a will on the ground of undue influence and incapacity brought by the principal heir-at-law against the executors and beneficiaries,—*Held*, first, that by the law of Jersey the evidence of executors was properly excluded; secondly, that the parochial authorities were wrongly added as parties to the action, and that their evidence was inadmissible; thirdly, that the fact that the will was prepared by the executors, who took a beneficial interest themselves, was, in the absence of fraud or dishonesty, no ground for impugning its validity; and fourthly, that on the evidence there was no fraud or coercion or want of testamentary

capacity. *Baudains v. Richardson*, 75 L. J. P.C. 57; [1906] A.C. 169; 94 L. T. 290; 22 T. L. R. 333—P.C.

— **Settlement of Real Estate during Joint Lives of Husband and Wife—Separation of the Spouses** “quant aux biens”—**Claim of Husband's Heir.**—The rule of the law of Jersey which invalidates any gift of real estate by a husband, *stante matrimonio*, in favour of his wife, to the prejudice of his lawful heir, has no application to a case in which the wife's father conveys lands to the husband and wife, in consideration of an annuity paid to himself, by a deed under which the spouses take a joint interest during their joint lives and the survivor takes the whole. Such a deed is not a contract of sale and purchase, but a family arrangement, and is the source and measure of the rights acquired by each of the spouses. *Broomer v. Arthur*, 67 L. J. P.C. 148; [1898] A.C. 777—P.C.

S. CHINA.

Shanghai—Land Regulations—Surrender of Private Land for Public Purposes—Extension of Lines of Road—New Lines of Road—Roads “already defined”—By a regulation having the force of law it was enacted that “due provision shall be made for the extension of the lines of roads at present laid down.” Steps were prescribed for determining “what new lines of road are necessary”; and all land subsequently rented was to be held on the terms of the renter's surrendering any of his land “required for such roads”:—*Held*, that the powers conferred were not restricted to the lineal or lateral extension of existing roads, but included all roads enlarging the means of traffic. *Shanghai Corporation v. McMurray*, 69 L. J. P.C. 19; [1900] A.C. 206; 82 L. T. 101—P.C.

The words “already defined” prohibiting appropriation of land for other purposes than those specified, held to include the roads referred to in the whole of the regulation, new roads as well as enlargements of existing roads. *Id.*

9. GIBRALTAR.

Trial of British Subject for Offence Committed Abroad—Right to a Jury—Morocco.—By the Morocco Order in Council, Order III. sub-s. 11, the Supreme Court (that is, the Court of Gibraltar) has in all criminal matters in which the defendant is a British subject an original jurisdiction concurrent with the Court of Morocco, subject to any rules of procedure made under the Order (and none such have been made), but in all other respects with all the powers of the Supreme Court independent of the Order. Consequently, when the trial of a person charged with a criminal offence has been transferred from Morocco to Gibraltar, the mode prescribed by the Gibraltar Order must be pursued—that Order making no distinction between cases originally arising in Gibraltar and those brought thither from other places—and the accused is entitled to a trial by jury according to the Gibraltar Order. *Spilsbury v. Reg.*, 68 L. J. P.C. 66; [1899] A.C. 392; 80 L. T. 602; 63 J. P. 691; 19 Cox C.C. 303—P.C.

10. NEW ZEALAND.

Crown Land—Title by Possession against the Crown.—By section 19 of the New Zealand Colonisation Act, 1847, all the lands of the New Zealand Land Co. were, in the events therein described (which happened), “thereupon” to “revert to and become vested in Her Majesty as part of the demesne lands of the Crown in New Zealand.” In 1839 a purchaser obtained from the New Zealand Land Co. a land order in respect of certain allotments, of which the effect was to make him equitable owner, the legal estate being in the company. No conveyance was executed, and in 1850 the company surrendered all its lands in compliance with the Act of 1847. The purchaser died in or before 1851, and thereafter until 1870 the land was left derelict. In 1870 the appellant's predecessor and vendor took possession, and the appellant purchased the land in 1870:—*Held*, that the effect of the Act of 1847 was that the Crown became not a bare trustee for the purchaser or those claiming under him, but absolute and unqualified owner of the land, subject to no equities, and that the appellant, not having been in possession long enough to acquire title against the Crown, was an intruder. *Riddiford v. Regem*, 74 L. J. P.C. 37; [1905] A.C. 147; 92 L. T. 247; 21 T. L. R. 265—P.C.

False Trade Description—No Intention to Defraud—Forfeiture of Goods.—Goods imported into New Zealand with a false trade description are liable to forfeiture under section 104 of the Patents, Designs, and Trade Marks Act, 1889, incorporating the Customs Law Consolidation Act, 1882, whereby all such goods are liable to seizure and forfeiture, notwithstanding that the owner, having acted innocently, has not committed an offence against the Act in the terms of section 89. *Coppen v. Moore* (67 L. J. Q.B. 639; [1898] 2 Q.B. 306) approved. *Commissioner of Trade and Customs v. Bell*, 71 L. J. P.C. 109; [1902] A.C. 563; 87 L. T. 156—P.C.

Licensing—Jurisdiction to Grant Licences—Poll of Electoral District—Poll Declared Invalid.—Where a poll of the electors of a licensing district appointed under the Alcoholic Liquors Sale Control Act, 1895, to determine whether licences are to be continued, diminished, or abolished, has been declared irregular and void, the number of licences is to remain, under section 8, sub-section 4, unchanged until the next licensing poll. *Smith v. McArthur*, 73 L. J. P.C. 88; [1904] A.C. 389; 90 L. T. 744; 20 T. L. R. 529—P.C.

By the Interpretation Act, 1888, every enactment is to “receive such fair large and liberal construction and interpretation as will best ensure the attainment of the object of the Act.” By section 21 of the Alcoholic Liquors Sale Control Act, 1893, where a statutory district has been abolished or altered and divided into new districts, the poll in force in the original district is to remain in force in the new districts until the time for taking the next triennial poll:—*Held*, that the Interpretation Act makes this section applicable to one or more new districts constituted out of two or more previously existing districts. *Id.*

Land Legislation—Registered Title.—A registered title to land in New Zealand is, in the absence of fraud, conclusive, and defects in procedure cannot affect such title. The fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. *Assets Co. v. Mere Roihi and others*, 74 L. J. P.C. 49; [1905] A.C. 176; 92 L. T. 397; 21 T. L. R. 311—P.C.

— **Native Titles—Crown Lands—Extinction of Native Rights—Power to Sue an Officer of the Crown.**—An aggrieved person may sue an officer of the Crown to restrain a threatened act in alleged pursuance of an Act of Parliament, but really outside its limits. The Attorney-General is not a necessary or proper party to such an action. The Courts of New Zealand have under the Native Rights Act, 1865, power to enquire into native title and to ascertain whether or not it has been extinguished according to law. The appellant claimed an interest in part of certain lands which had been declared by the Governor, acting under statutory powers, to be waste lands of the Crown, and were subsequently offered for sale, alleging that the native rights had not been extinguished therein:—*Held*, that he was entitled to maintain the action. *Nireaha Tamaki v. Baker*, 70 L. J. P.C. 66; [1901] A.C. 561; 84 L. T. 633—P.C.

— **Native Land Court—Jurisdiction—Validation Court.**—By the Poututu Jurisdiction Act, 1889, jurisdiction with respect to certain lands was conferred upon the Native Land Court, whose orders and decrees were to be “final and conclusive”:—*Held*, that the words “final and conclusive” did not exclude the right to a re-hearing, which belonged to the ordinary litigants of the Native Land Court. *Barker v. Edger*, 67 L. J. P.C. 115; [1898] A.C. 749; 79 L. T. 151—P.C.

By an Act passed in 1892 the Validation Court was constituted, and it was provided that the commencement of proceedings in that Court should operate as a stay of proceedings, affecting the same matters, in all other Courts:—*Held*, that the commencement of such proceedings did not operate as a stay of proceedings under the Poututu Act. *Ib.*

— **Valuation—Valuer-General's Authority—Jurisdiction of Supreme Court.**—Where the freeholder of land has assented to the valuation of the Valuer-General, the leaseholder has no redress, and the jurisdiction and power of the Valuer-General under the Government Valuation of Land Amendment Act, 1900, are not subject to the control of the Supreme Court. *Ward v. Att.-Gen. for New Zealand*, 76 L. J. P.C. 52; 96 L. T. 280; 23 T. L. R. 297—P.C.

Land in Trust—Numerous Allottees—Beneficial Ownership.—The use of the word “trust” is not always sufficient to create an equitable right or obligation which can be enforced by legal proceedings. Thus, where lands were

granted to an individual to be held in trust for an unascertained and practically unascertainable class of loyal natives, no beneficial ownership is conferred on individual members of such a class. *Te Teira v. Te Roera Tareha*, 71 L. J. P.C. 11; [1902] A.C. 56; 85 L. T. 558—P.C.

Mines—Proclamation Allowing Discharge of Débris into River—Lands Injurious Affected—Compensation—Procedure.—Where, under sections 103 and 109 of the Mining Act, 1898, a proclamation is issued permitting the discharge into a river of *débris* and waste water from mines, every claim for compensation for injuriously affecting any land in respect of such proclamation must, if not settled by agreement, be determined by a Judge or magistrate as directed by section 233 of the Mining Act, and cannot be treated as undisputed under section 44 of the Public Works Act, 1894, even if no notice be served that the claim is disputed. *Heslop v. Minister of Mines for New Zealand*, 73 L. J. P.C. 117; [1904] A.C. 781; 91 L. T. 544; 20 T. L. R. 771—P.C.

Municipal Corporation—“Adjacent.”—The word “adjacent” is not one to which a precise and uniform meaning is usually attached. It is not confined to places adjoining, and it includes places close to or near, its application being entirely a question of circumstances. *Wellington (City) v. Lower Hutt Borough*, 73 L. J. P.C. 80; [1904] A.C. 773; 91 L. T. 539; 20 T. L. R. 712—P.C.

By section 219 of the Municipal Corporation Act, 1900, where the council of any borough desires to construct a bridge which in its opinion will benefit many or all “of the inhabitants of an adjacent borough or county or other district,” and such council is of opinion that such adjacent district should contribute to the cost, the council may apply to the Governor, who may issue a warrant specifying the proportion of the cost to be borne by the adjacent district. The respondents proposed to construct a bridge, and obtained a warrant apportioning part of the cost to the appellant corporation, whose district was six miles distant from the respondents' boundary, and three other local divisions intervened:—The COURT OF APPEAL, by a majority, held that the appellants' district was “adjacent” to that of the respondents, and the JUDICIAL COMMITTEE declined to interfere with the decision. *Ib.*

Public Authority—Compulsory Purchase—Claim for Compensation—Omission to Challenge Claim within Statutory Period.—By the Public Works Act (New Zealand), 1894, s. 44, where land is required for public purposes, and the owner, in manner prescribed by the statute, has sent in his claim, if the local authority within sixty days of receiving such claim fails to give notice in writing that the claim is not admitted, the claim is to have the effect of an award, and may be enforced under the Act:—*Held*, that a Court of law has no power to grant relief against the omission to challenge the amount within the time limited. *Wellington (Mayor) v. Johnston*, 71 L. J. P.C. 73; [1902] A.C. 396; 86 L. T. 538—P.C.

Railways Construction—Retention of Railway as Government Property—Extinction of Deben-

ture-holders' Rights.]—By sections 125 and 126 of the Railways Construction and Land Act, 1881, on events specified therein, including the failure to repay public moneys advanced, the governor is empowered to publish an Order in Council that the railway has become absolutely vested in the Queen. By a special Act of 1884, debentures and the interest payable thereon are to be "a first charge on the entire assets of the company, including the railway and everything pertaining thereto":—*Held*, that these words only operated to give priority to debenture-holders over the ordinary creditors of the company, and that the title of the Government was not subject to the charge. *Coates v. Reg.*, 69 L. J. P.C. 26; [1900] A.C. 217; 82 L. T. 162—P.C.

Revenue—Company—“Income derived from business”—“Profits derived from or received in New Zealand.”—By sections 51 and 59 of the New Zealand Land and Assessment Act, 1900, the income of a company derived from business and assessable to income tax includes “the profits derived from or received in New Zealand.” The respondent company sends messages from New Zealand to Madras. The Government, which owns the telegraphs in New Zealand, receives the entire charge for each message, deducting the cost of transmission over its own lines, and also of transmission to New South Wales, to the Government of which the balance is paid. The message then travels by successive stages to the point from which it is despatched by the company's cable, and the company receives the balance after deduction of the charges for those stages, which are paid to the Governments concerned. There are no contracts with respect to the company's operations between the New Zealand Government and the company:—*Held*, that the profits of the company for the conveyance of messages over its own cables were not “derived from or received in New Zealand,” and not liable to income tax. *Erichsen v. Last* (50 L. J. Q.B. 570; 51 L. J. Q.B. 86; 7 Q.B. D. 12; 8 Q.B. D. 414) distinguished. *Income Tax Commissioner for New Zealand v. Eastern Extension Telegraph Co.*, 75 L. J. P.C. 84; [1906] A.C. 526; 95 L. T. 308; 22 T. L. R. 780—P.C.

Entering Judgment—New Trial.]—By rule 5 in the Schedule to the Court of Appeal (New Zealand) Act, 1882, powers are conferred on the Court of Appeal of entering judgment according to the justice of the case similar to those contained in the Rules of the Supreme Court, 1883, Order LVIII. rule 4. The verdict having been held unsatisfactory by the Judge at the trial, but no application having been made on the appeal to enter judgment for the defendants, a new trial was ordered. *Clouston v. Corry*, 75 L. J. P.C. 20; [1906] A.C. 122; 93 L. T. 706; 54 W. R. 382; 22 T. L. R. 107—P.C.

Estate Duty—Life Interest Given to a Widow with Power of Appointment—Exercise of Power in Favour of Herself—Statutory Exemption from Duty.]—Where a testator gives his widow a life interest in his residuary estate, together with an absolute power of appointment over the property, which she exercises in favour of herself, she does not become “absolutely entitled” under her husband's will, and cannot claim the exemption from duty conferred on

widows so entitled under the Deceased Persons' Estates Duties Acts, 1881 and 1885. *Jackson v. Commissioner of Stamps*, 72 L. J. P.C. 68; [1903] A.C. 350; 88 L. T. 480—P.C.

Testamentary Gift to Charity—Death Duty—Income Tax—Exemptions.]—A bequest to found an institution for the training of boys who are either destitute orphans, or the children of persons of good character and straitened circumstances, is a “charitable” bequest within the meaning of section 3 of the Charitable Gifts Duties Exemption Act, 1883, and the institution so founded is a “public” school within section 2 of that Act, although the recipients of the benefit are to be trained in a particular church and chosen from specified localities, and is as such entitled to the exemption from taxation granted by the Act. *Dilworth v. New Zealand Commissioner of Stamps*, 68 L. J. P.C. 1; [1899] A.C. 99; 79 L. T. 473; 47 W. R. 337—P.C.

Such an institution is also exempt from income tax as a “public charitable institution . . . carried on for” a “public charitable purpose, and not for any gain or profit,” under section 3, sub-section 4 of the Land and Income Assessment Act Amendment Act, 1892. *Id.*

Stipendiary Magistrate—Jurisdiction of, whether Local or General—Enquiry into Licensing Poll.]—By the Magistrates' Courts Act, 1893, the system of resident magistrates exercising jurisdiction over allocated districts was replaced by a system of stipendiary magistrates appointed to hold office “within the Colony”:—*Held*, that the jurisdiction of a stipendiary magistrate is not confined to a particular district, the Magistrates' Court being no longer a collection of Courts, but one Court throughout the whole colony in which all the stipendiary magistrates are of equal rank and authority. Thus any stipendiary magistrate, whether or not usually sitting in the district affected, is entitled to entertain a petition for enquiring into a licensing poll presented under the Alcoholic Liquors Sale Control Act, 1895. *Bastings v. Callaghan*, 74 L. J. P.C. 79; [1905] A.C. 351; 92 L. T. 734; 21 T. L. R. 501—P.C.

11. WEST INDIES.

(a) TRINIDAD.

Crown Concession—Construction—Lands in Possession of the Crown.]—Lands in Trinidad, the subject of a concession by the Crown, “which now are, or at any time during the said term or terms shall come into the possession of Her Majesty,” include only those in the actual possession of the Crown, and not those to which the Crown has a right or title without possession. *New Trinidad Lake Asphalt Co. v. Att.-Gen. for Trinidad and Tobago*, 73 L. J. P.C. 97; [1904] A.C. 415; 91 L. T. 208; 20 T. L. R. 571—P.C.

Land Forfeited to Crown—Waiver of Forfeiture—Receipt of Rates.]—Where land has been forfeited to the Crown by regular legal process, the fact that rates have subsequently been demanded from and paid by persons found in occupation of the land without any title, will not be held to be a waiver of the forfeiture. *De Silva v. Att.-Gen. for Trinidad*, 79 L. T. 130—P.C.

12. APPEALS TO THE PRIVY COUNCIL.

(a) LEAVE WHEN GRANTED.

In Criminal Proceedings.]—The rule is accurately stated in *Dillet, In re* (12 App. Cas. 459), that, save in exceptional circumstances, such as a gross miscarriage of justice or disregard of the forms of legal process, her Majesty will not review or interfere with the course of criminal proceedings. *Curew v. Japan* (Crown Prosecutor), 66 L. J. P.C. 95; [1897] A.C. 719; 77 L. T. 1; 18 Cox C.C. 625—P.C.

Special leave to appeal from a criminal conviction after a trial by jury cannot be granted where there is evidence for the jury, and no fact is established sufficient to countervail the findings and verdict. *Aldred, Ex parte*, 71 L. J. P.C. 27; [1902] A.C. 81; 86 L. T. 163; 20 Cox C.C. 149—P.C.

Special leave to appeal from a criminal conviction by a special Court refused. *Reg. v. Marais*; *Marais, Ex parte*, 71 L. J. P.C. 32; [1902] A.C. 51—P.C.

Treason.]—See INTERNATIONAL LAW.

Appeal in Forma Pauperis.]—Where leave to appeal has been obtained in regular form, the appeal may be presented in *forma pauperis*. *Quinlan v. Child*, 69 L. J. P.C. 85; [1900] A.C. 496—P.C.

Where the facts and issues of several suits were intermingled with each other, although in one the grounds for leave to appeal were insufficient, leave to appeal was given in all. *Ib.*

There being no power of appeal to the Court of Appeal for the Windward Islands in *forma pauperis* was held to be an additional reason for granting special leave to appeal. *Ib.*

Their Lordships have no jurisdiction to order a stay of sale in execution pending an appeal. *Ib.*

As a general rule leave will not be given to appeal in *forma pauperis* where the Court below has power to grant such leave on the usual conditions, unless in the first instance an application for leave has been made within due time to the Court from which it is proposed to bring the appeal. *Walker v. Walker*, 72 L. J. P.C. 36; [1903] A.C. 170; 88 L. T. 133; 51 W. R. 658—P.C.

Leave to appeal in *forma pauperis* refused on the ground that the materials supplied on the application for leave to appeal were ample and complete, and afforded no ground of action to the petitioner, who was plaintiff in the action. *Mitchell v. New Zealand Loan and Mercantile Agency Co.*, 73 L. J. P.C. 17; [1904] A.C. 149; 89 L. T. 83—P.C.

No Provision in Colonial Code.]—When a Colonial Code makes no provision for appeals in *forma pauperis* from a decision of the Supreme Court of the colony, special leave to appeal will be granted as of right, provided that the case is, as regards amount, value, and nature, fit to be taken in appeal to his Majesty

in Council. *Ponnamma v. Arumogam*, 71 L. J. P. C. 121; [1902] A. C. 561—P. C.

—Rescission of Order Granting such Leave.]
—Leave to appeal to the King in Council in *forma pauperis* is not of course, and ought not to be granted where it is made apparent that the proposed appeal is idle and frivolous. Order in Council (69 L. J. P.C. 85; [1900] A.C. 496), granting leave to appeal, rescinded on the petition of the respondent, on the ground that there was no real question to be tried. *Quinlan v. Quinlan*, 70 L. J. P.C. 122; [1901] A.C. 612; 85 L. T. 360—P.C.

“Final order.”]—Where in an action for account the Court at the request of the plaintiffs selects one item, and in respect thereof after hearing the evidence makes an order that the action be dismissed, such order is a final order and subject to the conditions under which an appeal may be taken therefrom. *McDonald v. Belcher*, 73 L. J. P.C. 91; [1904] A.C. 429; 90 L. T. 735—P.C.

Immaterial Omission in Petition—Costs.]
Where in a petition for special leave to appeal reference is made to a statute of which it is alleged that it is important to ascertain the construction, but the petitioner inadvertently omits to state that the statute has been repealed, such omission, not affecting the real question at issue, will not operate to deprive the petitioner of the costs to which he is otherwise entitled. *Ib.*

Judgments Out of Time—Leave Refused.]
Where an appellant is out of time for appealing from an order he cannot bring himself within time by a fresh application for the same purpose to the Court below, the refusal of which is within time. *Grieve v. Tasker*, 75 L. J. P.C. 12; [1906] A.C. 132; 94 L. T. 115—P.C.

The appellant obtained leave to appeal from an order made in March, 1905. He then petitioned for leave to appeal from orders of June, 1899, and August, 1904, in respect of which the time for appeal had expired, on the ground that they were necessary to the conduct of his appeal from the order of March, 1905. All three orders were substantially the same. Appeal from order of March, 1905, dismissed, and appellant's petition refused. *Ib.*

Act of Executive Government of a Colony—No Application to Colonial Courts.]—The Judicial Committee will not interfere with an act of the executive Government of a colony in a case in which no application has been made to the Courts of Justice in the Colony to interpose in the matter. *Mgomini, Ex parte*, 94 L. T. 558; 21 Cox C.C. 154; 22 T. L. R. 413—P.C.

Abstract Point of Law not Arising in Proceedings.]—Special leave to appeal will not be granted for the purpose of obtaining a determination of an abstract point of law which did not arise in the case. *Rex v. Lowe*, 73 L. J. P.C. 65; [1904] A.C. 412; 91 L. T. 210; 20 T. L. R. 572—P.C.

Speculative Opinions on Hypothetical Questions.]—It is contrary to the practice of the Judicial Committee to attempt to give specula-

tive opinions on hypothetical questions submitted to them. The questions upon which a decision is given must arise in concrete cases involving private rights. *Att.-Gen. for Ontario v. Hamilton Street Railway*, 72 L. J. P.C. 105, [1903] A.C. 524; 89 L. T. 107—P.C.

Concurrent Findings of Fact.—Concurrent judgments of facts in the Courts below will not be reversed unless the appellant adduces the clearest proof of error, and points to the source of that error. *Allen v. Quebec Warehouse Co.* (56 L. J. P.C. 6; 12 App. Cas. 101) followed. *Whitney v. Joyce*, 75 L. J. P.C. 89; 95 L. T. 74—P.C.

Unanimous Judgment—Question of Fact.—The unanimous judgment of Courts below on a question of fact will not be set aside except where it is plain that there has been a miscarriage of justice, or at least that the evidence has not been adequately weighed. *Archambault v. Archambault*, 71 L. J. P.C. 131; [1902] A.C. 575; 87 L. T. 404—P.C.

Point not Raised and Considered in Court Below.—A new point which was not fully raised and considered in the Court below will not be entertained on the appeal to the King in Council. *Ib.*

Martial Law—Civil Tribunals.—Where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals. The fact that for some purposes some tribunals have been permitted to pursue their ordinary course in a district in which martial law has been proclaimed is not conclusive that war is not raging. *Ephinstone v. Bedreechund* (1 Knapp P.C. 316) followed. Special leave to appeal refused from a judgment affirming the rightful custody of the petitioner by the military authority in a district in which martial law prevails. *Marais v. General Officer Commanding Lines of Communication*, 71 L. J. P.C. 42; [1902] A.C. 109; 85 L. T. 734; 50 W. R. 273—P.C.

Legislation Legalising Sentences of Court-martial.—There is no analogy between the proceedings of courts-martial and those of Courts of justice administering the ordinary law. The Judicial Committee has no power to review the sentences of courts-martial or to enquire into the propriety or impropriety of legislation which has established the legality of such sentences. *Tilonko v. Att.-Gen. of Natal* (No. 1), 76 L. J. P.C. 29; [1907] A.C. 93; 95 L. T. 853; 23 T. L. R. 21—P.C.

Appealable Value—Amount.—In estimating the appealable value regard will be had to the whole matter involved in the suit, and not to the value of a fractional part of the property sought to be recovered by the petitioner. *Mussumat Ameena Khatoor v. Radhabenod Misser* (12 Moo. P.C. 470; 7 Moo. Indian App. Cas. 261) approved. *Ponamma v. Arumogam*, 71 L. J. P.C. 121; [1902] A.C. 561—P.C.

Subsequent Legislation.—The rights of parties must be decided according to the law in force at the commencement of the action, and a provision in a later law that such law shall apply to pending actions is inapplicable to an appeal

to the King in Council. An appeal to the King in Council is an appeal, strictly so called, confined to the materials which were before the Court below, and not a re-hearing. *Ponamma v. Arumogam*, 74 L. J. P.C. 102; [1905] A.C. 383; 92 L. T. 740; 21 T. L. R. 524—P.C.

Question Settled by—Act of Colonial Legislature.—Special leave to appeal will not be granted where the question has been settled by a Colonial Legislature, the function of the Judicial Committee being the application, not the policy, of legislation. *Tilonko v. Att.-Gen. of Natal* (No. 2), 76 L. J. P.C. 105; [1907] A.C. 461; 23 T. L. R. 668—P.C.

Bishop—Jurisdiction of—Revocation of Appointment of Chaplain.—The appellant was nominated by the respondent to a colonial chaplaincy within his diocese, and the nomination was accepted by the Secretary of State. In consequence of certain reports as to his conduct, the Colonial Government decided to suspend the issue of his official letter of appointment pending an enquiry. An enquiry was held before the bishop, who found certain charges of misconduct proved, and withdrew his nomination:—*Held*, that, there being no litigation which the bishop had jurisdiction to determine, no appeal lay to the Judicial Committee from his act in withdrawing the nomination. *Ward v. Mauritianus (Bishop)*, 95 L. T. 854; 23 T. L. R. 52—P.C.

Power to Relax Conditions—New Trial—Judgment.—There is no power to relax or dispense with an enactment prescribing the exact conditions under which applications for a new trial or for judgment must be made. *George D. Emery Co. v. Wells*, 75 L. J. P.C. 104; [1906] A.C. 515; 95 L. T. 589—P.C.

Interlocutory Orders—Interim Injunction.—The Judicial Committee will not encourage appeals from interlocutory orders of a temporary character, such as an interim injunction. *Croudace v. Zobel*, 68 L. J. P.C. 47; [1899] A.C. 258; 79 L. T. 602—P.C.

Powers of Board after Amendment.—Where the Judicial Committee order an amendment as to parties to be allowed and thereby reverse a decision of the Court below, the Committee cannot hear the action as a Court of first instance on the merits, but must refer it back to the Court below. *Kent v. La Communauté des Sœurs de Charité de la Providence*, 72 L. J. P.C. 61; [1903] A.C. 220; 88 L. T. 275—P.C.

Special Leave—Terms.—Special leave to appeal granted on the terms of the appellant's submission to pay the costs of appeal in any event, if so directed. *Montreal Gas Co. v. Cadieux*, 67 L. J. P.C. 115; [1898] A.C. 718—P.C.

Duty of Court of Appeal—No Cross-appeal.—The respondents, the next-of-kin of a testator, presented a petition for the revocation of the probate of his will, on the ground that he was not of sound mind, and that the will was obtained by undue influence. The Court of first instance decided in their favour. The executrix appealed, and the Court of Appeal held the will good so far as regarded the per-

sonal estate of the testator, but invalid so far as regarded his real estate, which was considerable. No such point had been raised at the trial, at which the will was attacked and defended as a whole. The executrix appealed, but there was no cross-appeal by the next-of-kin:—*Held*, that the course taken by the Court of Appeal was not correct according to the rule laid down in *The Tasmania* (15 App. Cas. 223)—that a Court of Appeal ought only to decide in favour of an appellant on a ground put forward for the first time on the hearing of the appeal if it be satisfied that it has before it beyond all doubt all the facts bearing upon the new contention as completely as if it had been raised at the trial—but, in the absence of a cross-appeal by the next-of-kin, the decision must be affirmed, but without costs. *Karunaratne v. Ferdinandus*, 71 L. J. P.C. 76; [1902] A.C. 405; 86 L. T. 329—P.C.

Commonwealth of Australia—High Court.—Applications for special leave to appeal from the High Court of Australia ought to be treated in the same manner as applications for special leave to appeal from the Supreme Court of Canada, as explained in *Cité de Montréal v. Ecclesiastiques du Séminaire de St. Sulpice de Montréal* (59 L. J. P.C. 20; 14 App. Cas. 660) and in *Prince v. Gagnon* (8 App. Cas. 103), "*Daily Telegraph*" Newspaper Co. v. *McLaughlin*, 73 L. J. P.C. 95; [1904] A.C. 776; 91 L. T. 233; 20 T. L. R. 674—P.C.

Such applications will not be granted "save where the case is of gravity involving matters of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character." *Ib.*

— **Special Leave to Appeal.**—In cases in which there is an alternative appeal, either to the High Court or to his Majesty in Council, and parties have made their election to appeal to the High Court, special leave to appeal from the High Court to the King in Council will not be given save in very exceptional circumstances. *Victorian Railway Commissioners v. Brown*, 75 L. J. P.C. 65; [1906] A.C. 381; 95 L. T. 73; 22 T. L. R. 644—P.C.

Australia—Question of Private Right.—Special leave to appeal from a decision of the High Court of Australia will not be granted where a matter of private right only and not of public importance is involved. *Walfley Ore Concentrator Syndicate v. Guthridge*, 75 L. J. P.C. 87; [1906] A.C. 548; 95 L. T. 73—P.C.

Canada—Special Leave to Appeal from the Supreme Court of.—Where no important question of law is involved, and no *prima facie* ground warranting an appeal is made out, special leave to appeal from an order of the Supreme Court of Canada will not be granted. *Ewing v. Dominion Bank*, 74 L. J. P.C. 21; [1904] A.C. 806—P.C.

Where a litigant elects to appeal to the Supreme Court, and not direct to his Majesty in Council, as he may do, special leave to appeal will not be granted save in exceptional circumstances. *Clergue v. Murray* (72 L. J. P.C. 99;

[1903] A.C. 521) followed. *Canadian-Pacific Railway v. Blain*, 73 L. J. P.C. 109; [1904] A.C. 453—P.C.

Ontario—Admission of Appeal to King in Council—Competency.—The question whether an appeal from the Court of Appeal for Ontario to the King in Council is competent is one upon which the Court of Appeal itself must exercise its judgment; and where that Court has avoided the expression of any opinion, no such appeal is permitted. *Gillett v. Lumsden*, 74 L. J. P.C. 155; [1905] A.C. 601; 93 L. T. 314; 21 T. L. R. 693—P.C.

(b) INTEREST.

Money Found Due—Discretion of Court.—The Court has a discretion on further directions to order payment of interest on a sum found due from a defendant, although the decree declaring the liability contains no direction for payment of interest, and the statement of claim does not ask for interest. *Burland v. Earle*, 74 L. J. P.C. 156; [1905] A.C. 590; 93 L. T. 313—P.C.

But in the special circumstances disclosed in the appeal the Board overruled the exercise of the discretion of the Court below, which had intentionally omitted a direction as to interest and allowed interest from the date of that Court's decree. *Ib.* And see INTEREST.

(c) COSTS.

Security for Costs of Appeal—Form of.—Where a municipality is respondent to an appeal to her Majesty in Council the condition that security shall be given in bond, mortgage, or personal recognisance is sufficiently complied with by delivery of the bonds to the prothonotary and not to the municipality. *Melbourne Tramway and Omnibus Co. v. Fitzroy Corporation*, 70 L. J. P.C. 1; [1901] A.C. 153; 83 L. T. 442—P.C.

Crown a Party.—The Judicial Committee will henceforth adhere to the practice of the House of Lords, under which the Crown neither pays nor receives costs, unless the case is governed by some local statute, or there are exceptional circumstances to justify a departure from the ordinary rule. *Johnson v. Regem*, 73 L. J. P.C. 113; [1904] A.C. 817; 91 L. T. 234; 53 W. R. 207; 20 T. L. R. 697—P.C.

Pauper—Successful Appellant.—The rule in pauper cases prevailing in the House of Lords was adopted by the Privy Council, and the successful appellant was awarded such costs of the appeal as would be granted by that rule. *Wasteneys v. Wasteneys*, 69 L. J. P.C. 83; [1900] A.C. 446—P.C.

13. OTHER MATTERS.

Charity—Land reverting to.—See CHARITY.

Commitment for Contempt.—See CONTEMPT OF COURT.

Committee of Lunatic.—See LUNACY.

Company—Registered in England—Business in New Zealand.]—See COMPANY.

Crime—Marital Compulsion.]—See CRIMINAL LAW.

Gas Company—Right to Cut Off Supply.]—See GAS COMPANY.

Notaries—Appointment of in Colonies.]—See NOTARY.

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COMMONS.

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2. Inclosure, 307.
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4. Quarry, 311.
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1. STATUTES.

Commons Act.]—62 & 63 Vict. c. 30 is the Commons Act, 1899.

Metropolitan.]—61 & 62 Vict. c. 43 is the Metropolitan Commons Act, 1898.

2. INCLOSURE.

"Recital" in Inclosure Act—Evidence.]—Recitals in an Inclosure Act are not conclusive evidence against persons claiming through original allottees under the Act, but may be rebutted by other evidence. *Merttens v. Hill*, 70 L. J. Ch. 489; [1901] 1 Ch. 849; 84 L. T. 260; 49 W. R. 408; 65 J. P. 312—Cozens-Hardy, J.

General Principles for Construction of Inclosure Acts.]—The general principles applicable to the construction of Inclosure Acts collected and stated. 73 L. J. Ch. 335; [1904] 2 Ch. 419; 90 L. T. 149; 68 J. P. 177; 20 T. L. R. 204.

Inclosure Act—Award—River Running along Waste—Allotment of Waste—Bed of River—"Ad medium filum."]—An Act for inclosing moors, commons, and waste grounds of a manor does not apply to the bed of a river which is proved to be not waste of the manor, but the freehold of the lord, and not subject to any commonable rights. Therefore an award under the Act of waste bordering on the river does not carry with it the bed of the river *ad medium filum*. *Ecroyd v. Coulthard*, *supra*. 67 L. J. Ch. 458; [1898] 2 Ch. 358—C.A.

Inclosure Award—Allotment to Trustees for Purpose of Turbary—Ownership of Soil—Lord of the Manor.]—By section 73 of the Inclosure Act, 1845, the valuer acting in the matter of any inclosure shall and may set out and allot for the public purposes mentioned in the provisional order of the Commissioners such parts of the land to be inclosed as shall have been thereby respectively directed to be set apart for such purposes; and in every case in which the valuer shall not think it necessary or proper to direct

the same to be otherwise made, such allotments shall be made to the churchwardens and overseers of the poor for the time being of the parish in which such allotments shall be situate, and shall be held by them in the same manner and with the same legal powers and incidents as if the same allotments were lands belonging to the parish. By an award made under the Act the valuer set out, allotted, and awarded to the churchwardens and overseers of the poor of a parish an allotment situate therein for the purpose of the exercise of rights of turbary, and declared that the allotment should be held by them and their successors for ever upon trust to permit the occupiers of certain cottages to cut and dig turf thereon:—*Held*, that the ownership of the soil in the allotment was thereby taken away from the lord of the manor and vested in the churchwardens and overseers of the poor. *Simcoe v. Pethick*, 67 L. J. Q.B. 919; [1898] 2 Q.B. 555; 79 L. T. 432—C.A.

—Jurisdiction of Commissioner—Watercourse Repairing and Cleansing—Highway Authority.]

—An Inclosure Act provided that the commissioner should set out such watercourses as he should think proper, and should order and direct by whom and at whose expense such watercourses should be repaired and cleansed. The Act further provided that the commissioner should assign land for the getting of materials for repairing public roads. The commissioner, in pursuance of such act, by his award, appointed certain roads to be set out, and awarded to the surveyor of highways land for the getting of materials for the repair of public roads. He further ordered that a watercourse should be made, and directed that such watercourse should for ever thereafter be repaired and cleansed by the surveyor of highways for the time being, the expenses attendant upon such repairing and cleansing to be paid out of a rate to be made for the repair of highways in the township:—*Held*, that it was within the jurisdiction of the commissioner to order the surveyor of highways to repair and cleanse the watercourse and to raise the expenses of so doing by means of a rate. *Aff. Gen. v. Tamworth Rural Council*, 85 L. T. 190—Byrne, J.

Land Allotted in Lieu of Tithes—Annual Payment for Poor of Parish—Charge on Tithes.]

Certain lands were allotted in 1834 in lieu of great tithes of a certain parish under an Inclosure Act which provided that any allotment should not prejudice any person or persons having any right or claim out of or affecting any lands allotted or inclosed, but the persons to whom any hereditaments should be allotted should be seised thereof subject to such and the same charges and incumbrances as the hereditaments whereof they were seised before the award. It was proved that the great tithes had from time immemorial been subject to the annual provision of a certain quantity of corn for the benefit of the poor of the parish, and from 1834 to 1881 the owners or occupiers of the lands allotted in lieu thereof had made payments in money or kind in respect of this charge. In 1881 the lands in question were sold to the defendants' predecessor in title, and conveyed to him "subject to the unredeemed land tax and tithe commutation rentcharge both rectorial and vicarial and to all other

payments and outgoings ecclesiastical and civil charged upon or payable out of the said hereditaments." Payments had occasionally been made by him on account of the charge:—*Held*, that the payment constituted a valid charge on the property allotted in lieu of tithes, and that the purchaser took subject thereto under his conveyance. *Lanchbury v. Bode* (67 L. J. Ch. 196; [1898] 2 Ch. 120) distinguished. *Alms Corn Charity, In re*; *Charity Commissioners v. Bode*, 71 L. J. Ch. 76; [1901] 2 Ch. 750; 85 L. T. 533—*Stirling, J.*

"**Parsonage**"—**Liability to Charge.**—A charge "issuing and payable out of a parsonage" is a charge on the endowments of the benefice. *Ib.*

Annual Payment of Corn to Poor of Parish—Charge on Great Tithes—Lands Allotted in Lieu of Tithes—Sale of Lands—Lands subject to Charge.—In 1881 the defendant purchased from the Ecclesiastical Commissioners certain lands which in 1834 had been allotted to their predecessors in title under the Inclosure Act, 11 Geo. 4, c. 1, in lieu of the great tithes of the parish of H. There was evidence that from time immemorial an annual payment of a certain quantity of corn had been made out of the tithes for the benefit of the poor of the parish, and from 1834 to 1881 the same payment had been made by the owners or occupiers of the lands in question. The conveyance to the defendant was expressed to be made "free from incumbrances," but was also expressly subject to the unredeemed land tax, tithe commutation rent-charge, both rectorial and vicarial, and to all other payments and outgoings, ecclesiastical or civil, charged upon or payable out of the lands conveyed:—*Held*, that the payment of corn constituted a valid charge to which the lands allotted in lieu of the tithes became subject by virtue of section 66 of the Inclosure Act, and that the defendant by the terms of his conveyance took the lands subject to the charge. *Alms Corn Charity, In re*; *Charity Commissioners v. Bode*, 71 L. J. Ch. 76; [1901] 2 Ch. 750; 85 L. T. 533—*Stirling, L.J.*

Reservation of Minerals to Lord—Allotment of Surface to Commoners—Right to Work Minerals—Right to Support—Damage to Surface—Compensation Clause—Injunction.—The lord of a manor was seised of the soil of the manor and entitled to the mines and minerals thereunder, subject only to the ordinary rights of pasturage in the commoners. The common lands of the manor were duly inclosed and allotted by an award made under an Inclosure Act which enacted that lands allotted to any person in respect of freehold lands entitled to a right of common should be vested in and held by such person as freehold; that the lord of the manor should have, hold, and enjoy all mines and quarries in and under the said common lands, together with liberty of searching for, winning, and working the said mines and quarries, and other usual liberties, as fully and freely as he might or could have had and enjoyed the same in case that Act had not been made, and that without making or paying any satisfaction for so doing; that any damage done to persons by reason of the searching for, winning, and working the mines and quarries under their respective allotments by the lord of the manor without

making or paying any satisfaction for so doing, should be assessed as therein mentioned, and should be paid and borne by the occupiers of the several other allotments lying and being in such and the same township as was the allotment so damaged; and that the owners of the allotments might at all times win, work, get, and take stones in their several allotments, and also in the common quarries to be established as therein mentioned, and also for the space of one year after the award in the other allotments. The plaintiffs, who were the surface owners of lands allotted by the award in respect of freehold lands, claimed an injunction to restrain the defendants, lessees of the mines, from the successors in title of the lord of the manor, from so working the mines as to lower or depress the surface of the plaintiffs' lands or injure the buildings thereon:—*Held*, that the mines and minerals were not granted, but were reserved to the lord of the manor subject to the principle, *Sic utere tuo ut alienum non ledas*, the words "and that without making or paying any satisfaction for so doing" limiting the reservation to the ordinary rights of ownership and amounting to a provision that so long as the mineral owners worked in exercise of the usual common-law rights, they were to pay no compensation to any one; that the provisions of the compensation clause were quite consistent with the working of mines and quarries in the ordinary way and subject to the ordinary rights of surface owners; and that the plaintiffs were entitled to an injunction. *Bishop Auckland Industrial Co-operative Flour and Provision Society v. Butterknowle Colliery Co.*, 73 L. J. Ch. 335; [1904] 2 Ch. 419; 90 L. T. 149; 68 J. P. 177; 20 T. L. R. 204—*Farwell, J.* Affirmed in C.A., 73 L. J. Ch. 635; [1904] 2 Ch. 419. *See MINES.* Affirmed in H.L., 41 L. J. N.C. 814.

Quære, whether the decisions in *Consett Waterworks Co. v. Ritson* (64 L. J. Ch. 293n.; 22 Q.B. D. 702) and *Bell v. Dudley (Earl)* (64 L. J. Ch. 291; [1895] 1 Ch. 182) do not conflict with the subsequent decision of the HOUSE OF LORDS in *New Sharlston Collieries v. Westmorland (Earl)* (73 L. J. Ch. 333n.). *Ib.*

Repair of Roads—Action for Breach of Duty—Canon of Construction to be applied in Construing Act.—By an Inclosure Act passed in the 7 George 3, with reference to the inclosure of certain commons and waste grounds known as B. Moor, after reciting that the persons interested were owners and proprietors of messuages, &c., in the several townships therein mentioned, including, amongst others, the township of W., it was enacted that the commissioners should appoint and undertake the repair of (*inter alia*) two roads mentioned in the statement of claim. The plaintiffs alleged that these roads were duly made in accordance with the award, and were for many years kept in repair by the surveyor of the township of W., and that the said township was included in the defendant urban district, and that the defendants were liable to repair them. There was no evidence that the inhabitants of W., taken as a body, had ever in fact repaired or paid for the repair of the roads in question since 1767, although it was shewn that since 1859 certain of the inhabitants of the township had contri-

buted towards the repair of the roads for their own convenience. It was contended by the plaintiffs that liability to repair the roads in question was imposed upon the defendants:—*Held*, in the circumstances, that the Court was justified in reading in after the words “in such manner as other public highways are by law directed to be repaired by such of the said townships respectively” the words “within whose district such public highways are situated”; that the doctrine of *contemporanea expositio* did not apply; that the defendants were not liable to repair the roads in question as the same were outside their district; and that in construing an Inclosure Act it is right to take the whole of the document as one complete document. It is not sufficient to take out one section and disregard others which are germane to the same subject. *Att.-Gen. v. Lunsdale Rural Council*, 86 L. T. 822—Farwell, J.

Metropolitan Common—Land Included in Scheme—Claim of Alleged Owner—Lapse of Time.—Where a certain piece of land was included in a scheme (made in 1890 under the Metropolitan Commons Acts, 1866 and 1869, and confirmed by Act of Parliament in 1891), and in the plan embodied with the scheme, as portion of the common subject to such scheme, and a person nine years afterwards brought an action against the conservators claiming to be entitled to the piece of land in fee-simple, it was held that the inclusion of such land in the scheme and plan was conclusive that the land formed part of the common, and that the alleged owner was debarred from asserting any title to the land. *Cook v. Mitcham Common Conservators*, 70 L. J. Ch. 228; [1901] 1 Ch. 387; 83 L. T. 519; 49 W. R. 201—Farwell, J.

Section 14 of the Metropolitan Commons Act, 1866, which requires every scheme to state the rights affected by it, refers to all rights of property claimed in respect of land comprised in a common, and not merely to rights in or over the common as such. *Id.*

3. WASTE.

River.—Whether a river running along waste of a manor is waste is a question of fact. *Ecroyd v. Coulthard*, 67 L. J. Ch. 458; [1898] 2 Ch. 358; 78 L. T. 702—C.A.

Evidence—Boundary Stones.—The erection of boundary stones with the initials thereon of an adjacent proprietor, so as to mark out uninclosed lands, is, standing alone, strong evidence of ownership, and if recognised and acquiesced in by those whose interest it would be to dispute such ownership, it may afford irresistible evidence in favour of the party claiming the property set out. *Jenkins v. Dunraven (Earl)*, 62 J. P. 661—Byrne, J.

— **Ancient Survey of Manor.**—An ancient survey of a manor is admissible though not conclusive evidence in a question relating to lands within the manor. *Id.*

4. QUARRY.

Right to get Stone—Freehold and Copyhold Tenants—Evidence—Court Rolls.—The copyhold

tenants of a manor may by custom have a right of common to get stone and sand out of the lord's waste to be used by them on their respective tenements within the manor, and there is no legal objection to the existence of a similar right in the freehold tenants. Such a right is not unreasonable, and the court rolls may be given in evidence to its existence. The lord cannot inclose against such a right of common; and the fact that an amercement rent was at one time paid in respect of the quarry from which the stone was taken cannot affect the tenants in respect of the right in question. *Heath v. Deane*, 74 L. J. Ch. 466; [1905] 2 Ch. 86; 92 L. T. 643; 21 T. L. R. 404—Joyce, J.

5. OTHER MATTERS.

Compensation for Compulsory Purchase.—*See* LANDS CLAUSES ACT.

Inclosure—Enlargement of Right—Prescription.—*See* EASEMENT.

Minerals.—*See* MINES AND MINERALS.

Right of Way—Dedication after Award.—*See* WAY.

River—Several Fishery—Bed of River—Presumption.—*See* WATER.

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 - (k) *Fraudulent Preference*, 472.
- 19. *Voluntary Winding-up*, 474.
 - (a) *Resolution*, 474.
 - (b) *Stay of Executions*, 475.
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 - (d) *Liquidator*, 476.
 - (e) *Transfers*, 477.
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- 20. *Surplus Assets*, 478.
- 21. *Dissolution*, 481.
- 22. *Costs*, 484.

1. STATUTES.

Stock and Shares.—61 & 62 Vict. c. 26 empowers the Court to grant relief for non-compliance with section 25 of the Companies Act, 1867.

Companies Act, 1900.—63 & 64 Vict. c. 48 is the Companies Act, 1900.

Companies Act, 1907.—7 Edw. 7 c. 50 is the Companies Act, 1907.

2. FORMATION.

"Institution in the nature of a joint-stock company"—Acquisition of Gain.—Neither the acquisition of gain nor the provision of a dividend among its members is of the essence of a joint-stock company. *Dictum* of KAY, J., in *Bristol Athenæum, In re* (59 L. J. Ch. 116; 43 Ch. D. 236), dissented from. *Russell Literary and Scientific Institution, In re; Figgins v. Baglino*, 67 L. J. Ch. 411; [1898] 2 Ch. 72; 78 L. T. 588—North, J.

A literary and scientific institution founded and established by the issue of transferable shares, entitling their holders to the property of the institution, but bearing no dividend, was held an institution "founded or established by the contributions of shareholders in the nature of a joint-stock company" so as to escape the operation of section 30 of the Literary and Scientific Institutions Act, 1854, which forbids a distribution of the property among the members on a dissolution. *Ib.*

An institution within the Literary and Scientific Institutions Act, 1854, in the constitution of which the following ingredients existed—a common property, the contributions of members as the source of such property, and the holding of the property by numerous persons in transferable shares,—*Held*, an institution "in the nature of a joint-stock company" within the meaning of the proviso of section 30 of the Act, although the institution was not carried on for purposes of profit, and although, by its constitution, the members were forbidden to receive any dividend or bonus during the continuance of the institution, but were entitled on its dissolution to a share of the profits after payment of debts and liabilities. *Jones, In re; Clegg v. Ellison*, 67 L. J. Ch. 504; [1898] 2 Ch. 83; 78 L. T. 639; 46 W. R. 577—Stirling, J.

In such a case the property of the institution may, on a dissolution, be divided among the members, and is not liable to be applied, under section 30, to a similar institution. *Bristol Athenæum, In re* (59 L. J. Ch. 116; 43 Ch. D. 236), considered. *Ib.*

Illegal Association—Action to Administer Funds—Claim on Contract.—In an action to administer the funds of the defendant syndicate, brought by a subscriber against the syndicate, the supervising committee and the bankers, certain enquiries were ordered, in the course of which it transpired that the syndicate consisted of more than twenty members and was illegal, not being registered under the Companies Acts.

and advertisements were issued for creditors on which a claim was made by U. Brothers for printing and posting prospectuses. It appeared that U. Brothers were already suing the committee and others in the Queen's Bench Division for payment of their debt. On a summons to disallow their claim in this action it was *held*, that the only ground for the claim was that the syndicate had taken the benefit of the work and therefore the claim must rest on a *quantum meruit*; that the doctrine did not apply where other persons were liable, and that as the persons or some of them sued in the Queen's Bench Division appeared to be liable, the claim in this action ought not to be allowed. *Hume v. Record Reign Jubilee Syndicate*, 80 L. T. 404—Stirling, J.

Illegality—Unregistered Association of More than Twenty Members—Right to Maintain Action.]—The trustees of an unregistered association of more than twenty persons formed for mutual insurance against death and accident sued the late treasurer for moneys of the society which he had converted to his own use;—*Held*, that the society was not rendered illegal by the Companies Act, 1862, for want of registration, and that the plaintiffs were not precluded from maintaining the action by reason of non-registration under that Act or the Friendly Societies Act, 1896. *Marrs v. Thompson*, 86 L. T. 759—D.

Company Limited by Guarantee—Member's Liability beyond Amount Prescribed by Memorandum.]—A member of a company limited by guarantee, under the Companies Act, 1862, is not liable to be placed on the list of contributors, in the event of a winding-up, for an amount beyond that prescribed by the memorandum of association as the extent of his guarantee. *Maria Anna and Steinbank Coal Co., In re*; *Maxwell's Case* (L. R. 20 Eq. 585), and *Maria Anna and Steinbank Coal Co., In re*; *McKewan's Case* (46 L. J. Ch. 819; 6 Ch. D. 447), distinguished, as turning on the Companies Act, 1856, and relating to companies limited by shares. *Bangor and North Wales Mutual Marine Protection Association, In re*; *Baird's Case*, 68 L. J. Ch. 521; [1899] 2 Ch. 593; 80 L. T. 870; 47 W. R. 695; 7 Manson, 160—Wright, J.

Whether these cases are authorities on the construction of the Companies Act, 1862, even as to companies limited by shares, *quære*. *Ib.*

"Flotation"—Mining Claims—Prospector's Agreement.]—The condition of "flotation" in an agreement between a mining prospector and his employers is fulfilled when claims, pegged off under licences and registered in the name of the employers or their nominees, are sold to a mining company in consideration of fully paid-up shares of the company and the undertaking by the purchasers of the contracts and obligations of the vendors. It is not necessary that the purchasing company should have offered its shares to the public or be actually working at a profit, or that the word should be confined to the particular kind of flotation referred to in the mining regulations in force in the territories of the British South Africa Co. *Torva Exploring Syndicate v. Kelly*, 69 L. J. P.C. 115; [1900] A.C. 612; 83 L. T. 34—P.C.

As to Pre-Incorporation Contracts.]—See 9. CONTRACTS, *infra*.

Name—Similarity.]—See TRADE NAME.

3. MEMORANDUM OF ASSOCIATION AND ULTRA VIRES.

Primary Object—Wide General Powers—Subordination of Powers—Separate Objects—Ultra Vires.]—Although a limited company may be formed for any number of separate objects of the most diverse kind, provided that those objects are precisely discriminated as separate in its memorandum of association, yet, when it is clear on the general construction of the memorandum that the company is formed for a single primary object, and that other objects contained in its memorandum are intended to be only subordinate or ancillary to that single primary object, it is not possible to construe each of those other objects as a separate and independent object of the company, merely because of the insertion of a clause in the memorandum of association to the effect that each of those other objects shall so be construed. *Stephens v. Mysore Reefs (Kangundy) Mining Co.*, 71 L. J. Ch. 295; [1902] 1 Ch. 745; 86 L. T. 221; 50 W. R. 509; 9 Manson, 199—Swinfen Eady, J.

—Wide General Powers—Construction—Ultra Vires.]—A company was formed—first, to acquire and take over as a going concern the undertaking of another gold-mining company; and secondly, to acquire gold mines, mining and other rights, and land, auriferous, metalliferous, or otherwise, or any interests in the same, in Mysore and elsewhere, and to work, exercise, develop, and turn to account the said mines, &c. The memorandum of association also gave the company wide general powers. The property acquired under the first object was not workable at a profit, and the directors now sought to purchase other mining properties in Bombay. A general meeting of the company was called, and a resolution was passed approving of the draft agreement, and authorizing the directors to enter into it and carry it into effect. On a motion by a shareholder for an injunction to restrain the company from entering into the agreement on the ground that it was *ultra vires*,—*Held*, that the main object of the company was gold mining in "Mysore and elsewhere," and that the proposed agreement to purchase other mining properties was within the objects stated in the memorandum of association, and injunction refused. *Stephens v. Mysore Reefs (Kangundy) Mining Co.* (71 L. J. Ch. 295; [1902] 1 Ch. 745) discussed and distinguished. *Pedlar v. Road Block Gold Mines*, 74 L. J. Ch. 733; [1905] 2 Ch. 427; 93 L. T. 665; 54 W. R. 44; 12 Manson, 422—Warrington, J.

—Liability to Subscribe for Shares in New Company.]—A company was formed (a) to acquire lands, mines, mineral and other properties and grants, concessions, claims, licences, and options in any part of the world; (b) to purchase and undertake the business of the N.T. Mining and Smelting Co. under a specified agreement; (c) to carry on business as general merchants, bankers, capitalists, financiers, and all kinds of financial, commercial, trading, and

other similar operations or business in any part of the world: (g) to promote companies having objects wholly or in part similar to those of the company, and in particular to provide the whole or any part of the capital thereof, or by taking shares therein: (n) to subscribe for, acquire, hold, sell, and give guarantees in relation to the shares and securities of any company. The company had undertaken and carried on the business of the N. T. Mining and Smelting Co., but, having money unemployed, the directors proposed to acquire a large interest in a mine situated in another State of Australia over which they had bought an option. If the option should be exercised, a new company promoted by the defendant company was to be formed to take over the W. F. Mine from the company, and it was proposed that the defendant company should subscribe for 64,000 shares in such new company, applying 32,000*l.* of its cash in hand in paying for such shares. On a motion by a shareholder for an injunction to restrain the company from carrying into effect the purchase of the W. F. Mine on the ground that the proposed agreement was *ultra vires*,—*Held*, that although if clauses (a) and (b) had stood alone it might have been possible to find in the memorandum of association such a main primary object of the company as was found in *Stephens v. Mysore Reefs (Kangundy) Mining Co., Lim.* (71 L. J. Ch. 295; [1902] 1 Ch. 745), yet that, when read in conjunction with the following clauses, especially (g) and (n), it was shewn that the company contemplated many primary objects, and that what was proposed to be done was not *ultra vires*. *Butler v. Northern Territories Mines of Australia*, 96 L. T. 41; 23 T. L. R. 179—Kekewich, J.

Sale of Undertaking—Reconstruction—Voluntary Winding-up—Contemporaneous Resolutions for Sale and Winding-up—Shares in New Company—Ultra Vires.—It is competent to a company by its memorandum of association to exclude the operation of section 161 of the Companies Act, 1862, in the event of a sale by the company of its undertaking to another company, part of the consideration for such sale being shares in the purchasing company, notwithstanding that the resolutions for sale and voluntary winding-up are contemporaneous and that stipulations in the agreement for sale can only be thoroughly carried out in the winding-up. *Cotton v. Imperial &c. Agency Corporation* (61 L. J. Ch. 684; [1892] 3 Ch. 454) followed and extended. *Doughty v. Lomagunda Reefs, Lim.*, 71 L. J. Ch. 888; [1902] 2 Ch. 837; 51 W. R. 29; 9 Manson, 418—Buckley, J. Affirmed on the ground of non-joinder of parties. *Doughty v. Lomagunda Reefs, Lim.*, 72 L. J. Ch. 331; [1903] 1 Ch. 673; 88 L. T. 337; 51 W. R. 564; 10 Manson, 189—C.A. But see *Bisgood v. Henderson's Transvaal Estates, Lim.*, 43 L. J. N.C. 225.

Power to Sell Land—No Express Power—Implied Power—Memorandum of Association—Ultra Vires—Reasonably Necessary.—“Incidental or conducive.”—A colliery company, without express power of sale in its memorandum of association, may sell land from time to time and in a proper manner where it is reasonably necessary and has the effect of

making the rest of the company's property more useful. *Johns v. Balfour* (1 Megone, 191) applied. *Kingsbury Collieries and Moore's Contract, In re*, 76 L. J. Ch. 469; [1907] 2 Ch. 259; 96 L. T. 829; 14 Manson, 212; 23 T. L. R. 497—Kekewich, J.

Signatory—Shareholder—Liability for Unpaid Portion of Share.—The signatories to the memorandum of association of a company, though they thereby agree to become members of the company, do not become debtors to the full amount of their shares; they are only liable, like other members of the company, to pay calls if and when made upon them in the manner provided by the articles. *Alexander v. Automatic Telephone Co.*, 68 L. J. Ch. 514; [1899] 2 Ch. 302; 80 L. T. 753—Cozens-Hardy, J.

Alteration of—Jurisdiction—Company Registered under the Joint-Stock Companies Act, 1856.—The Court has jurisdiction under the Companies (Memorandum of Association) Act, 1890, to make an order for the alteration of the memorandum of association of a company registered under the Joint-Stock Companies Act, 1856. *Copiapo Mining Co., In re*, 6 Manson, 320—Wright, J.

The Court has jurisdiction to make an order under the Companies (Memorandum of Association) Act, 1890, in the case of a company registered under the Joint-Stock Companies Act, 1856, although it is not also registered under the Companies Act, 1862. *Nitrophosphate and Odams Chemical Manure Co., In re* (W. N. (1893), p. 141); *Hong-Kong and China Gas Co., In re* (33 L. J. N.C. 578; W. N. (1898), p. 158 (3)), and *Copiapo Mining Co., In re* (34 L. J. N.C. 138; W. N. (1899), p. 25 (1); 6 Manson, 320), followed. *General Credit Co., In re* (W. N. (1891), p. 153), not followed. *Euphrates and Tigris Steam Navigation Co., In re*, 73 L. J. Ch. 175; [1904] 1 Ch. 360; 90 L. T. 56; 11 Manson, 93—Swinfen Eady, J.

Association Formed for Purpose not of Gain—Sanction of Board of Trade to Proposed Alteration.—Where an association incorporated with the licence of the Board of Trade under section 23 of the Companies Act, 1867, as an association formed for purposes not of gain, without the word “limited,” desires to alter its memorandum of association, the proper course is first to submit the proposed alterations to the Board of Trade, and if the Board approves and authorises them then to apply to the Court under the Companies (Memorandum of Association) Act, 1890, for its sanction. *St. Hilda's Incorporated College, Cheltenham, In re*, 70 L. J. Ch. 266; [1901] 1 Ch. 556; 49 W. R. 279; 8 Manson, 430—Buckley, J.

Unlimited Company—No Shares or Capital.—The High Court has jurisdiction, equally after as before the Companies (Winding-up) Act, 1890, to wind up an unlimited company, having neither shares nor capital, and therefore under section 1, sub-section 1 of the Companies (Memorandum of Association) Act, 1890, jurisdiction to confirm a resolution altering the provisions of the memorandum of association of such a company. *North of England Steamship Insurance Co., In re*, 69 L. J. Ch. 211; [1900] 1 Ch. 481; 82 L. T. 598; 48 W. R. 604; 7 Manson, 364—Cozens-Hardy, J.

— **To Enable Company "to carry on its business more economically or efficiently."**—A manufacturing company, founding upon section 1, sub-section 5 (a) of the Companies (Memorandum of Association) Act, 1890, petitioned the Court to confirm a resolution altering its memorandum of association by adding thereto a clause enabling the company to invest its reserve funds and other moneys not immediately required for the other objects of the company in such stocks and securities as the company or directors might think proper, on the ground that it required to have large sums at command, and that it was more economical to have these invested in marketable securities than deposited in the bank. The Court granted the petition. *Coats' Petition*, 2 F. 829—Ct. of Sess.

— **Single-ship Company—Discretion.**—The Court has jurisdiction and will exercise its discretion under the Companies (Memorandum of Association) Act, 1890, to confirm the alteration of the memorandum of association of a company, so as to change it from a single-ship company into a general shipping company, where there is evidence that under the proposed extension the business of the company can be more efficiently carried on, and no shareholder or creditor opposes. *Bernicia Steamship, Lim.*, *In re*, 69 L. J. Ch. 194; 81 L. T. 816; 7 Manson, 361—Cozens-Hardy, J.

— **Cycling—Motoring.**—A company was formed having for its objects the promotion of the interests of cyclists:—*Held*, that a proposed alteration of the memorandum so as to include in the objects the promotion of the interests of motorists, was not within either clause (a) or clause (d) of section 1, sub-section 5 of the Companies (Memorandum of Association) Act, 1890, as an alteration, which would "enable the company to carry on its business more economically or efficiently" or "to carry on some business which may conveniently or advantageously be combined with the business of the company." *Cyclists' Touring Club, In re*, 76 L. J. Ch. 172; [1907] 1 Ch. 269; 96 L. T. 780; 14 Manson, 52; 23 T. L. R. 220—Warrington, J.

— **Extension to New Business.**—A company carrying on the ordinary business of bankers petitioned the Court to confirm a resolution, passed unanimously, to alter its memorandum of association by empowering it to undertake the execution of trusts and to act as executor or administrator, as trustee or treasurer. The application was opposed by seven shareholders, who were solicitors, on the ground that the alteration would not be beneficial to the shareholders and would be injurious to the solicitors' profession. The Court confirmed the alteration, with the modification that the powers were not to be exercised unless some part of the trust property was situate within the jurisdiction of the Court. *Munster and Leinster Bank, In re*, [1907] 1 Ir. R. 237—M.R.

— **Practice.**—Immediately after the presentation of a petition under the Companies (Memorandum of Association) Act, 1890, a summons should be taken out to have a day fixed for the hearing of the petition, and directions given for advertising the presentation of the petition in accordance with the practice stated in *Palmer's Company Precedents* (1906 ed.), Part I. p. 1163. *Id.*

— **Extension of Local Area of Operations—Change of Name.**—A laundry company, incorporated under the Companies Acts, 1862 to 1890, presented a petition under the Companies (Memorandum of Association) Act, 1890, for confirmation of a special resolution altering its memorandum of association so as to enable it to extend the local area of its operations. The Court granted the petition without requiring any change in the company's name. *Kirkaldy Steam Laundry Co., In re*, 6 F. 778—Court of Sess.

— **Verbal Alterations.**—The power given to the Court by the Companies (Memorandum of Association) Act, 1890, to sanction alterations in the memorandum of association of a company does not apply to mere verbal alterations in the language of the original memorandum of association. *Consett Iron Co., In re*, 70 L. J. Ch. 198; [1901] 1 Ch. 236; 84 L. T. 258; 8 Manson, 429—Cozens-Hardy, J.

— **Ultra Vires—Judgment by Consent on Contract Ultra Vires—Effect of.**—A judgment against a company obtained by consent upon a contract which was *ultra vires* has no more validity than the contract upon which it is founded, but is impeachable to the same extent as the contract. In such a case the contract cannot be maintained as to matters admitted to be lawful, while matters *ultra vires* are disallowed, but it must be wholly set aside. *Great North-West Central Railway v. Charlebois*, 79 L. T. 35—P.C.

— **Gratuities to Servant—Power of Company.**—A scheme prepared by a water company under schedule 4 to the Metropolis Water Act, 1902, for the application and distribution of the compensation moneys payable upon the purchase of the company's undertaking by the Metropolitan Water Board *held* not to empower the company to pay a certain sum, part of the compensation moneys, as gratuities to those servants who had been for a certain number of years in the service of the company. *Warren v. Lambeth Waterworks*, 21 T. L. R. 685—Warrington, J.

— **Railway Company and Dock Company—Amalgamation—Supply of Water by Railway Undertaking to Dock Undertaking.**—A railway company and a dock company were amalgamated under an Act which provided that the two undertakings should form one undertaking and be the undertaking of the defendant company, but that no provisions of Acts which related exclusively to one of the undertakings should apply to the other undertaking. The defendant company supplied their dock undertaking with water obtained from their railway undertaking:—*Held*, that the defendants were not carrying on the business of a water company, and were not acting *ultra vires* in supplying the dock with water. *Att.-Gen. v. North-Eastern Railway*, 76 L. J. Ch. 5; [1906] 2 Ch. 675; 95 L. T. 512; 70 J. P. 473; 22 T. L. R. 695—C.A. Affirming, 54 W. R. 212—Joyce, J.

— **Investment of Property in the Name of Sole Trustee.**—It is not beyond the powers of a company to invest its funds in the name of a sole trustee. *Burland v. Earle*, 71 L. J. P.C. 1; [1902] A.C. 83; 85 L. T. 553; 50 W. R. 241—P.C.

— **Power to "lend money"—Loan to Servant**

of Company.]—The articles of the company empowered the directors to lend money and generally undertake such other financial operations as might in their opinion be incidental or useful to the general business of the company:—*Held*, that this authorised the making of a loan to a servant trusted by the company. *Rainford v. James Keith & Blackman Co.*, 74 L. J. Ch. 531; [1905] 2 Ch. 147; 92 L. T. 786; 54 W. R. 189; 12 Manson, 278; 21 T. L. R. 582—C.A.

4. ARTICLES OF ASSOCIATION.

Explaining Memorandum by Articles.]—Articles of association can be read for the purpose of explaining the memorandum in respect of a matter which need not appear in the latter—for example, the borrowing of money by a railway company—but not for the purpose of shewing that borrowing means the granting of perpetual annuities, for that is not borrowing, nor is it a purpose subsidiary to the general objects of such a company. *Southern Brazilian Rio Grande do Sul Railway, In re*, 74 L. J. Ch. 392; [1905] 2 Ch. 78; 92 L. T. 593; 53 W. R. 489; 12 Manson, 323; 21 T. L. R. 451—Buckley, J.

Alteration—Alteration of Articles—Lien Created on Fully Paid Shares—Antecedent Debts—Vendor's Shares—Shares Paid in Full in Advance of Calls.]—Section 50 of the Companies Act, 1862, authorises a limited company formed with articles which confer no lien upon fully paid shares, and which allow them to be transferred without any fetter, to alter those articles by special resolution, and to impose a lien and restrictions on the registration of transfers of those shares by members indebted to the company; and that can be done so as to impose a lien or restriction in respect of a debt contracted before and existing at the time when the articles were altered, so long as the alteration is *bona fide* for the benefit of the company, and not to defeat the rights of any particular shareholder. *Allen v. Gold Reefs of West Africa*, 69 L. J. Ch. 266; [1900] 1 Ch. 656—C.A.

The altered articles, however, may not be binding as regards some particular fully paid-up shareholder, even though passed *bona fide*, as he may have special rights by contract, or otherwise, against the company, which may exempt him from the operation of the articles as altered. *Ib.*

Per LINDLEY, M.R., and ROMER, L.J.—Shares allotted as fully paid to the vendor of the property purchased by the company in payment of the purchase-money are not, in the absence of any special bargain with the vendor, exempt from the operation of the altered articles; nor, *per* ROMER, L.J., are shares which the company has allowed the shareholder to pay up in full in advance of calls. *Ib.*

The fact that the original articles provided for a limited lien upon unpaid shares only would not justify a person who acquired fully paid shares in assuming that those shares would never be made subject to a lien by the alteration of the articles. *Ib.*

VOL. I.

Per VAUGHAN WILLIAMS, L.J.—A company cannot by altering its articles impose a lien on fully paid vendor's shares, as the effect of that would be to make those shares less marketable, and so affect the consideration given for the property purchased. *Ib.*

Whether it can impose a lien in that way upon shares which the shareholder has been allowed to pay up in full in advance of calls, *quære. Ib.*

—Contract not to Alter Articles—Special Resolution to Alter Same—Issue of Shares to Control Voting—Injunction.]—The principle of the decision in *Allen v. Gold Reefs of West Africa* (69 L. J. Ch. 266; [1900] 1 Ch. 656), that a company cannot as between itself and its shareholders contract itself out of the right to alter its articles of association conferred by section 50 of the Companies Act, 1862, applies to the case of a contract to that effect between a company and an outside person independent of and not contained in its articles. *Punt v. Symons & Co.*, 72 L. J. Ch. 768; [1903] 2 Ch. 506; 89 L. T. 525; 52 W. R. 41; 10 Manson, 415—Byrne, J.

Where a company, formed for the purchase of a certain business, had entered into an independent contract with the vendor not to alter its articles in respect of certain powers of management given to the vendor by the contract, and the directors subsequently, by the issue of certain new shares, not for the general advantage of the company, but in order to control the voting power, had obtained the passing of a special resolution to alter the articles so as to deprive the vendor of his powers under the contract, an injunction was granted restraining them from holding a confirmatory meeting. Principle of *Fraser v. Whalley* (2 H. & M. 10) applied. *Ib.*

—Life Assurance—Participating Policy-holders—Rights of Policy-holders to Profits.]—A life assurance company constituted by a deed of settlement with by-laws, and originally registered under the Joint-Stock Companies Registration Act, 1844, cannot, when registering itself as a limited company under the Companies Acts, 1862 to 1900, make articles altering the provisions of its by-laws in such manner as to alter the contractual rights to profits of the holders of participating policies of the company acquired under the by-laws. *Baily v. British Equitable Assurance Co.*, 73 L. J. Ch. 240; [1904] 1 Ch. 374; 90 L. T. 335; 52 W. R. 549; 11 Manson, 169; 20 T. L. R. 242—C.A.

The power which a company has under section 50 of the Companies Act, 1862, of altering its articles by special resolution, though it enables it to alter to some extent the rights of shareholders in respect of their shares, does not enable it to alter contracts between the company and outsiders, or contracts between the company and shareholders otherwise than in respect to their shares. *Allen v. Gold Reefs of West Africa* (69 L. J. Ch. 266; [1900] 1 Ch. 656), distinguished. *Ib.*

Article Empowering Directors to Contract with Themselves on Behalf of Company.]—Where articles of association purport to give directors very wide powers to enter into contracts with

themselves on behalf of the company "having regard to the interests of the Company," directors who seek to maintain a contract with themselves made under such a power must bring evidence that in making it they had regard to the interest of the company. *Alexander's Timber Co., In re*, 70 L. J. Ch. 767; 8 Manson, 392—Wright, J.

Power to "lend money"—Loan to Servant of Company.—The articles of the company empowered the directors to lend money and generally undertake such other financial operations as might in their opinion be incidental or useful to the general business of the company:—*Held*, that this authorised the making of a loan to a servant trusted by the company. *Rainford v. James Keith & Blackman Co.*, 74 L. J. Ch. 531; [1905] 2 Ch. 147; 92 L. T. 786; 12 Manson, 278; 21 T. L. R. 582—C.A.

Restricting Alienation—Repugnancy.—By the articles of association of a company it was *inter alia* provided that any member proposing to transfer a share should serve a "transfer notice" upon the company of his intention, which notice constituted the company his agent for the sale of the share to any member at the "fair value" thereof, the latter being defined as a sum of 100*l.*, or such other sum as should from time to time be fixed as the "fair value" by resolution of the company in general meeting. No share could, save as therein provided, be transferred to a non-member so long as any member was willing to purchase at the "fair value," the directors being empowered to refuse to register any transfer to a non-member of whom they did not approve, such transfer being void. Upon the company, within twenty-eight days after the service of the "transfer notice," finding a member willing to purchase, the retiring member was bound, upon payment of the "fair value," to transfer the share to the purchasing member, in default of which the company might receive the purchase-money and enter the name of the purchasing member in the register as the holder of the share. In the event of the company not finding a purchaser within the twenty-eight days, the retiring member might, within three months, sell and transfer the share to any person, subject to the approval of the directors, and at any price. It was also provided that the executors or administrators of a deceased member should be the only persons recognised by the company as having any title to the shares registered in the name of such member, and that any person becoming entitled to a share in consequence of the death of any member might, subject to the regulations contained in the articles, transfer such share to himself or any other person; the executors of a deceased member being further empowered, subject to the approval of the directors, to transfer the share of such member to his son or brother, or to any son or brother of any existing member:—*Held*, *per* BOYD, J., and KENNY, J. (PALLES, C.B., expressing no opinion on the point), that the articles of association were not invalid, either as infringing the rule against perpetuity or as being repugnant to the right of alienation inherent in absolute ownership. *Att.-Gen. v. Jameson*, [1904] 2 Ir. R. 644—K.B. D.

Compulsory Transfer of Shares on Bankruptcy

—Articles of Association—Repugnancy—Fraud on Bankruptcy Law.—A provision in the articles of association of a company for the compulsory transfer of shares is neither repugnant to the nature of personal property nor obnoxious to the rule against perpetuity. *Borland's Trustee v. Steel Brothers & Co.*, 70 L. J. Ch. 51; 49 W. R. 120—Farwell, J.

The fact that the liability to such compulsory transfer is to arise only in the event of the shareholder's bankruptcy, and the fact that the transfer is to be effected at a pre-arranged valuation which may possibly be less than the actual market value of the share at the time of transfer, do not in themselves constitute a fraud upon the bankruptcy law; provided that both these provisions are made without undue preference, and *bona fide* with a view to the successful working of the company. *Ib.*

Rule against Perpetuity—Personal Contract.—The rule against perpetuity has no application in the case of personal contracts. *Ib.*

Sale of Land to Company—Invalidity of Resolution Authorising Sale—By-laws of Company.—The invalidity under the by-laws of a company of a resolution purporting to authorise the purchase of land by the company cannot affect the rights of the vendor in the absence of notice to him, the by-laws being matters of internal management to which those who deal with the company have no means of access. *Montreal and St. Lawrence Light and Power Co. v. Robert*, 75 L. J. P.C. 33; [1906] A.C. 196; 94 L. T. 229; 13 Manson, 184—P.C.

Limitation of Right to Present Petition.—A company incorporated under the Companies Act, 1862, cannot by its articles of association impose any limitation upon the right given by section 82 of the Act to a contributory to present a petition to wind up the company. *Peveril Gold Mines, In re*, 67 L. J. Ch. 77; [1899] 1 Ch. 122; 77 L. T. 505; 46 W. R. 198; 4 Manson, 398—C.A.

Purchase of Interest of Dissident Shareholder—Arbitration—Agreement.—Where a company has adopted a scheme of reconstruction and sale under section 161 of the Companies Act, 1862, the right of a dissident shareholder to have the price to be paid for the purchase of his interest determined by arbitration under section 162 will not be ousted by an article of association of the company providing some other means of fixing the price for the purchase of his interest. An article of association is not such an agreement as is referred to in section 162, which must be an agreement between the company or its liquidator on one side and the dissident shareholder on the other. *Baring-Gould and Sharpington Combined Pick and Shovel Syndicate, In re*, 68 L. J. Ch. 429; [1899] 2 Ch. 80; 80 L. T. 739; 47 W. R. 564; 6 Manson, 430—C.A.

Power of Sale for Shares Irrespective of Statutory Powers—Statutory Right of Dissident Members Negatived.—It is not competent for a company by its articles of association to confer upon the liquidator in the event of the winding-up of the company, whether

voluntarily or otherwise, a power of selling the assets for shares fully or partly paid up of another company, irrespective of the powers conferred upon him by the Companies Acts and as an additional power thereto, nor is it competent by such articles upon any such sale to deprive dissentient members of the benefits given to them by section 161 of the Companies Act, 1862. *Paine v. Cork Co.*, 69 L. J. Ch. 156; [1900] 1 Ch. 308; 82 L. T. 44; 48 W. R. 325; 7 Manson, 225—Stirling, J.

Peveril Gold Mines, In re (87 L. J. Ch. 77; [1898] 1 Ch. 122), and *Baring-Gould and Sharpington Combined Pick and Shovel Syndicate, In re* (68 L. J. Ch. 429; [1899] 2 Ch. 80), applied. *Cotton v. Imperial and Foreign Agency and Investment Corporation* (61 L. J. Ch. 684; [1892] 3 Ch. 454) explained and distinguished. *Ib.*

Informal Registration—Adoption—Acquiescence.—A mere informality in the registration of articles of association which have been adopted and for a long course of years acted upon by the company will not render those articles invalid or inoperative. *Ho Tung v. Man On Insurance Co.*, 71 L. J. P.C. 46; [1902] A.C. 232; 85 L. T. 617; 9 Manson, 171—P.C.

The Companies Ordinance of Hong Kong, 1865, s. 14, provides that the memorandum of association may be accompanied, when registered, by articles signed by the subscribers to the memorandum of association, and by section 15, in the absence of such articles, the regulations of Table A of the Companies Act, 1862, become those of the company:—*Held*, that articles registered, but not signed, and acted upon for many years by the company, were valid and effectual. *Ib.*

Jurisdiction of Court to Rectify Articles on Ground of Mistake after Execution.—Under its ordinary jurisdiction to rectify written instruments the Court has no power to rectify a mistake in the articles of association of a company which have been executed by the seven signatories to the memorandum, although no one else has come in under the articles and no shares have been allotted. The proper mode of rectifying a mistake is by section 50 of the Companies Act, 1862, which has only a statutory effect. *Evans v. Chapman*, 86 L. T. 381—Joyce, J.

5. PROMOTERS.

Fiduciary Position—Directors Nominated by Promoters—Misrepresentation—Concealment of Material Facts—Contract for Sale—Rescission—Restoration of Parties to Former Position.—Where shares in a company are offered to and taken by the public, and a prospectus is issued by the promoters which conceals or misrepresents material facts with regard to a contract for purchase entered into by the company with its promoters, the company in its corporate capacity will be entitled to rescission of the contract, although its directors, who are nominees of the promoters, may have been aware of the real facts of the case, and although fraud is not imputed to them. Such directors would have no power or authority to release or discharge the promoters from the consequences of their acts in providing the company. *Salomon v.*

Salomon & Co. (66 L. J. Ch. 35; [1897] A.C. 22) distinguished. *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate*, 68 L. J. Ch. 699; [1899] 2 Ch. 392; 81 L. T. 334; 48 W. R. 74; 7 Manson, 165—C.A.

But in the absence of fraud, where the company has adopted the contract and has carried on business for some time, so that it has become impossible to restore the parties to their former position, the right to rescind the contract will be lost. *So held* by LINDLEY, M.R., and COLLINS, L.J. *Ib.*

Per LINDLEY, M.R., and COLLINS, L.J.—There is no duty imposed on the promoters of a company to provide it with an independent board of directors, if the real truth is disclosed to those who are induced by the promoters to join the company; and where the promoters are vendors to the company the contract for sale cannot be set aside under such circumstances merely because the board of directors were not independent. *Erlanger v. New Sombreiro Phosphate Co.* (48 L. J. Ch. 73; 3 App. Cas. 1215) distinguished. *Ib.*

Per RIGBY, L.J.—Full disclosure of all material facts by promoters who sell property to and become directors of the company promoted is necessary, and if there has been concealment, honesty of purpose on their part, with an intention to act for the benefit of the company, will not avail them as a defence to an action for rescission. The mere fact of the disclosure of the fiduciary relation and of the double character in which the promoters have acted will not discharge them from the obligation of making a complete and candid disclosure of all material facts. This obligation will exist so long as they retain control of the affairs of the purchasing company, and if not fulfilled they will be treated as wrong-doers, though they may not have acted fraudulently. *Ib.*

Further held by RIGBY, L.J.—The rule that, in order to entitle beneficiaries to rescind a voidable contract of purchase against the vendor, they must be in a position to offer back the subject-matter of the contract, has no application to a case where the subject-matter has been reduced by the fault of the vendor himself; and where compensation can be made for any deterioration, such deterioration is no bar to rescission, but only a ground for compensation. *Ib.*

— **Secret Profit—Fraudulent Misrepresentation—Prospectus—Measure of Damages.**—In December, 1896, a promoting company in the name of R. agreed to purchase two music-halls for 24,000*l.* with a view to sell them at an enhanced price to a theatre company which it intended to promote for the purpose. On February 1, 1897, R. agreed to sell the music-halls to C. as trustee for the intended Theatre Co. for 75,000*l.*, to be paid partly in cash and partly by mortgages, debentures, and fully paid shares, the vendor undertaking to pay all preliminary expenses and to expend some 5,000*l.* in repairs. Both R. and C. were mere nominees of the promoting company. On February 2 the Theatre Co. was incorporated, and on February 4 the directors of the Theatre Co., who were all nominated by the promoting com-

pany, approved the prospectus and adopted the purchase by C., which were subsequently carried out. The business failed and the music-halls were sold by the mortgagees. The promoting company was the promoter of the Theatre Co., and was responsible for the prospectus, which concealed the fact that the promoting company was the true owner, and further contained fraudulent misrepresentations:—*Held*, that the promoting company was liable in damages to the Theatre Co., the measure of which was the difference in value between the consideration paid by the Theatre Co. and the actual value at the date of the purchase of the properties which it acquired. *Cavendish-Bentinck v. Fenn* (57 L. J. Ch. 552; 12 App. Cas. 652) distinguished by STIRLING, L.J. *Leeds and Hanley Theatre of Varieties, In re*, 72 L. J. Ch. 1; [1902] 2 Ch. 809; 87 L. T. 488; 51 W. R. 5; 10 Manson, 72—C.A.

Held also, by WRIGHT, J. (but not decided by the COURT OF APPEAL), that the promoting company must be deemed to have purchased the music-halls as agent or trustee for the then intended Theatre Co., and was liable to account to that company after its incorporation for the secret profit. *Ib.*

Secret Profit—Commencement of Fiduciary Relation.]—A syndicate was formed for the purpose of buying a certain property with a view to a re-sale “to a company to be registered or to some other purchaser.” The syndicate agreement provided who were to be the directors of the proposed company, and that the company, if formed, should adopt certain contracts which had been entered into. The syndicate trustees then entered into a contract for the purchase of the property in question, caused a company to be registered, and took part in the preparation of its memorandum and articles, and also of its prospectus. The object of the company was stated to be to buy the property in question, and the articles provided that the contract for purchase and other contracts should be adopted by the company, and that the persons named in the syndicate agreement should be the directors:—*Held*, that the syndicate trustees were promoters of the company before they bought the property, and that they must be taken as having bought it in that capacity. *Olympia, Lim., In re*, 67 L. J. Ch. 433; [1898] 2 Ch. 153; 78 L. T. 629; 5 Manson, 139—C.A.

The mere fact that a contract for purchase by a company cannot be rescinded does not preclude the company from obtaining from the vendor if he is a promoter, and still less if he is also a director, a secret profit made by him at its expense. *Cape Breton Co., In re* (54 L. J. Ch. 822; 29 Ch. D. 795), explained. *Ib.*

—Disclosure.]—A promoter of a company whose duty it is to disclose what profits he has made does not perform that duty by making a statement not disclosing the facts but containing something which, if followed up by further investigation, will enable the enquirer to ascertain that profits have been made and what they amounted to. *Ib.*

—Adoption of Contract by Directors—Company not Bound.]—A company was formed to carry out an agreement for the purchase of cer-

tain property made by the vendors, the promoters of the company, with a trustee for the company. The articles provided that the agreement was ratified and binding, and the directors were required to carry it into effect. The directors adopted the contract. The agreement contained a clause providing that it was not to be impeached, on the ground that the vendors as promoters or otherwise were in a fiduciary relation to the company; and that the vendors were not to be required to account for any profit made by them in buying up certain charges on the property to be bought by the company, and which were to be satisfied out of the purchase-money to be paid by the company. The prospectus, which was issued to the public, referred to the agreement, but not specifically to the subject-matter of the above clause, though it referred to the fact that the vendors were selling at an advanced price on what they gave, and stated that any other profits made from “interim investments” were excluded from the sale. The four directors of the company were all promoters and trustees of the syndicate, who were the vendors to the company:—*Held*, that knowledge of the subject-matter of the above clause could not be imputed to the company; and the adoption of the contract by the directors did not, under the circumstances, make it binding on the company, who could recover from the directors and promoters the profit they had made in buying up the charges on the property sold to the company. *Ib.*

—Duty of—Articles of Association—Directors of a company, who are also vendors to the company, do not discharge their duty of disclosing to the shareholders what profits they have made on the sale to the company by the insertion of words in a prospectus, which, read with caution and sifted to the bottom, might have given to the reader a clue to their meaning. The disclosure must be explicit. Nor can they escape liability to refund secret profits by a clause in articles of association that they shall not be accountable to the company for any profit realised by reason only of their holding that office or of the fiduciary relation thereby established. *Gluckstein v. Barnes*, 69 L. J. Ch. 385; [1900] A.C. 240; 82 L. T. 393; 7 Manson, 321—H.L. (E.)

—Commencement of Fiduciary Relation—Liability to Account—Misfeasance Summons.]—A vendor who sells property to a company towards which he stands in a fiduciary relation at the time of the sale is not liable to account in the winding-up of the company for any undisclosed profit made by him on the transaction, unless either, first, his conduct has been tainted with fraud; or, secondly, he stood towards the company in a fiduciary relation, not only at the time of the sale, but also at the time of his original acquisition of the property in question. *Lady Forest (Marchison) Gold Mine, In re*, 70 L. J. Ch. 275; [1901] 1 Ch. 582; 84 L. T. 559; 8 Manson, 438—Wright, J.

Olympia, Lim., In re (67 L. J. Ch. 433; [1898] 2 Ch. 153; affirmed *sub nom. Gluckstein v. Barnes*, in HOUSE OF LORDS, 69 L. J. Ch. 385; [1900] A.C. 240), discussed and distinguished. *Cape Breton Co., In re* (54 L. J. Ch. 822; 29 Ch. D. 795), *Ladywell Mining Co. v. Brookes*

(56 L. J. Ch. 684; 35 Ch. D. 400) and *dicta* of LORD CAIRNS in *New Sombrero Phosphate Co. v. Erlanger* (48 L. J. Ch. 73, 84; 3 App. Cas. 1218, 1234, 1235) followed. *Ib.*

The mere suppression by the vendor of the amount of profit that is being made by him on the sale to the company does not by itself amount to fraud within the meaning of the above proposition. *Ib.*

Where a syndicate is formed for the acquisition and working of a gold mine absolutely and entirely for their own benefit, and without, at the time, any present intention of promoting or selling to any other company, the mere fact that they contemplate the bare possibility of the promotion by them of and sale to another and larger company, in the event of their needing further capital, or being able to sell at a greatly enhanced price, does not place them in any fiduciary relation at the time of their own formation to any such company which they may happen subsequently to promote. *Ib.*

— “Officer” — Misfeasance — Statement of Agreement in Prospectus—Statute of Limitations.]—H., in 1888, acted temporarily as secretary of a company formed for the purpose of an hotel and gardens, the vendor of which had offered 2,000*l.* to him and other persons if they would form such a company. H. received 250*l.* of this amount to the knowledge of the other persons, who became the directors, and the date and parties to the agreement under which he took this profit were stated in the prospectus issued to the public inviting share subscriptions. In May, 1894, the voluntary winding-up of the company was ordered to be continued under the supervision of the Court. A summons was taken out by the liquidator under section 10 of the Companies (Winding-up) Act, 1890, asking that H. might be ordered to contribute to the assets 250*l.* and interest as secret profit made by him in a fiduciary position, for which he must be held liable:—*Held*, that although the facts showed that H. was in every sense of the words a “person who had taken part in the formation or promotion of the company” within the meaning of section 10 of the Companies (Winding-up) Act, 1890, yet there was no legal obligation on him to account to the company for the money which he had received. *Sale Hotel and Botanical Gardens, In re; Heskesteth, ex parte*, 78 L. T. 368; 46 W. R. 617—C.A.

6. PROSPECTUS.

Material Misstatement in—Untrue at Date of Allotment—Name of Director—Rescission.]—A prospectus was issued which stated that a certain D. was to be chairman of the K. Company, which would have the benefit of his services, and that he was a man of great experience in the particular business to be carried on by the company. Before the date of allotment D. refused to have anything more to do with the company, and resigned, though such resignation was not made formally in writing prior to the time of allotment. There were also other misleading statements in the prospectus. Upon an application by shareholders under section 85 of the Companies Act to have their names

removed from the register, and for repayment of moneys paid by them in respect of their shares,—*Held*, that the shareholders were materially influenced by the misrepresentation; the promoters and directors both understood that D. was not going to continue to be chairman or director, and notwithstanding proceeded to allotment, being aware that the statement in the prospectus was untrue. The applicants were therefore entitled to rescission. *Kent County Gas Co., In re; Brown, ex parte*, 95 L. T. 756—Joyce, J.

Untrue Statement in Prospectus by Directors—Compensation—Contribution—Death of Director—Actio Personalis.]—Appeal of executors of deceased directors from decision of WARRINGTON, J. (75 L. J. Ch. 633; [1906] 2 Ch. 235), allowed by consent, the Court stating that it must not be taken that, as at present advised, they were prepared to assent to the whole of the decision of WARRINGTON, J. *Shepherd v. Bray*, 76 L. J. Ch. 692; [1907] 2 Ch. 571; 24 T. L. R. 17—C.A.

Statement that the Directors will take Shares—Estoppel.]—A statement in a prospectus issued by the directors of a company inviting applications for preference shares and debentures, that the capital of the company is “1,500 ordinary shares of 20*l.* each (the whole of which will be taken by the directors),” and, further, that the vendors will take some, and that the other directors would take the rest of the ordinary shares, cannot, as between the company and the directors, be construed as containing such a definite contract as would justify the Court in putting one of the directors upon the list of contributories in respect of the whole of the unallotted ordinary shares. *Moore Bros. & Co., In re; Bartholomew's Case*, 68 L. J. Ch. 302; [1899] 1 Ch. 627; 80 L. T. 104; 47 W. R. 401; 6 Manson, 290—C.A.

Fraud—Misrepresentation and Suppression of Facts.]—Where a person subscribes for shares in a company upon the faith of a prospectus in which the promoters of the company have made actual misrepresentations of material facts that were false to their knowledge as well as suppressed material facts that were within their knowledge, such person, if he takes no benefit under the contract and repudiates within a reasonable time after he becomes aware of the fraud, can successfully rely on the fraud of the promoters as a defence to an action by the company for calls, can rescind his contract, and can recover all moneys paid in respect of the shares subscribed for by him. The omission in a prospectus of the names of the real vendors of the undertaking, and the employment, to conceal their identity, of a nominee as the ostensible vendor may, if misleading, amount to such fraud as will vitiate the contract. So may also the omission to state that money was to be spent in underwriting. *Components Tube Co. v. Naylor*, [1900] 2 Ir. R. 1—Q.B. D.; and see cases *infra*.

Document not Issued to Public Generally—No Invitation to Take Shares.]—A shareholder in a limited company incorporated in 1902 asked for rectification of the register by the removal therefrom of his name, on the ground that the prospectus, on the faith of which he

applied for shares—first, contained misrepresentations of fact; and secondly, omitted to give items of information required in a prospectus by the Companies Act, 1900. The company denied that the document referred to was a prospectus of the company. It appeared that the document was sent to the petitioner prior to the formation of the company by one of six persons therein named as directors of the proposed company, to whom he was personally known, and who afterwards became a director, along with a letter advising him to apply for an allotment of shares. It was proved that copies of this document, to the number of about forty, were similarly distributed by the provisional directors to their business friends, who were in turn requested or allowed to place it before their friends or clients. It was not proved that the company after its formation had adopted or issued copies of this document. The document itself contained no invitation to take shares, and it stated that the company was to be a private one:—*Held*, first, that the document was not a prospectus within the meaning of the Act of 1900, as it was not issued to the public generally, and did not contain an invitation to take shares; and secondly, that the company, not having adopted the document, were not responsible for the statements it contained. *Sleigh v. Glasgow and Transvaal Options*, 6 F. 420—Ct. of Sess.

Summary Procedure.—*Semble*, the procedure by summary petition, authorised by section 35 of the Companies Act, 1862, is an inappropriate method to try such a question. *Ib.*

Disclosure of Contracts in Prospectus—Duty of Directors—Disclosure.—Where the directors of a company enter into a contract with a promoter for the payment of services in the form of a bonus or commission of fixed amount, and the contract is subsequently rescinded and replaced by a written undertaking that the promoter's claim to a proper remuneration shall be honourably met by the directors, such contract and undertaking ought, under section 38 of the Companies Act, 1867, to be disclosed in the prospectus, and in a case to which that section applies the directors are liable for non-disclosure to persons who have taken shares on the faith of a prospectus, not mentioning either the contract or undertaking, but referring to certain other contracts as "the only contracts" to which the company was a party. *Shepherd v. Broome*, 78 L. J. Ch. 608; [1904] A.C. 842; 91 L. T. 178; 53 W. R. 111; 11 Manson, 283; 20 T. L. R. 540—H.L. (E.)

Material Contract—Omission to Disclose in Prospectus—Inducement to take Shares—Onus of Proof—Liability of Directors.—In an action against directors of a company for breach of the statutory obligation imposed by section 38 of the Companies Act, 1867, to disclose in the prospectus particulars of contracts, the plaintiff must satisfy the Court that he has been damaged by the omission to disclose. The mere fact that a material contract has not been disclosed raises no presumption of law that the plaintiff was induced to take his shares by the omission, or would not have taken them if the contract had been disclosed. In order that the plaintiff may

succeed the Court must be satisfied that if the omitted contract had been disclosed the plaintiff would not have applied for the shares. Judgment of COLLINS, M.R., in *Broome v. Speak* (72 L. J. Ch. 251, 256; [1903] 1 Ch. 586, 620), considered. *Nash v. Calthorpe*, 74 L. J. Ch. 493; [1905] 2 Ch. 237; 93 L. T. 585; 12 Manson, 260; 21 T. L. R. 587—C.A.

Per ROMER, L.J.—The plaintiff in such a case must shew that if the contract had been disclosed he might not have applied for the shares. It is not necessary for him to prove that he certainly would not have applied. *Ib.*

Liability of Director and Promoter to Underwriter.—The plaintiff, who was an underwriter of shares, sought to recover damages for non-disclosure of the same agreement as that in *Cackett v. Keswick* (*supra*) of March 10, 1899, in the prospectus, but the circumstances were different. On March 13, 1899, the plaintiff met a friend who mentioned the company to him and shewed him a draft prospectus. He was attracted by the names of M. and K. on the front sheet, but in his evidence he stated that he did not remember reading anything about contracts. He signed an underwriting agreement for 250 shares, and gave a cheque for 62l. 10s., which was returned him on the 28th, as the directors had decided "not to issue" the prospectus before Easter. Another cheque and a signed application form for those shares were sent before the end of April:—*Held*, that the plaintiff signed his underwriting agreement and application for shares before any prospectus had been issued to the public; that the incorporation took place on the 24th and the prospectus was issued on the 27th May; and section 38 of the Act was not intended to apply to copies of a prospectus not authorised for publication shewn to friends or speculators by way of anticipation of the public. If such persons were deceived they had certain rights, but could not get the benefit of the statute. Moreover, the plaintiff had failed to prove that he subscribed on the faith that there was no such contract as that of March 10 in existence; and the fact that his commission was payable in shares was insufficient to regard him as "the careful investor." The contract of underwriting with the promoters was wholly different from that with the company to take shares, and different considerations applied as to the materiality of facts. The action therefore failed. *Baty v. Keswick*, 85 L. T. 18; 50 W. R. 14—Farwell, J.

Non-disclosure of Contracts—Materiality—Waiver Clause—Companies Act, 1867, s. 38.—A contract entered into by the promoters of a company before the issue of the prospectus ought, under section 38 of the Companies Act, 1867, to be disclosed in the prospectus, if knowledge of it would affect the mind of a reasonable person intending to take shares in the company. Test applied by BAGGALLAY, L.J., and THESIGER, L.J., in *Sullivan v. Mitcalfe* (49 L. J. C.P., 815, 824, 829; 5 C.P. D. 455 460, 465), adopted. *Cackett v. Keswick*, 71 L. J. Ch. 641; [1902] 2 Ch. 456; 87 L. T. 11; 51 W. R. 69; 9 Manson, 388—C.A.

A person who takes shares in a company on the faith of a prospectus may be debarred by a

waiver clause in the prospectus from pursuing his remedy under section 38 of the Companies Act, 1867, for non-disclosure of a contract in the prospectus, but the waiver clause must be honestly made, and must direct the attention of the intending shareholder to the nature of the contract in question. *Greenwood v. Leather Shod Wheel Co.* (69 L. J. Ch. 131; [1900] 1 Ch. 421) followed. *Ib.*

The prospectus of a mining company, after referring to a contract with a smelting company as to the purchase of the products of the mining company, and stating that the directors with other underwriters had guaranteed the subscription of part of the company's capital, and would receive a commission from the vendor for so doing, specified certain contracts relating to the purchase of the mine and property to be acquired by the company, and proceeded as follows: "There may also be various trade contracts and business arrangements in addition to the before mentioned agreement. . . . As these contracts and arrangements and the above mentioned underwriting agreements may constitute contracts within the meaning of s. 38 of the Companies Act, 1867, applicants for shares shall be deemed to waive the insertion of the dates of and the names of the parties to any such contracts, arrangements, or agreements, and shall accept the foregoing as a sufficient compliance with s. 38 of the Companies Act, 1867, or otherwise." On March 10, 1899, prior to the issue of the prospectus, a letter was written on behalf of the promoters to the firm of M. & Co., in which the defendant Keswick was a partner, confirming a previous arrangement made with M. & Co., which was said to be that M. & Co. were to be commercial agents for the company, and as remuneration for the services so rendered were to receive 10,000l. in fully paid shares, that one of their firm, Keswick, was to become a director, and the offices of the company located at their address, and that they promised to underwrite 10,000 shares at a commission of 20 per cent., or 2,000 shares. No mention of the contract embodied in this letter was made in the prospectus:—*Held*, that the contract was one which it was material for a person intending to take shares in the company to know; that the waiver clause gave no fair or sufficient notice to an intending investor that such a contract existed, and that he was to waive the omission from the prospectus of any mention of it, and that by reason of the omission of any mention of it from the prospectus the prospectus must be deemed to be fraudulent on the part of the promoters and directors issuing it as against a person who took shares on the faith of the prospectus within the meaning of section 38 of the Companies Act, 1867. *Ib.*

— **Directors' Liability—Damages—Waiver Clause.**—In an action based on section 38 of the Companies Act, 1867, against a director, promoter, or officer of a company for non-disclosure of a contract in a prospectus, the plaintiff must prove that if he had known of the contract he would not have taken shares; that he has suffered damage from such non-disclosure; and that the defendant knew of the existence of the undisclosed contract. *Calthorpe v. Trechmann*; *Macleay v. Tait*, 75 L. J. Ch. 90; [1906] A.C. 24; 94 L. T. 68; 54 W. R. 365; 18 Manson, 24; 22 T. L. R. 149—H.L. (E.)

The defendant may also be protected by a waiver clause which is honest and above suspicion. *Ib.*

— **Omission—Onus of Proof.**—Where a director has issued a prospectus knowing that there might be contracts material to be stated under section 38 of the Companies Act, 1867, and taken no trouble to ascertain the facts, but left the matter to the company's solicitor, his responsibility under that section is not avoided by the fact that he may truthfully say that when he approved the prospectus he had in fact forgotten the existence of a particular contract which was material to be stated. It is not necessary for the plaintiff to show that the directors' attention was deliberately and consciously directed to a particular contract which he then omitted to mention. *Trechmann v. Calthorpe*; *De la Cour v. Clinton*; *Tait v. Macleay*, 74 L. J. Ch. 43; [1904] 2 Ch. 631; 91 L. T. 474; 11 Manson, 444; 20 T. L. R. 710—C.A. Reversed, 22 T. L. R. 149—H.L. (E.)

The duties and responsibilities of a director under section 38 considered, and the ruling of *COCKBURN, J.*, in *Twycross v. Grant* (46 L. J. C.P. 636; 2 C.P. D. 469) explained. *Ib.*

— **"Knowingly issuing"—Advance Copy of Prospectus—Unauthorized Issue—Ratification.**—Directors will not be held liable for non-disclosure of contracts in a prospectus for which they otherwise would have been liable if they shew that it was issued without their authority. *Hoole v. Speak*, 73 L. J. Ch. 719; [1904] 2 Ch. 732; 91 L. T. 183; 11 Manson, 421; 20 T. L. R. 649—Kekewich, J.

In such a case directors cannot be made liable on the ground that they afterwards ratified and adopted the prospectus, or even derived some advantage from it. *Ib.*

— **Advice of Counsel—Fraud.**—Directors of a company agreed, by letter and resolution and minute of the board, with B., a promoter, in consideration of his finding the money for payment of deposit on a purchase, to repay the amount together with a bonus. By a subsequent agreement, similarly entered into, the parties agreed to cancel the earlier agreement as to payment of a bonus, B. receiving an assurance that his right to commission for providing the deposit should be "honourably met." The prospectus was issued, on the advice of counsel, mentioning certain contracts as "the only contracts to which the" company "is a party," but not mentioning either of the two agreements above mentioned:—*Held*, that the two agreements constituted a binding obligation, subsisting at the date of the prospectus, to repay the deposit and to pay a proper sum for commission; and that the directors were liable in damages, to a person who had taken shares on the faith of the prospectus, for non-disclosure of the contracts under section 38 of the Companies Act, 1867. *Broome v. Speak*, 72 L. J. Ch. 251; [1903] 1 Ch. 586; 88 L. T. 580; 51 W. R. 258; 10 Manson, 38—C.A.

— **Plea of Ignorance—Knowledge of Director—Notice to Subscriber.**—Where a director knows of the existence of other contracts than those

stated in a prospectus for which he is responsible, he cannot escape liability under the Companies Act, 1867, s. 38, by a plea of ignorance of the contents or materiality of those contracts, or that he left the matter to legal advisers. *Watts v. Bucknall*, 72 L. J. Ch. 447; [1903] 1 Ch. 766; 88 L. T. 845; 51 W. R. 433; 10 Manson, 176—C.A.

The notice of a contract sufficient to disentitle a shareholder to claim relief under section 38 must be notice not only of the existence of the contract, but also of its contents as bearing upon the statements in the prospectus. *Ib.*

Waiver Clause.—A waiver clause in a prospectus should contain a frank and fair avowal of the nature of the contracts in respect of which the subscriber is asked to waive his claims under section 38. A waiver clause which says, "There are or may be other contracts within the meaning of section 38," when there is no doubt about the materiality of such contracts, is misleading. *Ib.*

Directors' Liability Act, 1890 — Misleading Prospectus — Waiver Clause.—A misleading statement in a prospectus is untrue within the meaning of section 3 of the Directors' Liability Act, 1890, even though it may be true in the sense in which it is used by those who issue the prospectus. *Greenwood v. Leather Shoe Wheel Co.*, 69 L. J. Ch. 181; [1900] 1 Ch. 421; 81 L. T. 595; 7 Manson, 210—C.A.

A prospectus so framed as to convey to the ordinary reader that an invention referred to in it has passed the experimental stage, and that numerous orders besides mere trial orders have been given, when in fact no orders have been given except for trial and experiment, contains untrue statements within the meaning of section 3. *Ib.*

If a prospectus is fraudulent at common law or is to be deemed fraudulent under section 38 of the Companies Act, 1867, and an applicant for shares signs a contract which is intended to deprive him of his right to redress, he is not bound in equity by what he signs unless his attention is called to the existence of the facts which render the prospectus fraudulent. *Ib.*

A waiver clause introduced into the form of application for shares signed by the applicant is subject to the same considerations as a general waiver clause in a prospectus. *Ib.*

Form and scope of waiver clauses discussed. *Ib.*

Notice of Contract.—Notice of a contract in section 38 of the Companies Act, 1867, means such notice as brings home to the mind of a reasonably intelligent and careful reader such knowledge as fairly and in a business sense amounts to notice of a contract. *Ib.*

Misleading Prospectus—Waiver Clause.—A statement in a prospectus that the company has acquired a valuable property is untrue within the meaning of section 3 of the

Directors' Liability Act, 1890, if the property has not in fact been acquired when the prospectus is issued, though the director issuing it believes that it will be acquired, and though it is in fact acquired a few days afterwards. *McConnell v. Wright*, 72 L. J. Ch. 347; [1903] 1 Ch. 546; 88 L. T. 431; 51 W. R. 661; 10 Manson, 160—C.A.

The subscriber for shares on the faith of the prospectus cannot be said to have suffered no loss or damage merely because the property in question was in fact afterwards acquired by the company. *Ib.*

Measure of Damages.—The true measure of damage is the difference between the value which the shares would have had at the date of the allotment to the subscriber if the statement had been true, and the value which they actually had at that date, when there was merely a possibility or chance of the property being afterwards acquired. *Ib.*

Misrepresentation—Reputation by Director — "Reasonable public notice."—Where a director knows that a prospectus is being issued inviting persons to take debentures, and abstains from asking to see it until after action brought on account of misrepresentations therein, it is too late then for him to give "reasonable public notice," within the meaning of section 3 of the Directors' Liability Act, 1890, that it was issued without his knowledge or consent. *Dringbier v. Wood*, 68 L. J. Ch. 181; [1899] 1 Ch. 393; 79 L. T. 548; 47 W. R. 252; 6 Manson, 76—Byrne, J.

Omissions — Director — Liability — "Sub-purchaser."—Where a company is the purchaser of property which at law as well as in equity belongs absolutely to the vendor, section 10, sub-section 1 (f) of the Companies Act, 1900, which prescribes the publication in the prospectus of the name and address of the vendor and the amount of the consideration, does not require that the prospectus shall disclose the amount of the purchase-money paid by the vendor upon his acquisition of the property. *Brookes v. Hansen*, 75 L. J. Ch. 450; [1906] 2 Ch. 129; 94 L. T. 728; 54 W. R. 502; 13 Manson, 172; 22 T. L. R. 475—Joyce, J.

Generally speaking, a company is not a "sub-purchaser" for the purposes of this sub-section unless it has to pay purchase-money to some one other than its own vendor; nor need the prospectus contain a statement of the amount of any consideration paid or to be paid by any one other than the company itself. *Ib.*

The whole of the consideration, cash, shares, or debentures, payable to any one by the company in respect of the purchase or acquisition of the property, must be stated. *Ib.*

Proof that Shares not Worth Sum Paid for them.—For an action to be maintainable against a director under the Directors' Liability Act, 1890, or under section 38 of the Companies Act, 1867, in respect of the omission to specify contracts by dates and parties in the prospectus, it must be shewn that the shares subscribed for by the plaintiff were not really worth what

he paid for them; the fact of the company's having been wound up is not conclusive upon the question of damage, but only a fact to be considered and weighed as against the evidence tending the other way, and the onus of proof is upon the plaintiff. *Stevens v. Hoare*, 20 T. L. R. 407—Joyce, J.

— **Statute of Limitations—Action—Untrue Statement in Prospectus of Company.**—

An action against directors and promoters of a company under the Directors' Liability Act, 1890, is not an action for "penalties, damages, or sums of money given to the party grieved" by a statute within the meaning of section 3 of the Civil Procedure Act, 1833, and is not subject to the limitation of two years imposed by that section. *Thomson v. Clanmorris (Lord)*, 69 L. J. Ch. 337; [1900] 1 Ch. 718; 82 L. T. 277; 48 W. R. 488; 8 Manson, 51—C.A.

— **Action against Director for Fraudulent False Statement in Prospectus—Right of Contribution from Co-director.**—

A right to contribution given to a director of a company against his co-directors by section 5 of the Directors' Liability Act, 1890, in respect of a liability incurred under section 3 of the Act for an untrue statement in the prospectus of the company, applies to a liability incurred by reason of an untrue statement fraudulently made, which might have been the subject of an action at common law. *Gerson v. Simpson*, 72 L. J. K.B. 603; [1903] 2 K.B. 197; 89 L. T. 117; 51 W. R. 610—C.A.

— **Untrue Statement in Prospectus—Compensation—Contribution from Co-directors.**—

Directors of a company issued a prospectus which contained an untrue statement that the only contracts to which the company was a party were two, omitting a third which was material to be disclosed. An action against some of the directors was brought and judgment obtained by a shareholder who had taken shares on the faith of the prospectus, for compensation for loss or damage sustained by reason of the untrue statement, under section 3 of the Directors' Liability Act, 1890. After appeal to the House of Lords, where the judgment of the Court of Appeal, affirming the judgment of the Court below, was affirmed, a compromise was arrived at between the parties to the action, under which the shareholder was to receive an agreed sum of 800*l.*, by way of compensation or damages, the taxed costs of an inquiry which had been begun, but was agreed not to be further proceeded with, and 700*l.* for additional costs. The amounts were paid, together with the taxed costs of the action and appeals, by the present plaintiffs, who were some of the directors, and who contributed to the payment in equal shares. A number of other similar actions were commenced or claims made against the present plaintiffs, of which some were compromised, in others judgment was entered by consent for an enquiry as to damages, in others money was paid into court to answer the claims. In respect of these, the present plaintiffs had paid or become liable to pay large sums, and incurred considerable costs and expenses. They commenced this action under section 5 of the Directors' Liability Act against their co-directors and the representatives of deceased co-directors for contribution to the payments they

had made or become liable for, and to the costs and expenses they had incurred, and to their own solicitor and client costs and reasonable expenses:—*Held*, that they were entitled to contribution to (1) sums paid for compensation for loss or damage, (2) taxed costs of the plaintiff in the original action up to and including judgment, and (3) costs paid to other claimants (whether under judgment in actions or agreement); but not (4) the additional costs of the plaintiff in the original action, nor (5) the present plaintiffs' own costs in that action, nor (6) costs in the Court of Appeal and the House of Lords. *Shepherd v. Bray*, 75 L. J. Ch. 633; [1906] 2 Ch. 235; 95 L. T. 414; 54 W. R. 556; 13 Manson, 279; 22 T. L. R. 625—Warrington, J.

Appeal of executors of deceased directors from decision of WARRINGTON, J. (75 L. J. Ch. 633; [1906] 2 Ch. 235), allowed by consent, the Court stating that it must not be taken that, as at present advised, they were prepared to assent to the whole of the decision of WARRINGTON, J. *Shepherd v. Bray*, 76 L. J. Ch. 692; [1907] 2 Ch. 571; 97 L. T. 729; 14 Manson, 310; 24 T. L. R. 17—C.A.

7. CAPITAL, REDUCTION OF.

Power to Reduce in Memorandum, but not in Articles of Association.—

The memorandum of association of a company gave the company power to reduce its capital, but the articles of association of the company contained no such power. The company passed special resolutions purporting to reduce its capital, and petitioned the Court for confirmation of the reduction:—*Held*, that the word "regulations" in section 9 of the Companies Act, 1867, meant the articles and not the memorandum of association, and that it was necessary to alter the articles by inserting a power to reduce capital before passing a special resolution for reduction. *Dexine Patent Packing and Rubber Co., In re*, 88 L. T. 791—Byrne, J.

Reduction—Dissentient Stockholders—Sanction of Court.—A scheme for reduction of capital is not necessarily unfair or inequitable because it involves the alteration of rights of voting and priority as between the different classes of stockholders. *Allsopp & Sons, Lim., In re*, 51 W. R. 644—C.A.

Special Resolution—Article Requiring Majority Holding not less than Four-fifths of Capital—Validity.—

One of the clauses in the articles of association of a limited company provided (*inter alia*) that the capital should not be increased or reduced, nor should any shares be issued with any preference, priority, or special advantage, except by a resolution passed by a majority of the members present personally or by proxy, and which majority should hold not less than four-fifths of the capital for the time being:—*Held*, that the requirement of a four-fifths majority was invalid as conflicting with section 51 of the Companies Act, 1862. *Ayre v. Skelsey's Adamant Cement Co.*, 20 T. L. R. 587—Kekewich, J.

The Court held upon the evidence that the special resolution of a company for the increase

of capital had been carried by a majority holding four-fifths of the capital of the company as required by the articles of association. *Ayre v. Skelsey's Adamant Cement Co.*, 21 T. L. R. 464—C.A.

Confirmation of Resolution by Court—Alteration of Provisions of Memorandum.—The memorandum of association of a company incorporated under the Companies Acts provided that the capital should consist of 6,000 preference shares of 10l. each, and 6,000 ordinary shares of 10l. each, the preference shares to be entitled to a cumulative preferential 5 per cent. per annum dividend and to priority of repayment of capital in the event of a winding-up. By the articles of association it was provided that the voting power should be one vote for each share, whether preference or ordinary. The whole of the ordinary shares were held by the vendors or the representatives of the vendors, who were also the managers of the company. The company's business having greatly depreciated, a resolution was passed by large majorities of both classes of shareholders approving of a scheme for reduction of capital, whereby the preference shares were to be reduced from 10l. to 5l. 10s., and the ordinary shares from 10l. to 1l. The voting power remained one vote for each share, whether preference or ordinary. A petition for the confirmation of this resolution was opposed by certain preference shareholders, who contended that it was *ultra vires* of the Court to confirm a scheme which violated the provisions of the memorandum of association as to the shareholders' rights *inter se*, and, further, that the scheme proposed was not just and equitable. The Court confirmed the resolution, holding that they had power to do so, and that the scheme was just and equitable. *British and American Trustee and Finance Corporation v. Cowper* (63 L. J. Ch. 425; [1894] A.C. 399) considered and applied. *Balmenach-Glenlivet Distillery, Lim. v. Croall*, 8 F. 1135—Ct. of Sess.

Cancelling Paid-up Shares by Consent of Shareholder—Release of Rights—Amount neither Lost nor Unrepresented by Available Assets nor to be Returned as in Excess of Wants.—A company limited by shares cannot, under the Companies Acts, 1867 and 1877, reduce its nominal and its paid-up capital by cancelling, with the consent of the holders, paid-up shares, where the amount neither has been lost, nor is unrepresented by available assets, nor is to be returned as in excess of the wants of the company, unless the reduction is so made as not to affect the equilibrium of the balance-sheet to the prejudice of creditors. *Anglo-French Exploration Co., In re*, 71 L. J. Ch. 800; [1902] 2 Ch. 845; 51 W. R. 8; 9 Manson, 432—Buckley, J.

The capital of a company was 700,300l., divided into 350,000 preference, 350,000 ordinary, and 300 founders' shares, all of 1l. each and fully paid-up. By a conditional agreement between the holders of the founders' shares, the company, and the directors, it was agreed that the company should be at liberty to pass resolutions cancelling the founders' shares and increasing the capital by creating 78,000 new ordinary shares, and that on the agreement becoming absolute each holder of founders'

shares should in respect of every founder's share be entitled to an allotment of 260 of the new shares. The agreement was to become absolute upon its being ratified by the holders of founders' shares and the company, the resolutions being passed and the sanction of the Court to the reduction being obtained. The agreement was ratified, and the resolutions passed, and it was intended, on the sanction of the Court being obtained, to issue the 78,000 new ordinary shares to the holders of the founder's shares. On petition to sanction the reduction,—*Held*, that, the agreement to take the new shares being conditional on, and not taking effect till after, the reduction, the Court had not power to sanction it; but that, if the petition were amended so as to shew that the 78,000 shares had been allotted and paid for, and the holders of the founders' shares declared themselves trustees of the latter for the company, the Court could sanction it. *Id.*

Cancellation of Arrears of Dividend on Preference Shares.—The preference shareholders in a company limited by shares were, under the memorandum of association of the company, entitled to receive out of the profits a fixed cumulative preferential dividend of 5 per cent. per annum. By article 46 of the articles of association it was provided that all or any of the rights and privileges attached to any class of shares might be modified by an extraordinary resolution passed at a general meeting of the holders of shares of that class. By a resolution duly passed in terms of article 46 on February 9, 1903, at which date the dividends due on the preference shares were two years in arrear, a meeting of the preference shareholders agreed to a scheme for reduction of capital proposed by the directors, under which these arrears were cancelled, and the future profits distributable as dividend were appropriated, in order of priority, to payment—first, of a cumulative dividend of 5 per cent. on the preference shares; secondly, of 5 per cent. on the ordinary shares; and thirdly, of any surplus *pari passu* to holders of both classes of shares. In a petition by the company, the Court confirmed the scheme, holding that it was not *ultra vires* to cancel the arrears of preference dividend in the manner proposed. *Oban and Aultmore-Glenlivet Distilleries, In re*, 5 F. 1140—Ct. of Sess.

Deferred Shares—Onerous Rights—Extinguishment in Return for other Shares—Scheme—Shares Issued at a Discount—Ultra Vires.—A company in order to encourage further subscription for its shares, and with the consent of all the shareholders, duly resolved to reduce its capital by cancelling all its deferred shares, to which onerous rights attached, and then, after increasing its ordinary share capital, to issue thereout to the holder of each deferred share so cancelled 100 ordinary shares as fully paid and of a nominal value per share equal to that of the cancelled share. Upon petition to the Court to confirm the resolution,—*Held*, that what the Court was asked to sanction, although in form a reduction of capital, was in fact an increase of capital; that the scheme, regarded as a whole, involved an issue at a discount of 99 out of every 100 shares issued in respect of each cancelled share, and was *ultra vires*; and that in the circumstances the Court could not confirm the resolution. *Development*

Company of Central and West Africa, In re, 71 L. J. Ch. 310; [1902] 1 Ch. 547; 86 L. T. 323; 5 W. R. 456; 9 Manson, 151—Swinfen Eady, J.

Extinction of One Class of Shares.]—It is not a condition of jurisdiction to reduce the capital of a company that it should be proved that there has been loss of capital or that capital is unrepresented by available assets or is in excess of the wants of the company. The jurisdiction arises whenever the company seeking reduction has duly passed a resolution to that effect. *Dicta* of BUCKLEY, J., in *Anglo-French Exploration Co., In re* (71 L. J. Ch. 800; [1900] 2 Ch. 845), disapproved. *Poole v. National Bank of China*, 76 L. J. Ch. 458; [1907] A.C. 229; 96 L. T. 889; 14 Manson, 218; 23 T. L. R. 567—H.L. (E.)

The only questions for the Court to consider are—first, the interests of those members of the public who may be induced to take shares in the company; and secondly, whether the reduction is fair and equitable as between the different classes of shareholders. When the interests of the public are not concerned it is not material for the Court to consider whether the amount of the proposed reduction is exactly commensurate with the loss actually proved. *Ib.*

The amount of the reserve fund to be retained is a purely domestic matter outside the province of the Court. *Ib.*

Writing off Losses Incurred in Previous Years—Capital Account.]—*Semble*, a company is not at liberty to write off to capital losses incurred in previous years, or in any subsequent year, and, if the receipts for that year exceed the outgoings, to pay dividends out of such excess without making up the capital account, such a procedure being inconsistent with the provisions of the Companies Act, 1877. *Dovey v. Cory*, 70 L. J. Ch. 753; [1901] A.C. 477; 85 L. T. 257; 50 W. R. 65—H.L. (E.)

Return of Capital.]—A company limited by shares duly passed a special resolution in accordance with section 51 of the Companies Act, 1862, reducing its capital from 80,000*l.* in 16,000 shares of 5*l.* each (2*l.* 10*s.* paid up) to 32,000*l.* in 16,000 shares of 2*l.* each, of which 1*l.* was to be deemed paid up—the reduction to be effected by returning to the shareholders 1*l.* 10*s.* per share, of which 1*l.* might be called up again:—*Held*, on petition, that an order confirming the reduction could be made, although the 1*l.* 10*s.* per share had not yet been returned, and that the proper minute to approve for registration was one which, after stating the reduced capital, contained the words “At the time of the registration of this minute the sum of 1*l.* and no more is proposed to be deemed to have been paid up on each of the said shares.” *Calgary and Edmonton Land Co., In re* (75 L. J. Ch. 138; [1906] 1 Ch. 141), not followed. *Lees Brook Spinning Co., In re*, 75 L. J. Ch. 565; [1906] 2 Ch. 394; 95 L. T. 54; 54 W. R. 563; 13 Manson, 262; 22 T. L. R. 629—Swinfen Eady, J.

—Special Resolution—Prospective and Retrospective Effect—Capital or Income—Tenant for Life and Remainderman.]—Where a company

makes payments out of profits to shareholders and intends to make them as returns of capital, but fails lawfully to do so, the amounts so paid must be treated, as between tenants for life and remaindermen, as payments of dividend to which the tenants for life are entitled. *Piercy, In re; Whittham v. Percy*, 76 L. J. Ch. 116; [1907] 1 Ch. 289; 95 L. T. 868; 14 Manson, 23—Neville, J.

A company purported to make payments from time to time out of profits to shareholders under the Companies Act, 1880, in reduction of paid-up capital. For many years no special resolution was passed authorising this, as required by section 3 of the Act, but in 1905 a special resolution was passed which, besides authorising an immediate distribution thereunder, purported to authorise, as returns of capital, the past payments and any future payments which the directors might make:—*Held*, that, upon the construction of sections 3 and 5 of the Companies Act, 1880, the resolution was void so far as it purported to authorise payments in reduction of paid-up capital retrospectively or prospectively. *Ib.*

—Statute of Limitations.]—Sums due for capital returnable to shareholders in pursuance of a resolution sanctioned by the Court are not barred by the Statute of Limitations when unpaid for more than six years but less than twenty years, as they are in the nature of specialty and not simple contract debts. *Artizans' Land and Mortgage Corporation, In re*, 73 L. J. Ch. 581; [1904] 1 Ch. 796; 52 W. R. 330; 12 Manson, 98—Byrne, J.

Capital in Excess of Wants of Company—Return of Capital—Form of Minute.]—A company passed a resolution to reduce its capital, which was in excess of its wants, from 241,510*l.* in shares of 1*l.* each to 211,321*l.* 5*s.* in shares of 17*s.* 6*d.* each, the reduction to be effected by returning 2*s.* 6*d.* per share to each of the shareholders. Upon a petition to confirm the reduction, the Court gave leave to return 2*s.* 6*d.* per share, and, subject to the production of evidence that the 2*s.* 6*d.* had, in fact, been repaid, ordered (the order to be post-dated) that the reduction be confirmed, and approved a minute to be registered under section 15 of the Companies Act, 1867, as follows: “The capital of the Calgary and Edmonton Land Company, Limited, is henceforth 211,321*l.* 5*s.* divided into 241,510 shares of 17*s.* 6*d.* each, instead of the original capital of 241,510*l.* divided into 241,510 shares of 1*l.* each. At the time of the registration of this minute the sum of 17*s.* 6*d.* has been and is to be deemed paid up upon each of the said shares.” *Calgary and Edmonton Land Co., In re*, 75 L. J. Ch. 138; [1906] 1 Ch. 141; 94 L. T. 132; 13 Manson, 55—Buckley, J.

Capital Lost or Unrepresented by Available Assets—Arrears of Dividends on Preference Shares—Inequality of Reduction—Conversion of Preference into Ordinary Shares.]—An incorporated society whose articles of association did not give power to modify rights, or to subdivide shares, or to reduce capital, having issued both preference and ordinary shares of 5*l.* each, finding that, owing partly to the defalcations and mismanagement of a former manager and partly to depreciation of property, its capital had been lost or was unrepresented by available

assets to the extent of a large amount, and also that the arrears of dividends on the preference shares amounted to a considerable sum, added to its articles of association articles for the above-mentioned purposes, and then prepared a scheme which was approved by a majority of each class of shareholders, under which some ordinary shares which had been transferred to the society were cancelled, the preference shares were reduced to 2L. shares and then divided into 1L. shares, the ordinary shares were reduced to shares of 10s. each and then consolidated into 1L. shares, the arrears of dividends on the preference shares were cancelled, and the preference shares were made to rank *pari passu* with and to have only the rights and privileges of ordinary shares. The society then petitioned the Court to confirm the reduction of its capital, and to approve minutes for registration. The petition was unopposed. The Court confirmed the reduction and approved the minutes. *National Dwellings Society, In re*, 78 L. T. 144—North, J.

Losses to be Borne in Proportion to Amount Paid up on Shares at Commencement of Winding-up—Shares of Same Class with Different Amounts Paid-up.—The Court has power to sanction a scheme for the reduction of capital whereby it is proposed to cancel lost capital in respect of partly paid and fully paid shares alike, notwithstanding a provision in the company's articles that in the event of a winding-up surplus assets insufficient to repay the whole of the paid-up capital shall be so distributed that the losses shall be borne by the members in proportion to the capital paid up on their shares at the commencement of the winding-up, if in the judgment of the Court the proposed scheme will not work inequitably or unjustly in the particular case. *British Insurance Trustee and Finance Corporation v. Couper* (63 L. J. Ch. 425; [1894] A.C. 399) followed and applied. *Credit Assurance and Guarantee Corporation, In re*, 71 L. J. Ch. 775; [1902] 2 Ch. 601; 87 L. T. 216; 51 W. R. 20—C.A.

Burden of Proof of Loss.—On a petition for confirmation of a reduction of capital the burden of proving loss is on the supporters of the reduction; and the Court will not, in an opposed case, sanction a reduction upon a mere balance of expert evidence as to the value of assets of a speculative nature, such as mineral property. In estimating assets for the purpose of shewing loss a company must bring into account reserve funds, any undistributed balance standing to profit and loss account, and the value of its goodwill. *Barrow Haematite Steel Co., In re* (No. 2), 69 L. J. Ch. 869; [1900] 2 Ch. 846; 83 L. T. 397—Cozens-Hardy, J.

Reduction of Preference Shares — Unjust Scheme.—The Court will not sanction a reduction of preference and ordinary shares in the same proportion, where the effect would be merely to reduce the share of profits payable to the preference shareholders and increase that payable to the ordinary shareholders, without proof of necessity, or of great advantage to the company as a whole. *Ib.*

Decision of COZENS-HARDY, J. (69 L. J. Ch. 869; [1900] 2 Ch. 846), refusing to confirm a resolution for the reduction of the capital of the company, affirmed on the facts, the Court refusing to express any opinion upon any ques-

tions of law raised in the Court below. *Barrow Haematite Steel Co., In re* (No. 2), 71 L. J. Ch. 15; [1901] 2 Ch. 746; 85 L. T. 498; 50 W. R. 71; 9 Manson, 35—C.A.

As to a resolution for reduction involving an alteration in the rights of the preference shareholders, see *Welsbach Incandescent Gas Light Co.*, 73 L. J. Ch. 704; [1904] 1 Ch. 87; 89 L. T. 645; 52 W. R. 327; 11 Manson, 47; 29 T. L. R. 122—C.A. And see PREFERENCE SHARES, *infra*.

Reserve Fund — Undistributed Profits — Premiums on Leases—Premiums on Issue of Preference Shares—Capital Lost or Unrepresented by Available Assets—Apportionment of Loss between Capital and Reserve.—The provisions of section 3 of the Companies Act, 1877, empowering a company to cancel "any lost capital, or any capital unrepresented by available assets," are alternative provisions; the latter is not explanatory of the former. *Hoare & Co., Lim., In re*, 73 L. J. Ch. 601; [1904] 2 Ch. 208; 91 L. T. 115; 53 W. R. 51; 11 Manson, 307; 20 T. L. R. 581—C.A.

A company with a share capital of 1,950,000l. had formed a reserve of 292,612l. 18s. 1d., representing partly premiums received for leases, partly premiums received on the issue of preference shares, and partly undistributed profits. Under the articles the reserve could be applied to meet contingencies, or for equalising dividends, or repairing, improving, and maintaining the property of the company, or for other purposes, as the directors should think conducive to the interests of the company. It might be employed in the business of the company, and it was in fact so employed and not kept separate. Certain of the company's assets had depreciated by 591,707l. 13s. 10d., and to that extent capital had been lost or was unrepresented by available assets. It was proposed to reduce the company's capital, writing 396,000l. of the loss off by extinguishing a corresponding amount of shares, and to meet 195,707l. 13s. 10d. of the loss by writing that amount off the reserve:—*Held*, that the reserve did not represent capital of the company properly so called, and the proper course would be to apportion the loss between the reserve and the share capital; and that the scheme for the reduction of the capital of the company which proposed to attribute more than the rateable proportion of loss to the reserve ought to be sanctioned by the Court. *Ib.*

Per VAUGHAN WILLIAMS, L.J.—If the profit and loss account of a company shews a profit balance, that balance can be distributed as dividend, notwithstanding that the company has at the time lost capital, and the loss can be written off capital entirely without touching upon any fund properly appropriated for dividend, even if the fund has arisen after the loss of capital. *Ib.*

Barrow Haematite Steel Co., In re (69 L. J. Ch. 869; [1900] 2 Ch. 846), explained by COZENS-HARDY, L.J. *Ib.*

Depreciation Fund — Priority of Payment — Capital and Profit—Lost Capital—Restoration of Lost Capital.—Where fixed capital of a limited company has been lost, but there is a present balance in hand to the credit of the profit and loss account, there is no general and universal rule of law as to whether such balance

is primarily liable to replace such lost capital or to be distributed in dividends. The question must be answered in each particular case according to surrounding circumstances, the nature of the company, and the evidence of competent witnesses. *Dictum of LINDLEY, L.J.*, in *Ferner v. General and Commercial Investment Trust* (63 L. J. Ch. 456; [1894] 2 Ch. 239) considered and explained. *Bond v. Barrow Hematite Steel Co.*, 71 L. J. Ch. 246; [1902] 1 Ch. 353; 86 L. T. 10; 50 W. R. 295; 9 Manson, 69—Farwell, J.

There is, however, a rule of law that floating or circulating capital must in every case be kept up. *Ib.*

There is no general rule of law as to whether a company owing wasting assets ought or ought not to create a depreciation fund. The question in every case is for the decision of the Court on evidence. *Lee v. Neuchatel Asphalt Co.* (57 L. J. Ch. 622; 41 Ch. D. 1) considered and explained. *Ib.*

Scheme of Arrangement—Reduction of Capital Involved.—A reduction of capital involved by a scheme of arrangement must be carried out in accordance with the statutes specially dealing with reduction of capital. *Cooper, Cooper & Johnson, In re*, 51 W. R. 814—Byrne, J.

Company Registered under 7 & 8 Vict. c. 110—Subsequent Registration under Companies Act, 1862—Capital Repaid to Shareholders—Capital only Capable of being Called up in Winding-up.—The Court sanctioned the reduction of capital of a company originally formed under 7 & 8 Vict. c. 110, and subsequently registered as a limited company under the Companies Act, 1862, in respect of—first, uncalled capital which could not be called up except in the event of and for the purposes of a winding-up, the company being in a prosperous condition; and secondly, capital which had before the registration of the company as a limited company been repaid to the shareholders. *Midland Railway Carriage and Waggon Co., In re*, 23 T. L. R. 661—Warrington, J.

Defect in Procedure—Conclusiveness of Certificate of Registrar.—Where a special resolution for the reduction of the capital of a joint-stock company has been confirmed by an order of the Court, and the order has been registered, such registration is conclusive evidence that all the requisitions of the Companies Act, 1867, with respect to the reduction of capital have been complied with, notwithstanding the subsequent discovery that a clear interval of fourteen days had not elapsed between the extraordinary general meeting passing such resolution and the general meeting confirming it. *Ladies' Dress Association v. Pulbrook*, 69 L. J. Q.B. 705; [1900] 2 Q.B. 376; 49 W. R. 6; 7 Manson, 465—C.A.

No Power to Reduce in Articles—No Amendment of Articles.—Where a company has passed a special resolution for reducing its capital, and an order has been made confirming the reduction under section 11 of the Companies Act, 1867, and the Registrar has certified the registration of the order and of a minute approved by the Court under section 15, the certificate is conclusive of the reduction, not-

withstanding that the company had not in its articles as originally framed, or by amendment, power to reduce capital. *Ladies' Dress Association v. Pulbrook* (69 L. J. Q.B. 705; [1900] 2 Q.B. 376) followed. *National Debenture and Assets Corporation, In re* (60 L. J. Ch. 533; [1891] 2 Ch. 505), distinguished. *Walker & Smith, Lim., In re*, 72 L. J. Ch. 572; 88 L. T. 792; 51 W. R. 491; 10 Manson, 333—Byrne, J.

S. DIRECTORS AND OFFICERS.

(1) DIRECTORS.

(a) Appointment and Vacation of Office.

Appointment, How Made.—A director may be appointed in an informal manner, provided the requirements of the articles of association are complied with. A director need not therefore be appointed at the offices of the company. *Smith v. Paringa Mines*, 75 L. J. Ch. 702; [1906] 2 Ch. 193; 94 L. T. 571; 13 Manson, 316—Kekewich, J.

Notice of Meeting.—A company was registered on February 17, 1897, under the Companies Acts, and on February 18 a meeting of the subscribers to the memorandum of association was held, at which one of the subscribers was appointed a director, and he afterwards acted as such. By the articles of association of the company, Table A, in schedule 1 to the Companies Act, 1862, so far as it dealt with the appointment of the first directors, was expressly excluded, but the articles contained no provisions in substitution therefor. By the articles seven days' notice of any meeting was necessary. The person so appointed as a director assigned to the plaintiff the fees alleged to be due to him as such:—*Held*, that as seven days' notice of the meeting was not and could not have been given, the appointment of the director was invalid, and neither he nor his assignees could sue the company for his fees, or upon a *quantum meruit* for services rendered. *Woolf v. East Nigel Gold Mining Co.*, 21 T. L. R. 660—Kennedy, J.

Bankruptcy—Disqualification.—An article which provides that the office of a director shall be vacated if he become bankrupt does not preclude the election as a director of a person who at the time is an undischarged bankrupt. *Davson v. African Consolidated Land and Trading Co.*, 67 L. J. Ch. 47; [1898] 1 Ch. 6; 77 L. T. 392; 46 W. R. 182; 4 Manson, 372—C.A.

Defective Appointment—Validity of Act done by De facto Directors.—An article which validates acts done by directors, notwithstanding that it shall be afterwards discovered that there was some defect in their appointment, or a subsequent disqualification, applies as between the company and its shareholders as well as between the company and outsiders. *Houbeach Coal Co. v. Teague* (29 L. J. Ex. 137; 5 H. & N. 151) discussed. *Ib.*

Agreement by Executors not to Oppose Re-election of Particular Director—Validity.—The defendants were the registered holders, as executors, of shares in a limited company. They were also, in their individual capacity, shareholders in, and directors of, the company. They entered into an agreement by which they bound

themselves alike in their representative and individual capacities to vote always for the re-election of a particular director. The consideration for the agreement was a certain benefit to their testator's estate:—*Held*, that the agreement was *intra vires* the defendants in their individual capacity, notwithstanding the fact that they were directors of the company. *Held*, also, that the agreement was *intra vires* the defendants in their representative capacity; and that it did not amount, on their part, to a delegation of a discretion reposed in them by their testator. *Greenwell v. Porter*, 71 L. J. Ch. 243; [1902] 1 Ch. 530; 86 L. T. 220; 9 Manson, 85—Swinfen Eady, J.

One Limited Company Sole Director of Another—Ultra Vires.—There is nothing in the Companies Acts which renders it *ultra vires* a company to have no directors, or to have another company as its sole manager or director. *Bulawayo Market and Offices Co., In re*, 76 L. J. Ch. 673; [1907] 2 Ch. 458; 23 T. L. R. 714; 97 L. T. 752; 14 Manson, 312—Warrington, J.

Vacation of Office—“Absented himself.”—Although there is a difference between the act of “absenting oneself,” which is purely voluntary, and the fact of “being absent,” which is voluntary or involuntary as the case may be; yet the fact that a person is absent under some strong compulsion, which does not amount to physical necessity, does not necessarily negative the voluntary aspect of his act, or show that he has not “absented himself.” Where, accordingly, the director of a company, though not actually physically prevented by present ill-health from attending the meetings of his fellow directors, was yet induced to stop away from them because his remaining at that season in England might have been injurious to his health, his absence was treated by the Court as being voluntary, and he was deemed to have “absented himself” within the meaning of a provision in the articles of association. *London and Northern Bank, In re; McConnell's Case*, 70 L. J. Ch. 251; [1901] 1 Ch. 728; 84 L. T. 557; 9 Manson, 91—Wright, J.

Acts done as Director Thereafter—Validation—Articles of Association—Construction.—One of the articles of association of a company incorporated under the provisions of the Companies Acts, 1862 to 1893, provided, “all acts done at any meeting of the directors or of a committee of such directors or by any person acting as such director, shall, notwithstanding that it shall afterwards be discovered that there was some defect in the appointment of such directors, or committee or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed, and was qualified to be a director:—*Held*, that the provisions of this article and of section 67 of the Companies Act, 1862, validated the acts of a person *bona fide* acting as director who had been originally appointed a director, but had vacated his office, according to the constitution of the company, on his appointment as secretary thereof, where the fact had been overlooked. *Dawson v. African Consolidated Land and Trading Co.* (67 L. J. Ch. 47; [1898] 1 Ch. 6), followed. *British Asbestos Co. v. Boyd*, 73 L. J. Ch. 31; [1903] 2 Ch. 439;

88 L. T. 763; 51 W. R. 667; 11 Manson, 88—Farwell, J.

Secret Profit by Director—Automatic Vacation of Office under Articles of Association—Re-election—Continuing Contract—Recovery of Director's Fees Paid under Mistake—Legal Consideration.—A provision in the articles of association of a company that a director shall vacate his office on the happening of a certain event operates automatically and *ipso facto* as soon as the event occurs. *Turnbull v. West Riding Athletic Club, Leeds* (70 L. T. 92), not followed. *Bodega Co., In re*, 73 L. J. Ch. 198; [1904] 1 Ch. 276; 89 L. T. 694; 52 W. R. 249; 11 Manson, 95—Farwell, J.

A provision that a director shall vacate his office on becoming secretly interested in any contract with the company operates only where the interest of the director is of such a nature that it may possibly be in conflict with the interest of the company—where the sphere of interest of the company is, to some extent at least, coincident with the sphere of interest of the director. *Ib.*

An action for the recovery of money had and received will lie even in cases when the money has been paid in remuneration of services actually rendered, provided that the services so rendered do not amount to a legal consideration. Services rendered do not amount to a legal consideration unless they have been rendered in response to some request, explicit or implied by law. The acceptance of services rendered is a *prima facie* ground for implying at law a request; but the Court is at liberty to resist this *prima facie* inference if warranted by the peculiar circumstances of the case. *Ib.*

A director vacated his office automatically by bargaining for a secret commission on the sale of certain property to the company. The fact was unknown to the company, and the director continued to act and to receive his fees as director. He was subsequently re-elected to office in the ordinary course on his supposed retirement by rotation. At the time of this re-election the sale in question was completed, with the exception of the payment of the secret commission, for which the director had a lien:—*Held*, that the bare existence of this lien was not a sphere of interest in the contract on the part of the director in any degree coincident with the sphere of interest of the company—that the interest of the director and the interest of the company no longer came into conflict, and accordingly that the director did not vacate his office on re-election by reason of the existence of the lien. *Held* also, that, although the director, during the period between his vacating his office, and his re-election, had rendered services to the company which had been accepted by them, yet, inasmuch as it was impossible for the Court to believe that the company would ever have requested him to render these services had they been aware of the true state of the facts, the Court could not imply a request for these services on the part of the company from the mere fact of their ignorant acceptance of them; and accordingly that the services rendered did not amount to a legal consideration for the fees paid for them, and that the company were therefore entitled

to recover these fees as money had and received. *Ib.*

Defective Appointments.—See POWERS, *infra*.

(b) *Qualification.*

Shares—"Holding in his own right"—**Bankruptcy.**—Although since *Pulbrook v. Richmond Consolidated Mining Co.* (48 L. J. Ch. 65; 9 Ch. D. 610) beneficial ownership is not essential to holding shares "in his own right" for the purpose of a qualification clause in articles of association, yet the shareholder must hold in such a way that the company may safely deal with the shares as his—*Bainbridge v. Smith* (41 Ch. D. 462). Accordingly, a director does not hold shares "in his own right" within the meaning of a qualification clause where the trustee in his bankruptcy has given notice claiming the shares. *Sutton v. English and Colonial Produce Co.*, 71 L. J. Ch. 655; [1902] 2 Ch. 502; 87 L. T. 438; 50 W. R. 571; 10 Manson, 101—Buckley, J.

—**Charging Order**—"In his own right."—*Seemle*, the words "in his own right" have not the same meaning for the purpose of a charging order under the Judgments Act, 1838, s. 14, as they have for the purpose of a qualification clause in articles of association. In the former case beneficial interest is required. *Ib.*

—**"Hold in his own right"**—**Holding as Liquidator.**—A person who is entered on a company's register as holding shares as liquidator of another company does not hold the shares "in his own right" so as to acquire a qualification as director under an article requiring a director to hold his share qualification "in his own right." *Boschoek Proprietary Co. v. Fuke*, 75 L. J. Ch. 261; [1906] 1 Ch. 148; 94 L. T. 393; 54 W. R. 359; 13 Manson, 100; 22 T. L. R. 196—Swinfen Eady, J.

—**Implied Agreement to take such Shares**—**Registration—Resignation—Share Qualification of Director Raised after Appointment of Director**—"Ceases to hold qualification."—By a special resolution of a company incorporated under the Companies Acts, 1862 to 1893, the share qualification of the directors was raised from 50 to 250 shares:—*Held*, that the directors did not thereby "cease" to hold their qualifications, and necessarily vacate their offices under the provisions of section 3, sub-section 2 of the Companies Act, 1890. *Molineaux v. London, Birmingham, and Manchester Insurance Co.*, 71 L. J. K.B. 848; [1902] 2 K.B. 589; 87 L. T. 324; 51 W. R. 36—C.A.

A person who accepts an appointment as director knowing that the holding of a certain number of shares in the company is a necessary qualification, and acts as director, must be held to have contracted with the company that he will, within a reasonable time, obtain the requisite shares either by transfer from existing shareholders or directly from the company. *Ib.*

Where a director takes an active part in a scheme for increasing the share qualification of the directors of a company, the reasonable time may begin to run before the date of the second confirmatory resolution of the members, and

ends on the first occasion when he does an important act as director after that date. *Ib.*

Disqualification—Place of Profit under the Company—Debentures—Trusteeship of Covering Deed—Remuneration.—The trusteeship of a deed covering or securing debentures, the trustees of which deed are appointed and paid, though not removable, by the company, is a place of profit under the company, within the meaning of an article vacating a director's office "if he accepts or holds any other office or place of profit under the company." *Astley v. New Tivoli, Lim.*, 68 L. J. Ch. 90; [1899] 1 Ch. 151; 79 L. T. 541; 47 W. R. 326; 6 Manson, 64—North, J.

(c) *Powers of.*

Management—Articles of Association—Resolution of Shareholders at General Meeting—Refusal of Directors to Carry Out—Sale of Assets of Company.—On the requisition of certain shareholders in the plaintiff company a meeting of the company was convened by the directors in January, 1906, and a resolution was then passed by a simple majority for the sale of the business to a new company, and the directors were directed to cause the seal of the company to be affixed to a contract to effect the sale which had been prepared and was before the meeting. The directors were of opinion that it was not in the interest of the company that the contract should be carried out, and they declined to comply with the resolution. An action was brought by the company, and a shareholder on behalf of himself and all other shareholders, asking that the directors might be ordered to affix the seal of the company to the contract, and for other incidental relief. Among the objects of the company stated in the memorandum of association was "to sell the undertaking of the company, or any part thereof." By the articles of association the management of the business of the company was vested in the directors, and they had power to do all such things as might be done, and were not by the articles or by statute expressly required to be done, by the company in general meeting, but subject to any regulations which might be made from time to time by the company by extraordinary resolution; and they had power to sell or deal with any property of the company on such terms as they might think fit. A director could only be removed from office by a special resolution of the company:—*Held*, that the directors were in the position of managing partners, and their mandate was the mandate of the whole body of shareholders, not of the majority only. If that mandate had to be altered, it could only be done by the machinery provided by the articles, and it was not competent for a simple majority of the shareholders by a resolution at an ordinary general meeting to alter the mandate and override the discretion of the directors. *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame*, 75 L. J. Ch. 437; [1906] 2 Ch. 34; 94 L. T. 651; 13 Manson, 156; 22 T. L. R. 378—C.A.

Power of Reduced Directorate—Quorum of Directors—Assignment by Debtor to Director with Knowledge of Defect.—Where articles of association provide that the number of directors

of a company shall not be less than three, and that the directors may act notwithstanding any vacancy, and the directors contract a loan upon security when their number has been reduced to two, the act of the two directors will be binding on the company, notwithstanding their reduction below the number fixed by the articles as necessary to form a quorum. *Scottish Petroleum Co., In re* (23 Ch. D. 413), followed. *Bank of Syria, In re; Owen and Ashworth's Claim; Whitworth's Claim*, 70 L. J. Ch. 82; [1901] 1 Ch. 115; 83 L. T. 547; 49 W. R. 100; 8 Manson, 105—C.A.

One of the two directors who takes an assignment from an outside creditor of a debt contracted by the company under the above-mentioned circumstances will be entitled to stand in the position of the creditor and will not be debarred from claiming against the company because he was a party to the contracting of the loan when the directorate was below its proper number. *Ib.*

Disability of Directors to Vote—Formation of Quorum.—A director of a company is not entitled to join in forming a quorum for the consideration of matters with regard to which he is not entitled to vote. *Greymouth-Point Elizabeth Railway and Coal Co., In re; Yuill v. Greymouth-Point Elizabeth Railway and Coal Co.*, 73 L. J. Ch. 92; [1904] 1 Ch. 32; 11 Manson, 85—Farwell, J.

Fiduciary Position—Purchase of Shares from Shareholder — Non-disclosure.—Shareholders asked the secretary of the company to find a purchaser for their shares in the company. The shareholders caused an independent valuation of their shares to be made by competent persons. The shares were bought by the chairman of directors of the company, and transferred to him and to his two nominees. At the time of the sale negotiations were proceeding between the chairman of directors and a third party with a view to ascertain the terms upon which the undertaking of the company would be sold, a transaction within the powers of the directors by the constitution of the company. Neither fraud nor any other malpractice could be imputed to the chairman of directors:—*Held*, that the directors were not precluded from purchasing the shares, and that the sale and purchase could not be set aside. *Percival v. Wright*, 71 L. J. Ch. 846; [1902] 2 Ch. 421; 51 W. R. 31; 9 Manson, 443—Swinfen Eady, J.

Stamped Proxies—Form of Proxy—Canvassing for Votes.—A company may legitimately do, and pay out of its assets for, all such acts as are reasonably necessary for procuring its members to express their views upon any question affecting the management of the company's affairs. *Peel v. London and North-Western Railway* (No. 1), 76 L. J. Ch. 152; [1907] 1 Ch. 5; 95 L. T. 897; 14 Manson, 30; 23 T. L. R. 85—C.A.

Directors of a railway company, previously to a half-yearly meeting of stockholders at which a discussion was about to arise on certain questions of policy relating to the management of the railway, on which there was a difference of opinion between the directors and certain stockholders, sent out circulars stating their case, and printed and stamped proxy papers

with the names of three of the directors printed thereon, and stamped envelopes for the return thereof. They also caused some of the officers of the company to interview certain of the stockholders with the view of obtaining their votes in support of the directors' policy:—*Held*, that the directors had the right and duty of putting before the stockholders what they believed to be the right policy in the interests of the company, and after giving the necessary information might send out stamped proxy papers with the return postage thereof, and endeavour to obtain the stockholders' support, and might pay for the expenses so incurred out of the company's funds. Decision of Kay, J., in *Studdert v. Grosvenor* (55 L. J. Ch. 689; 33 Ch. D. 528), so far as it was to the contrary effect, overruled. *Ib.*

Interim Directors of Railway Company Continuing in Office—Power to Bind Company.—An act was obtained in 1896 for the incorporation of a railway company which (*inter alia*) enacted that the first directors should be four persons named and three others to be nominated by them; that these directors should hold office until the first meeting of shareholders, which was directed to be held six months after the passing of the Act; and that the qualification of a director should be a holding of fifty shares. In 1900 the undertaking was abandoned, no capital having been subscribed and no shares issued. The board was not filled up, the only acting directors being the four persons named by the Act. In an action for the distribution of the parliamentary deposit, which was the only asset of the company, several persons who had been employed by the company after its incorporation, both before and after the lapse of the six months, claimed as creditors of the company. The depositors disputed these claims on the ground that there never had been a legally constituted board which had authority to bind the company:—*Held*, that so long as the four directors named had not been superseded by the appointment of new directors, and professed to represent the company as directors, they had power to bind the company in a question with the public. *Muir v. Forman's Trustees*, 5 F. 546—Ct. of Sess.

Validation of Acts Done Irregularly as Directors.—By a company's articles it was provided that all acts done by any person acting as a director should, notwithstanding that it might be afterwards discovered that there was some defect in the appointment of such person, be valid as if such person was duly qualified to be a director. A person *bona fide* believing that he was entitled to act as a director of the company, although legally he was not so entitled, caused a notice to be sent out convening a meeting of the shareholders in the company:—*Held*, that the notice which was subsequently adopted by another director was validated by the article in question. *Transport, Lim. v. Schonberg*, 21 T. L. R. 305—Warrington, J.

Acts Done as Director after Vacation of Office—Validation—Articles of Association—Construction.—One of the articles of association of a company incorporated under the provisions of the Companies Acts, 1862 to 1893, provided, "all acts done at any meeting of the directors

or of a committee of such directors or by any person acting as such director, shall, notwithstanding that it shall afterwards be discovered that there was some defect in the appointment of such directors, or committee or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director".—*Held*, that the provisions of this article and of section 67 of the Companies Act, 1862, validated the acts of a person *bona fide* acting as director who had been originally appointed a director, but had vacated his office, according to the constitution of the company, on his appointment as secretary thereof, where the fact had been overlooked. *Dawson v. African Consolidated Land and Trading Co.* (67 L. J. Ch. 47; [1898] 1 Ch. 6) followed. *British Asbestos Co. v. Boyd*, 73 L. J. Ch. 31; [1903] 2 Ch. 439; 88 L. T. 763; 51 W. R. 667—Farwell, J.

(d) Liability.

(See now the Companies Act, 1907, s. 32, enabling the Court to relieve directors where they have acted "honestly and reasonably.")

Reliance of Director on Officers of Company—Extent of Director's Responsibilities.—The director of a company is bound to give his attention to the matters brought before him at meetings of the board, and to exercise his judgment as a man of business upon them. In the absence of ground for suspicion he is entitled to rely upon the judgment, information, and advice of the officials of the company, and is not bound to examine entries in the company's books, but is entitled to rely on the examination of those whose special duty it is to attend to such details. *Dovey v. Cory*, 70 L. J. Ch. 753; [1901] A. C. 477; 85 L. T. 257; 50 W. R. 65; 8 Manson, 346—H.L. (E.)

It is not the function of any tribunal to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs, but to deal with each particular case on its own facts and circumstances. *Ib.*

A director who attends meetings, makes enquiries, is assured by the officials that provision has been made for bad debts and believes such assurances, and examines such matters as are brought before him in the ordinary course of business, cannot be made liable in the liquidation of the company in respect of losses incurred by improper credits to directors and customers or the payment of dividends out of capital. *Ib.*

—Conduct of Officers—Liquidation of Bank—Alleged Negligence.—In the liquidation of a company a director cannot be made personally liable on the ground that he has trusted the regularly authorised officers of the company and has failed to detect, and been misled by, misrepresentation or concealment by such officers when there was no reason for doubting their fidelity. *Dovey v. Cory* (70 L. J. Ch. 753; [1901] A.C. 477) followed. *Préfontaine v. Grenier*, 76 L. J. P.C. 4; [1907] A.C. 101; 95 L. T. 623; 13 Manson, 401; 23 T. L. R. 27—P.C.

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The respondent was president of a bank which became insolvent, and was specially remunerated for his services. The shareholders at the annual general meeting appointed three of their number to constitute a board of audit to look into the operations of the bank, to examine its books and papers, and to report thereon, but these had failed to discover the irregularities which caused the failure of the bank:—*Held*, that the respondent was not personally liable for the loss sustained by the bank. *Ib.*

Mistakes of Judgment.—*Per* LINDLEY, M.R., and COLLINS, L.J.—If directors act within their powers and with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company which they represent, they discharge both their legal and equitable duty to the company, and will not be liable for mistakes or errors of judgment committed, even though such mistakes or errors affect the relations of their company to another company of which they are also members, and though the interests of the two companies may conflict. *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate*, 68 L. J. Ch. 699; [1899] 2 Ch. 392; 81 L. T. 334; 48 W. R. 74; 7 Manson, 165—C.A.

Misstatements in Report.—Where a director joins in a statement in a report that due provision has been made for bad and doubtful debts before the declaration of a dividend, which is untrue, or makes other untrue representations as to the condition of the company, he will not, if he makes the statements honestly believing them to be true, and took such care to ascertain their truth as was reasonable at the time, be held liable for the consequences of his misstatements on the ground either of fraud or negligence. He will not be held liable for negligence in trusting the officers of the company not to conceal what it was their duty to report to him, if he has no suspicion that anything is wrong, although he might have discovered that he was being deceived by the officers.

Where after the resignation of a director his name appears as that of a director in a report issued to the shareholders, but he took no part in drawing up the report or in recommending the dividend then proposed to be paid, he will not, even if he was aware of his name being on the report, be liable in respect of the statements in the report, or the recommendation of the dividend.

The principles laid down in *Lagunas Nitrate Co. v. Lagunas Syndicate* (68 L. J. Ch. 699; [1899] 2 Ch. 392) and *Denham & Co., In re* (25 Ch. D. 752) applied. *National Bank of Wales, In re, Cory's Case*, 68 L. J. Ch. 634; [1899] 2 Ch. 629; 81 L. T. 363; 48 W. R. 99—C.A. And see *Dovey v. Cory* (*supra*).

Fraudulent Transfer of Business to Company—Avoidance by Trustee—Conversion—Waiver of Tort—Account.—Where in the case of a conversion by two joint tort-feasors, one of whom, as between themselves, has acted as principal and one as agent, the injured party elects to waive his remedy for damages against the agent and to proceed against him

by way of account, the injured party is entitled to demand from such agent an account of so much of the converted property, or of its proceeds, as may still be actually remaining in his hands at the time of taking the account. But he is not entitled to demand an account of so much of the converted property, or of its proceeds, as such agent has duly handed over, in the course of his agency, to his principal. *Ely, In re*; *Trustee, ex parte*, 48 W. R. 698—C.A. Affirming, 82 L. T. 501—D.

Partner or Shareholder in Concern Contracting with Company—Profit Acquired.—[Articles of association of a company provided that the rules therein contained as to the vacation of the office of a director if he was concerned in the profits of any contract with the company without setting forth in writing the nature of his interest should be subject to the exception that "no director shall vacate his office by reason of his being a member of any . . . company, or partnership which has entered into contracts with, or done any work for, the company; or by reason of his being interested, either in his individual capacity or as a member of any company . . . or partnership, in any adventure or undertaking in which the company may also have an interest," with a provision in respect of voting which prevented his vote being counted in such a case:—*Held*, that, having regard to the above article, a director was not liable to account for profits arising out of contracts with another company or partnership in which he was a shareholder or partner to the knowledge of the company. Decision of LORD HATHERLEY, L.C., in *Imperial Mercantile Credit Association v. Coleman* (40 L. J. Ch. 262; L. R. 6 Ch. 558) followed. *Costa Rica Railway v. Forwood*, 70 L. J. Ch. 385; [1901] 1 Ch. 746; 84 L. T. 279; 49 W. R. 337; 8 Manson, 374—C.A.

Costs of Litigation—Misfeasance not Causing Monetary Loss.—*J., M., and I.* were directors of a joint-stock company which was being wound up voluntarily. In the course of the liquidation it appeared that cheques signed by *J.* and *M.* had been drawn against the bank account of the company for purposes in which *I.* alone was interested, but that on the whole account lodgments had been made by *I.* to the credit of the company to an amount larger than the sums drawn out upon the cheques so signed by *J.* and *M.* On a summons by the liquidator under section 165 of the Companies Act, 1862, to determine whether these sums had been expended *ultra vires* and in breach of trust and, if so, that the director should repay the said sums, it was found that no money loss had been sustained by the company, but the Court decided that the directors were guilty of gross neglect and breach of duty, and that such neglect and breach of duty were the cause of the litigation, and ordered that the directors should pay the cost of the summons and enquiry:—*Held*, that the Court had jurisdiction to make the order that the directors should pay the costs, although the claim of the liquidator for repayment of money had failed. *Ireland & Co., In re*, [1905] 1 Ir. R. 133—C.A.

Purchase of Property by a Director and Resale at a Profit to the Company.—[When a director, not purporting to act on behalf of the

company, buys a property which he sells again at an enhanced price to the company, he is, in accordance with the principles laid down in *New Sombrero Phosphate Co. v. Erlanger* (48 L. J. Ch. 73; 3 App. Cas. 1218), under no obligation to account to the company for the profits so made. *Burland v. Earle*, 71 L. J. P.C. 1; [1902] A.C. 83; 85 L. T. 553; 50 W. R. 241; 9 Manson, 17—P.C.

(e) *Fraud.*

Fraudulent Balance-sheets—Director—Prosecution at Expense of Assets—Discretion of Court—Principles on which Exercised.—[In determining whether the Court should under section 167 of the Companies Act, 1862, direct a criminal prosecution at the expense of the assets of a company in course of winding-up the Court must consider, first, whether a *prima facie* case for conviction is made out; and if it is satisfied on this head, it must not allow a prosecution to be instituted for the personal profit or to satisfy the vengeance of those desiring a prosecution, but must enquire whether, if the persons at whose expense the prosecution would be instituted were not a class but a single person—an upright and honest man desirous as a good citizen to do his duty to the State—he would think it his duty to prosecute at his own expense. If that question be answered in the affirmative, a prosecution ought to be directed at the expense of the assets, notwithstanding the dissent of members of the class, at any rate if a substantial majority of the class desire a prosecution. *London and Globe Finance Corporation, In re*, 72 L. J. Ch. 368; [1903] 1 Ch. 728; 88 L. T. 194; 51 W. R. 651; 10 Manson, 198—Buckley, J.

Observations upon the weight to be attached to the fact that the Attorney-General has already refused to direct a prosecution by the Public Prosecutor. *Ib.*

Advance out of Funds of Company on Fraudulent Misrepresentations of Director—Insufficient Security—Measure of Damages.—[Where the directors of the plaintiff company had been induced by the fraudulent misrepresentations of the defendant, who was one of their number, to make an advance out of the funds of the plaintiff company on the security of a second debenture issued by another company in which the defendant was personally interested, and in the result the debenture proved to be an insufficient security, so that loss was occasioned to the plaintiff company, it was held that the measure of damages to which the plaintiff company was entitled was the difference between the money advanced by it and the value of the debenture at the date of issue. *Exploring Land and Minerals Co. v. Kolckmann*, 94 L. T. 234—C.A.

(f) *Misfeasance.*

Misapplication of Company's Funds—Agreement among Directors not to Enquire as to Price Paid for each Business Sold to Company—Untrue Statements.—[Directors who purposely abstain from making enquiries, in pursuance of an understanding between them to that effect, into

the prices being paid to each other for properties sold to the company are guilty of a gross dereliction of duty; and when, under such circumstances, they put forward a statement in a prospectus as to the bases upon which the prices have been arrived at, which is untrue in fact, they are liable, in an action of deceit, for a representation untrue in fact and made recklessly, careless whether it be true or false. A person who makes a statement under such circumstances can have no real belief in the truth of what he states. *Coats v. Crossland*, 20 T. L. R. 800—Swinfen Eady, J.

— **Bona fide Distribution of Capital Sum amongst Shareholders—Recovery by Liquidator from Directors—Right to Recover from Shareholders.**—The directors of a limited company by agreement with the shareholders in good faith distributed a capital sum, as such, amongst them, the company at that time having no debts. Subsequently a winding-up order was made against the company and the liquidator recovered from the directors the whole sum so distributed:—*Held*, that, as the payment by the directors to the liquidator was compulsory and in relief of an existing liability on the part of the shareholders, and as the illegality of the distribution did not render the directors and shareholders joint tort-feasors, the directors were entitled to recover from each shareholder the part of the sum which had been paid to him. *Moxham v. Grant*, 69 L. J. Q.B. 97; [1900] 1 Q.B. 88; 7 Manson, 65—C.A. Affirming, 81 L. T. 481; 48 W. R. 130—Lord Russell of Killowen, C.J.

— **Wrongful Appropriation of Shares—Measure of Damages—Highest Market Value.**—Although it is a general rule that wrongdoing directors will be held liable for any property of the company which has wrongfully come to their hands, its value being fixed at the highest possible price it has ever attained, yet in the case of a large number of shares wrongfully allotted to directors they will not be held liable for the highest market value the shares have ever reached when sold in small lots, if it appears that if a large number of shares had been thrown on the market at the same time, the price would have been substantially lowered. *Shaw v. Holland*, 69 L. J. Ch. 621; [1900] 2 Ch. 305; 82 L. T. 782; 48 W. R. 680; 7 Manson, 409—C.A.

— **Breach of Trust—Ultra Vires—Parties to Sue—Laches—Statute of Limitations—Trustee Act, 1888.**—In July, 1890, the plaintiffs contracted with the Railways and General Company, Lim., for the sale of certain stock in the Wrexham, Mold, and Connah's Quay Railway. The real purchaser, however, was the Manchester, Sheffield, and Lincoln Railway, and the money was paid by that company in two sums, the larger on August 5, and the smaller on October 10, 1890. These payments were then *ultra vires*. But by their Act of 1891 they were authorised to subscribe towards the undertaking of the Wrexham Company, and to hold shares therein, and a resolution authorising the Manchester Company to so subscribe was agreed to the day after the Act passed. The books of the Manchester Company did not accurately represent the facts. The writ was issued on August 6,

1896, claiming against three of the directors repayment to the company of these sums:—*Held*, first, that the purchase was not a subscription within the meaning of the Act of 1891, and was therefore *ultra vires*; secondly, that as to the larger sum, the writ not having been issued within six years and no fraud being alleged, the Statute of Limitations afforded a good defence; thirdly, that, as to the smaller sum, the evidence shewed that the plaintiffs had purchased shares to enable them to bring the action, and that they were aware of the purchase by the Manchester Company before October, 1890, and that, under the circumstances, therefore, the action ought to have been brought by the company and not by the plaintiffs. Action accordingly dismissed with costs. *Whitwam v. Watkin*, 78 L. T. 188—Stirling, J.

— **Payment of Dividends out of Capital—Dividends Paid out of Excess of Annual Receipts over Outgoings—Losses Charged against Capital.**—There is no law which prohibits a limited company, even a limited banking company, from paying dividends unless its paid-up capital is kept intact. Consequently, where directors declare dividends out of the excess of the receipts over the outgoings in each year, without making provision for losses in previous years, although such a mode of procedure may ultimately exhaust the paid-up capital and may be an improper mode of conducting business, the dividends cannot be said to have been paid out of capital, and the directors cannot be held liable on that ground. The principle of *Lee v. Neuchatel Asphalte Co.* (58 L. J. Ch. 408; 41 Ch. D. 1) and *Verner v. General and Commercial Investment Trust* (63 L. J. Ch. 456; [1894] 2 Ch. 239) applied. *National Bank of Wales, In re; Cory's Case*, 68 L. J. Ch. 634; [1899] 2 Ch. 629; 81 L. T. 363; 48 W. R. 99—C.A.

Excluding cases where payments are obviously improperly charged against capital so as to swell the apparent profits, what losses can be properly charged to capital and what to income is a matter for business men to determine, and there is no hard-and-fast legal rule on the subject. *Id.*

— **Right of Liquidator to Recover.**—There is nothing to prevent a liquidator recovering dividends improperly paid out of capital, although it is not shewn that the company is insolvent as regards creditors. *Id.*

— **Payment of Dividend out of Assets—Appreciation of Assets—Ultra Vires.**—A new company purchased the assets of an old company, and there was included in such assets a debt, then considered valueless, due to the old company. For some time this debt was treated as of no value in the new company's annual accounts, but ultimately it was paid in full:—*Held*, on motion for injunction by a shareholder, that the company ought to be restrained from distributing the amount so received as dividend except with reference to the other business or assets of the new company. *Foster v. New Trinidad Lake Asphalte Co.*, 49 W. R. 119—Byrne, J.

— **Resolution of Board to Pay Interim Dividend.**—
12—2

Profits not Earned—Directors Present at Board Meeting Confirming Minutes of Previous Meeting, including Resolution to Pay Dividend—Liability for Acts of Co-directors.]—By the articles of a company it was provided that dividends were only to be paid out of profits, and that the directors could declare an interim dividend as and when necessary. At a board meeting at which the defendant directors were absent an interim dividend was declared. At the meeting of the directors after this dividend had been paid, at which the defendant directors were present, the minutes of the previous meeting were read, including the resolution to declare the interim dividend. The defendant directors did not know, nor was there anything to suggest to them, that their co-directors had acted otherwise than properly in declaring the dividend. It having been found that there had been no profits made and that the dividend had been paid out of capital, the defendant directors were sued for the return of the dividends they had received:—*Held*, that by merely taking part in confirming the resolution of the board meeting at which they were not present they did not make themselves responsible, and having received the money innocently they were not liable to refund it. *Lucas v. Fitzgerald*, 20 T. L. R. 16—Lord Alverstone, C.J.

Secret Profits—Agreement by Director with Managers to Share Bonus.]—A, one of the directors of a company, entered into an agreement with the managers of the company to the effect that if the managers should receive a bonus of 700l. from the company on the sale of its business, A should receive 200l. from the managers. The managers having received the bonus of 700l., and refused to pay the 200l., A sued them for same:—*Held*, that the contract was illegal and could not be enforced. *Laughland v. Millar, Laughland & Co.*, 6 F. 413—Ct. of Sess.

— Agreement for Sale of Undertaking—Compensation to Directors—Power to Sanction.]—It is not *ultra vires* of a company governed by the Companies Clauses Act, 1845, to enter into an agreement for the sale of its undertaking to another company by reason of an agreement providing for payment of certain sums of money by the purchasing company to the directors and secretary of the selling company as compensation for their not being taken on to the management of the purchasing company. *Southhall v. British Mutual Life Assurance Soc.* (40 L. J. Ch. 97, 698; L. R. 11 Eq. 65; L. R. 6 Ch. 614) discussed. *Kaye v. Croydon Tramways Co.*, 67 L. J. Ch. 222; [1898] 1 Ch. 358; 78 L. T. 237; 46 W. R. 405—C.A.

The fact that the directors of such a company are interested under a contract to which their company is to be a party does not under section 85 of the Companies Clauses Act, 1845, make the contract invalid, and incapable of being adopted by the company.

Per VAUGHAN WILLIAMS, L.J.—If the money paid by the purchasing company to the directors of the selling company were in fact a bonus paid to them in consideration of their facilitating the contract, it would not be within the power of the majority of the shareholders

of the selling company to bind the minority to accept the contract. *Ib.*

— Notice of Meeting—Sufficiency—Purpose for which Meeting Called.]—To enable such a company to sanction an agreement for the sale of its undertaking, and the compensation of its directors and secretary, proper notices under section 71 of the Companies Clauses Act, 1845, of the meeting at which such sanction is to be given, must be sent to the shareholders. A notice, which says that the meeting is to be held to consider, and if thought fit adopt, such an agreement, referring to it simply as an agreement for the sale of the undertaking and assets of the company, does not sufficiently "specify the purpose for which the meeting is called" within the section. *Ib.*

Misfeasance Summons—Damages—Interest—Deduction of Income Tax.]—Where upon a misfeasance summons against a director of a company for payment of dividends out of capital an order has been made for the payment by him of a certain sum with interest at a stated rate by way of damages, he is not entitled to deduct income tax from the amount of the interest payable. *Per WRIGHT, J. National Bank of Wales, In re; Cory's Case*, 68 L. J. Ch. 634; [1899] 2 Ch. 629; 81 L. T. 363; 48 W. R. 99.

(g) *Remuneration.*

Matter of Internal Management.]—The amount of remuneration to be paid to directors and officers of a company is one of the internal management of the company. *Burland v. Earle*, 71 L. J. P. C. 1; [1902] A.C. 83; 85 L. T. 553; 50 W. R. 241; 9 Manson, 17—P.C.

Profits—Remuneration for Services Rendered—Liability to Account.]—Directors' fees are not profits earned by the use of qualification shares, but are remuneration for services rendered under contract between the directors and the company. Therefore, where directors of a company become directors of another company for the benefit of their own company, and hold as their qualification for directorship in that other company shares in it which have been purchased by their own company, and their own company goes into liquidation, the liquidator cannot make them account in the winding-up for directors' fees received by them as directors in the other company. *Dover Coalfield Extension, Lim., In re*, 76 L. J. Ch. 434; [1907], 2 Ch. 76; 96 L. T. 837; 14 Manson, 156—Warrington, J. Affirmed [1908] 1 Ch. 65; 24 T. L. R. 52—C.A.

Qualification—Contract to Accept Office.]—Where articles of association of a company provide that the qualification of a director shall be the holding of shares of the company of the nominal amount of 250l., and that a first director may act before acquiring his qualification, but shall in any case acquire the same within one month from his appointment, and unless he shall do so shall be deemed to have agreed to take the said shares from the company, and the same shall be forthwith allotted to him accordingly, one of the first directors who has not acquired his shares as required by

the articles, but has acted as a director, is entitled to his share of the remuneration provided by the articles notwithstanding the absence of qualification. *Anglo-Austrian Printing and Publishing Co., In re; Isaac's Case* (61 L. J. Ch. 481; [1892] 2 Ch. 158), followed. *Salton v. New Beeston Cycle Co. (No. 1)*, 68 L. J. Ch. 370; [1899] 1 Ch. 775; 80 L. T. 521; 47 W. R. 462; 6 Manson, 238—Cozens-Hardy, J.

Apportionment of Remuneration.—Where articles provide that the directors shall be entitled to receive a certain sum "by way of remuneration in each year," no remuneration can be claimed except for a complete year of service. *Id.*

By the articles of association of a joint-stock company it was provided as follows: "The directors shall be paid out of the funds of the company by way of remuneration for their services . . . the sum of 125*l.* per annum per director . . . and the same shall be divided amongst them in such proportion and manner as the directors by agreement may determine, and, in default of such determination, equally":—*Held*, that, upon the true construction of the articles, a director who had retired before the end of a complete year of service was not entitled to claim any share of the directors' remuneration. *Salton v. New Beeston Cycle Co. (No. 1)* (68 L. J. Ch. 370; [1899] 1 Ch. 775) approved. *Swabey v. Port Darwin Gold-Mining Co.* (1 Megone, 385) distinguished. *Inman v. Ackroyd and Best*, 70 L. J. K.B. 450; [1901] 1 K.B. 613; 84 L. T. 344; 49 W. R. 369; 8 Manson, 291—C.A.

"To be paid at such times as the directors may determine"—**Condition Precedent.**—The articles of association of a company provided for payment of directors' fees in these terms: "The directors shall be allowed to receive as a remuneration for their services, and there shall be allowed to them out of the funds of the company, . . . the sum of 200*l.* per annum each . . . to be paid at such times as they may determine . . .":—*Held*, that it was a condition precedent to the right of a director to remuneration that the time for payment should have been determined by the directors. *Nell v. Atlanta Gold and Silver Consolidated Mines* (11 Times L. R. 407) commented on. *Caridad Copper-Mining Co. v. Swallow*, 71 L. J. K.B. 601; [1902] 2 K.B. 44; 86 L. T. 699; 50 W. R. 565; 9 Manson, 336—C.A.

Travelling Expenses.—A director of a joint-stock company who is paid for his services has no right, in the absence of special circumstances, to be paid his expenses of travelling to and from board meetings out of the company's funds, unless such payment is authorised by the instrument which regulates the company or by the shareholders at a properly convened meeting, and, in the absence of such authority or special circumstances, a resolution of the directors giving their travelling expenses to all the directors is bad. *Young v. Naval and Military and Civil Service Co-operative Society of South Africa*, 74 L. J. K.B. 302; [1905] 1 K.B. 687; 92 L. T. 458; 53 W. R. 447; 12 Manson, 212; 21 T. L. R. 293—Farwell, J.

Special Remuneration of Directors for Extra

Services—Capital Outlay—Articles of Association.—One of the articles of association of a company provided that, if any of the directors should be called upon to perform extra services on behalf of the company, the directors or the company might remunerate him or them by a fixed sum or by a percentage of profits or otherwise as might be determined. By another article the directors were empowered to give to any director a commission or a fixed sum on any particular business or transaction, or a share in the general profits of the company, which should be treated as working expenses or capital outlay of the company. The company in general meeting passed a resolution to pay to each of the directors for their services in effecting the sale of the company's business to another company the sum of 250*l.* as a commission or fixed sum to be treated as capital outlay:—*Held*, that the sums ought to be debited to profit and loss account, and not treated as a capital outlay. *Ashton v. Honey*, 23 T. L. R. 253—Parker, J.

Per Annum—Apportionment.—Articles of association of a company incorporated under the Companies Acts, 1862 to 1890, provided that "the directors shall be paid out of the funds of the company as follows—namely, a sum of 150*l.* per annum to the chairman; and a sum of 100*l.* per annum to each ordinary director by way of remuneration for their ordinary services":—*Held*, that the fees were for a whole year's services, and were not apportionable. *Salton v. New Beeston Tyre Co.* (68 L. J. Ch. 370; [1899] 1 Ch. 775) considered and applied. *Central De Kaap Gold Mines, In re*, 69 L. J. Ch. 18; 7 Manson, 82—Wright, J.

Proof—Fixed Amount—Debt Due to Member of Company in Character of Member.—Where the articles of association of a company require that the directors should hold a certain share qualification and prescribe a fixed sum for their remuneration, and the directors are employed and accept office on the footing of such articles, the articles become embodied in the contract between them and the company, and in the winding-up of the company they are entitled to rank with the ordinary creditors of the company in respect of any fees which may be due to them at the commencement of winding-up. *Dale & Plant, Lim., In re* (59 L. J. Ch. 180; 43 Ch. D. 255), followed. *Leicester Club and County Racecourse Co., In re; Cannon, ex parte* (55 L. J. Ch. 206; 30 Ch. D. 629), distinguished. *New British Iron Co., In re; Beckwith, ex parte*, 67 L. J. Ch. 164; [1898] 1 Ch. 324; 78 L. T. 155; 46 W. R. 376; 5 Manson, 168—Wright, J.

Resolution to Forego Fees—Validity.—It is open to the directors of a company, with regard to remuneration which is not yet fully earned by them, to make, under the form of a resolution passed by them to renounce such remuneration, a new contract with the company, varying in the aggregate the several contracts which the directors have already severally made by accepting office as directors of the company. *Lambert v. Northern Railway of Buenos Ayres* (18 W. R. 180) distinguished. *London and Northern Bank, In re; McConnell's Case*, 70 L. J. Ch. 251; [1901] 1 Ch. 728; 84 L. T. 557; 9 Manson, 91—Wright, J.

Debenture - holder's Action — Directors Appointed Receivers—Double Remuneration.]—Two of five directors of a company were appointed receivers and managers in a debenture-holder's action:—*Held*, that they were entitled to receive their directors' fees as well as their remuneration as receivers and managers. *South-Western of Venezuela Railway, In re*, 71 L. J. Ch. 407; [1902] 1 Ch. 701; 86 L. T. 321; 50 W. R. 300; 9 Manson, 193—Buckley, J.

Income Tax on Directors' Fees.]—Where not authorised by the articles of association, the payment by the directors of the income tax on their fees out of the company's funds is an illegal payment. *Boschoek Proprietary Co. v. Fuks*, 75 L. T. Ch. 261; [1906] 1 Ch. 148; 94 L. T. 398; 54 W. R. 359—Swinfen Eady, J.

(2) MANAGER.

Resignation of Office by Managing Director—Withdrawal before Acceptance—Vacation of Office—Articles of Association—Construction.]—In the absence of any provision making acceptance of resignation necessary, a managing director vacates his office on giving notice to the company of his resignation; and he cannot withdraw his resignation without the consent of the company, even if, under the articles of association, the vacation of office is not to take effect unless the directors pass a resolution to the effect that the director has vacated his office. *Glossop v. Glossop*, 76 L. J. Ch. 610; [1907] 2 Ch. 370; 97 L. T. 372; 14 Manson, 246—Neville, J.

Power of Managing Director and Secretary to Bind Company.]—*See* SHARES.

Publication of False Statements—Larceny Act.]—*See* CRIMINAL LAW.

(3) SECRETARY.

Secretary Acting for Two Companies—Knowledge in One Character—Presumption of Notice in Other Character.]—Where a man acts as secretary of two companies, it is not true as a general proposition that a fact which comes to his knowledge as secretary of one company is notice to him as secretary of the other company from the mere existence of the common relationship. In order to make it notice, it must be shewn that it was his duty to the first company to communicate his knowledge to the second company. *Fenwick, Stobart & Co., In re; Deep Sea Fishery Co.'s Claim*, 71 L. J. Ch. 321; [1902] 1 Ch. 507; 86 L. T. 193; 9 Manson, 205—Buckley, J.

Notice of Dishonour—Same Person Secretary of Two Companies.]—*See* BILL OF EXCHANGE.

9. CONTRACTS BY.

Contract on Behalf of Intended Company—Subsequent Adoption of Contract by Company.]—A company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. To obtain such

benefit, a new contract must be entered into by the company on the terms of the old contract. *Kelner v. Baxter* (36 L. J. C.P. 94; L. R. 2 C.P. 174) approved. *Natal Land and Colonisation Co. v. Pauline Colliery and Development Syndicate*, 73 L. J. P.C. 22; [1904] A.C. 120; 89 L. T. 678; 11 Manson, 29—P.C.

Company's Adoption of Contract made before Formation.]—The adoption and confirmation by directors of a contract made before the formation of a company, by persons purporting to act on behalf of the company and others, do not create any contractual relation between the company and the other parties to the contract, or impose any obligation on the company towards such parties. *Johannesburg Hotel Co., In re* (60 L. J. Ch. 391; [1891] 1 Ch. 119), approved. *North Sydney Investment Co. v. Higgins*, 68 L. J. P.C. 42; [1899] A.C. 263; 80 L. T. 303; 47 W. R. 481; 6 Manson, 321—P.C.

Contract with Third Person for Intended Company—Privy—Inferred Contract—Adoption—Right of Action—"Profits available for dividend"—Depreciation Fund.]—On March 3, 1897, the plaintiffs agreed with A. to grant to him, or to an intended company (the defendants), an exclusive licence to use certain patents in consideration of payments to be made by the company, when formed, of a proportion of its "profits available for dividend" after payment of a preferential cumulative dividend of 8 per cent. on a capital of 150,000l., and such sum as the directors should think fit had been set aside as a reserve fund. The licence was granted to A., and on March 5, 1897, he agreed to sell to B., on behalf of the proposed company, the agreement of March 3, and the licence, and other licences, for 120,000l. The company was incorporated on March 8, and adopted the agreement of March 5, but the licence was not actually assigned to them. Their balance-sheet of October, 1899, shewed profits of 20,000l., and they proposed to write off 3,000l. against depreciation and towards the ultimate extinction of the cost of the licences. The action was brought to test their right to do this:—*Held*, first, that there was no direct contract between the plaintiff company and the defendant company which would entitle the plaintiff company to sue the defendant company—*Werderman v. Société Générale d'Electricité* (19 Ch. D. 246) discussed by VAUGHAN WILLIAMS, L.J.; and secondly, that the defendant company were justified in setting aside the 3,000l. out of their income against depreciation before ascertaining the net "profits available for dividend"; and even assuming that the plaintiff company had rights against the defendant company under the agreement, there would have been no money payable to the plaintiff company at the time of the action being brought, and the action must have failed apart from the question of want of privity of contract. *Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*, 71 L. J. Ch. 158; [1902] 1 Ch. 146; 85 L. T. 652; 50 W. R. 177; 9 Manson, 56—C.A.

Solicitor—Work done before Formation of Company—Adoption of Work by Company—Fees on Registration—Liability of Company.]—A company is under no liability in equity to pay for work done before its formation merely

because it has adopted and derived benefit from such work. Where, therefore, solicitors have done work in connection with the formation of a company which is subsequently incorporated, they must, in order to recover their costs of such work from the company, establish a legal claim against the company either on their own behalf or on behalf of some person in whose shoes they are entitled to stand. *English and Colonial Produce Co., In re*, 75 L. J. Ch. 831; [1906] 2 Ch. 435; 95 L. T. 580; 22 T. L. R. 669—C.A.

Per BUCKLEY, J.—They can, however, recover the fees paid by them on the registration of the company, inasmuch as the company is under a statutory liability to pay the same. *Ib.*

Hereford and South Wales Waggon and Engineering Co., In re (45 L. J. Ch. 461, 463; 2 Ch. D. 621, 624), explained and dictum discussed. *Ib.*

Date when Entitled to Commence Business—Contracts Previous to that Date—Contracts "Provisional" only—Contracts for Preliminary Expenses.]—The word "provisional" in subsection 3 of section 6 of the Companies Act, 1900, means that the contracts made by a company before the date at which it is entitled to commence business are to be read as if they contained a provision that they shall not be binding on the company unless and until it becomes entitled to commence business. It makes no difference whether a contract is preliminary or final or one in the course of carrying on the company's business; and if a company never becomes entitled to commence business no contract entered into by it is binding on it, and no one can sue it in respect of any such contract. *Otto Electrical Manufacturing Co., In re; Jenkins' Claim*, 75 L. J. Ch. 682; [1906] 2 Ch. 390; 95 L. T. 141; 54 W. R. 601; 13 Manson, 301; 22 T. L. R. 678—Buckley, J.

Bill of Exchange—Acceptance—Name of Company—Omission of Word "Limited."]—A bill of exchange was drawn upon a limited company in its proper name, and it was accepted by two directors for the company, the word "limited," however, being omitted in the acceptance owing to the fact that the rubber stamp, by which the words of acceptance were impressed on the bill, was longer than the part of the bill on which the acceptance was stamped, and therefore the word "limited" overlapped the paper. The company did not pay the bill:—*Held*, that the name of the company was "mentioned" in the bill in accordance with sections 41 and 42 of the Companies Act, 1862, and that the two directors were not personally liable thereon. *Dermatine Co. v. Ashworth*, 21 T. L. R. 510—Channell, J.

Invalidity of Contract—Consent Judgment Found on Contract—Estoppel.]—A contract between a railway company and a contractor, on the face of it legal and regular, and ostensibly for construction of the line, but covering payments which have nothing to do with construction, is *ultra vires* and invalid, and a judgment obtained by consent in the terms of such contract will be set aside. *Great North-West Central Railway v. Charlebois*, 68 L. J. P. C. 25; [1899] A.C. 114; 79 L. T. 35—P.C.

Enquiry directed of what was due to the undertaker in respect of the construction and equipment of the line. *Ib.*

10. TORTS BY.

Action of Malicious Prosecution.]—See MALICIOUS PROSECUTION.

11. SHARES AND STOCK.

(a) What is a Share.

Nature of Shares in Limited Company.]—A share in a company is not to be regarded as a sum of money settled subject to certain conditions contained in the articles of association; but is to be regarded as an interest in the company, measured, it is true, for the purposes both of liability and interest, by a certain sum of money, but impressed also from its inception with the various rights and liabilities contained in the contract entered into by means of the articles of association by all the shareholders *inter se*, in accordance with section 16 of the Companies Act, 1862. *Borland's Trustee v. Steel*, 70 L. J. Ch. 51; [1901] 1 Ch. 279; 49 W. R. 12—Farwell, J.

(b) Contract to take.

Application for Shares in Fictitious Name—Estoppel.]—A person who applies for and is allotted shares under an *alias* is estopped from disputing his liability as a shareholder. *Coventry's Case* (60 L. J. Ch. 186; [1891] 1 Ch. 202) distinguished. *Pugh and Shorman's Case* (41 L. J. Ch. 580; L. R. 13 Eq. 566) followed. *Central Klondyke Gold-Mining and Trading Co., In re; Savigny's Case*, 5 Manson, 336—Wright, J.

Application — Allotment — Withdrawal of Application — Reconstruction — Contributory—Purchase of Business of Another Company—Shares in New Company.]—The C. Co. was wound up and its assets transferred to the M. Co. upon the terms of a reconstruction agreement, which provided that every member of the C. Co. should be entitled as of right to receive two shares in the M. Co. for every share held by him in the C. Co., subject to the condition that the M. Co. was not to be bound to allot shares to any one to whom under its articles of association it could have objected as transferee, and that the liquidators of the C. Co. were to give notice to each member of the C. Co. stating the number of shares which the member was entitled to claim under the agreement. The liquidators sent a notice to a member of the C. Co., who on April 23, 1898, signed a document addressed to the directors of the M. Co.: "As holder of five shares in the C. Co. I claim an allotment of ten ordinary shares in the M. Co. . . . and I hereby agree to accept such shares and to pay the further moneys payable thereon when called upon." On July 2, 1898, the member wrote to the M. Co. withdrawing his application, but, notwithstanding this, the shares were allotted to him:—*Held*, that the document of April 23, 1898, was an application which could be withdrawn before acceptance,

and was not an acceptance of a prior offer made by the M. Co., and that the member was therefore entitled to have his name removed from the list of contributories of the M. Co. *Metropolitan Fire Insurance Co., In re; Wallace's Case*, 69 L. J. Ch. 777; [1900] 2 Ch. 671; 83 L. T. 403; 8 Manson, 80—Cozens-Hardy, J.

As to allotment by post, see CONTRACT, col. 506.

Contract to Take Shares in Consideration of Getting Sole Right to Supply Wine.—The plaintiffs agreed to take shares in the defendant company if they obtained the sole right to supply the company with particular kinds of wine. They paid for the shares in full:—*Held*, that the superadded contract did not constitute a violation of the principle that shares cannot be issued at a discount. *Servais Bouchard v. Prince's Hall Restaurant, Lim.*, 20 T. L. R. 574—C.A.

Mistake as to Company's Identity—Fraudulent Misrepresentation of Company's Officer—Rectification after Commencement of Winding-up.—Where an application is signed for membership in a company in a mistaken belief—induced by the fraudulent representations of an officer of the company—that the membership for which application has been made is in another old-established company bearing a similar name, no contract in law is constituted, and the applicant will consequently be entitled to rectification of the register and to have his name removed from the list of contributories notwithstanding that his name is on the list of contributories at the commencement of the winding-up of the company, and that it is not until after winding-up that he has taken proceedings to rectify the register. Principle of *Cundy v. Lindsay* (47 L. J. Q. B. 481; 3 App. Cas. 459, 465) applied. *International Society of Auctioneers and Valuers, In re; Baillie's Case*, 67 L. J. Ch. 81; [1898] 1 Ch. 110; 77 L. T. 523; 46 W. R. 187; 4 Manson, 393—Wright, J.

Statement in Prospectus that all Ordinary Shares taken by Directors—Liability of Directors—Estoppel.—Directors of a company sanctioned the issue by the company of a prospectus inviting applications for the company's preference shares and debentures. The prospectus, which contained the names of all the directors, stated that the capital of the company was "1,500 ordinary shares of 20l. each (the whole of which will be taken by the directors), 750 6l. per cent. preference shares of 20l. each, and 300 5l. per cent. debentures of 50l. each." None of the ordinary shares were ever applied for or allotted to any of the directors, but some of them were issued to other persons:—*Held*, that although the prospectus was not in itself a contract by the directors with the company, yet it might, like articles of association, be looked at for the purpose of seeing upon what terms the directors agreed to accept office; that one of the terms was that the directors should take all the ordinary shares, and that, the directors not having done so, their names were rightly put upon the list of contributories as jointly and severally liable in respect of the shares which remained unissued at the commencement of the liquidation. *Moore Brothers & Co., In re; Bartholo-*

mew's Case, 67 L. J. Ch. 677; 79 L. T. 70; 5 Manson, 243—Wright, J.

Rescission—Misrepresentation in Prospectus—Estoppel—Rescission.—Where a person has been induced by fraudulent misrepresentations in a prospectus to take shares in a company, unless he actually commences proceedings to have his name removed from the register before the presentation of a petition to wind up the company, nothing short of a bargain with the company that he shall be bound by pending proceedings will protect him, notwithstanding that he is active in the assertion of his rights and has acted reasonably. *Central Klondyke Gold-Mining and Trading Co., In re; Thomson's Case*, 5 Manson, 282—Wright, J.

Proceedings after Petition to Wind-up, but before Order.—The rule laid down by Lord Cairns in *Kent v. Freehold Land and Brick-making Co.* (37 L. J. Ch. 653; L. R. 3 Ch. 493), that a shareholder who seeks to escape from liability on his shares on the ground of misrepresentation must, where there is a winding-up by the Court, have commenced proceedings to set aside the contract before the presentation of the petition on which the order to wind up the company was made, is not affected by the observations of Lord Westbury in *Reese Silver-Mining Co. v. Smith* (39 L. J. Ch. 849; L. R. 4 H. L. 64). *General Railway Syndicate, In re; Whiteley's Case*, 68 L. J. Ch. 365; [1899] 1 Ch. 770; 80 L. T. 868; 6 Manson, 244—Wright, J.

A company brought an action against one of its shareholders for payment of calls and applied for leave to sign judgment under Order XIV. In opposition to the application the shareholder filed an affidavit alleging misrepresentation and stating his intention to commence proceedings for rescission, and obtained leave to defend. He subsequently delivered a defence and counter-claimed for rescission. After the affidavit was filed, but before the counterclaim was delivered, a petition was presented to wind up the company, on which an order was afterwards made. On an application by the shareholder to have his name removed from the list of contributories, —*Held*, that it was now too late for the shareholder to apply for relief. *Ib.*

Proceeding for Removal of Name from Register—Action for Calls—Affidavit in Answer to Application under Order XIV.—Where, in an action by a company against one of its shareholders for calls, the shareholder, in opposition to an application by the company for leave to sign final judgment under the Rules of the Supreme Court, 1883, Order XIV., files an affidavit stating that he intends to counterclaim for rescission of his contract to take the shares, on the ground of the misrepresentation of the company, and he obtains leave to defend on that footing, that is equivalent to taking proceedings to have his name removed from the register; and he will be allowed to proceed with his claim for rescission, although a petition to wind up the company, on which an order is subsequently made, is presented between the obtaining leave to defend and the delivery of the counterclaim. *Cleveland Iron Co., In re; Stevenson, ex parte* (16 W. R. 95), distinguished. *General Railway Syndicate, In re; Whiteley's*

Case, 69 L. J. Ch. 250; [1900] 1 Ch. 365; 82 L. T. 134; 48 W. R. 440; 8 Manson, 74—C.A.

Subscriber of Memorandum of Association—Misrepresentation by Promoter—Rescission of Contract.—Under the Companies Acts, a subscriber of the memorandum of association, who has been induced to become such by the misrepresentation of a promoter of the company, cannot obtain rescission of the contract, either on the ground that he has been misled by an agent of the company—as the company does not exist before registration of the memorandum—or on the ground that it is unfair of the company, although innocent of the fraud, to retain the benefit of the contract—as persons subsequently becoming members are entitled to rely on his signature of the memorandum. *Metro-politan Coal Consumers' Association, In re; Karberg's Case* (61 L. J. Ch. 741; [1892] 3 Ch. 1), distinguished. *Metals Constituents, In re*, 71 L. J. Ch. 323; [1902] 1 Ch. 707; 86 L. T. 291; 50 W. R. 492—Buckley, J.

Power of Trustees to take Allotment of Shares in New Company.—*See* TRUST.

(c) *Issue and Allotment.*

Commission for Placing Shares—Option at Future Date to Take Further Shares.—It is not illegal for a company to agree, in consideration of a person's taking or underwriting shares, to issue at par further shares to such person at a future date or within a prescribed period. *Hilder v. Dexter*, 71 L. J. Ch. 781; [1902] A.C. 474; 87 L. T. 311; 51 W. R. 225; 7 Com. Cas. 253; 9 Manson, 378—H.L. (E.)

The appellants took shares in a company upon the terms that for each share allotted a subscriber should have the option for one year from a date mentioned of taking up at par a further share; and, if the option were exercised, should have the option of taking up a third share at par at any time within two years from the said date. The appellants, in exercise of the first option, applied for shares, the 1l. shares having risen to the price of 2l. 17s. 6d.:—*Held*, that the contract was not invalid under section 8, sub-section 2 of the Companies Act, 1900, as it was not an application, direct or indirect, of "any of its shares or capital money"; there was no payment of "commission, discount, or allowance"; and there was no law to oblige a company to issue its shares above par because they were saleable at a premium in the market. *Burrows v. Matabele Gold Reefs and Estates Co.* (70 L. J. Ch. 434; [1901] 2 Ch. 23) not followed. *Ib.*

Intermediary Company—Sale and Re-Sale—Offer to the Public—Lump Sum—Article Authorising Rate per Cent.—A transaction by which a purchasing company pays part of its capital in substance as underwriting commission to an intermediary company is illegal under the Companies Act, 1900, s. 8, sub-s. 2, notwithstanding that the payment takes the form of a profit on a re-sale by the intermediary company to the purchasing company. *Booth v. New Afrikaner Gold-Mining Co.*, 72 L. J.

A company, having an issued capital of 205,014 fully paid shares of 1l. each, under the powers contained in its memorandum of association agreed to sell its undertaking to an intermediary company which undertook to form a new company to take over the undertaking according to the terms of a second scheduled agreement intended to be made between the intermediary company and the new company. Under this second agreement, as consideration for the purchase of the undertaking of the old company, the new company was to offer 205,014 shares of 1l. each, with 12s. paid up, to the shareholders of the old company in proportion to their holding in the old company, and the intermediary company was to take up such shares as should not be subscribed for by the shareholders in the old company, and was to receive in addition as further part of the consideration the sum of 12,300l. The new company had power under its articles to pay underwriting commission "at a rate" not exceeding 50 per cent.:—*Held*, that the proposed payment of 12,300l. was in substance an underwriting commission paid by the new company to the intermediary company; that it was not within the saving clause contained in sub-section 1 of the Companies Act, 1900, s. 8, as there had been no offer of shares to the public by the new company, and the payment was of a lump sum and not "at a rate," as provided by the articles, and that it was therefore illegal under sub-section 2. An injunction was granted accordingly, but without prejudice to any future right which the new company might have to claim the benefit of sub-section 1. *Ib.*

Issue at a Discount—Companies' Clauses Acts.—A company governed by the Companies' Clauses Acts may issue both original shares (other than shares subscribed for) and new shares at a price less than the nominal value of the shares. *Statham v. Brighton Marine Palace and Pier Co.*, 68 L. J. Ch. 172; [1899] 1 Ch. 199; 80 L. T. 73; 47 W. R. 185; 6 Manson, 308—Romer, J.

Bonus Shares.—A company, called the vendor company, sold a mining property to a limited company, called the Great Central Co., in consideration of fully paid shares in the Great Central Co. A person acting with the authority of both companies entered into an agreement with the defendant Chapman, whereby the latter agreed to take 5,000 1l. shares in the Great Central Co. at the price of 5,000l., and in addition he was to have a transfer from the vendor company of 15,000 fully paid shares in the Great Central Co., being part of the shares belonging to the vendor company, as the purchase-price of the mine:—*Held*, that this was not an issue of shares by the Great Central Co. at a discount, and the transaction was valid. *Chapman v. Great Central Freehold Mines*, 22 T. L. R. 90—P.C.

Debentures Issued at a Discount—Option to Exchange Debentures for Fully Paid Shares—Issue of 1l. Share for 1l. of Debenture—Validity of Scheme.—A company proposed to issue debentures for 100l. each at 80l. per debenture, the principal sum to be repaid on November 1,

1909, or such earlier date as the same might become payable under the conditions of the debentures. The circular announcing the issue contained this clause: "Debenture-holders will have the right at any time prior to May 1, 1909, to exchange their debentures for fully-paid shares in the company at the rate of one 1l. fully-paid share for every 1l. of the nominal amount of the debentures." Under the conditions of the debentures the principal sum was to be immediately repayable in the event of the registered holder of the debenture giving the company notice in writing directing it to allot to him fully paid shares in exchange for the debenture in accordance with this scheme:—*Held*, that the scheme as it stood might be made use of for the purpose of acquiring fully-paid shares of the nominal value of 100l. by the payment of 80l. only, and it was open to abuse, and an injunction ought to be granted restraining the issue of the debentures pursuant to the scheme. *Moseley v. Koffyfontein Mines, Lim.*, 73 L. J. Ch. 569; [1904] 2 Ch. 108; 91 L. T. 266; 53 W. R. 140; 11 Manson, 294; 20 T. L. R. 557—C.A.

Allotment—"Paid to and received by" the Company before Allotment—Cheque Received before but Honoured after Allotment.—The amount payable on application has been "paid to and received by" a company, within the meaning of section 4, sub-section 1 of the Companies Act, 1900, prior to allotment, although part of the amount has been received after bank hours on the day of allotment in cheques which cannot be presented till the following day, when they are paid. (*LORD MONCREIFF dubitante.*) *Glasgow Pavilion v. Motherwell*, 6 F. 116—Ct. of Sess.

—Minimum Subscription Received—Cheques for Application Money—Allotment before Cheques Cleared—Dishonoured Cheques.—In response to the issue of a prospectus the company received applications for the full amount of the minimum subscription named, accompanied by cheques for the application money, and it went to allotment. At the time of allotment a considerable number of the cheques sent for the application money had not been credited to the company's banking account, and certain of those cheques were after the allotment dishonoured:—*Held*, that the sum payable on application for the amount fixed by the prospectus as the minimum subscription had "not been paid to and received by the company" within the meaning of sub-section 1 of section 4 of the Companies Act, 1900, and the allotment was voidable. *Glasgow Pavilion, Lim. v. Motherwell* (6 Ct. of Sess. Cas. (5th Series), 116) discussed and distinguished. *Mears v. Western Canada Pulp and Paper Co.*, 74 L. J. Ch. 581; [1905] 2 Ch. 353; 93 L. T. 150; 54 W. R. 176; 12 Manson, 295; 21 T. L. R. 661—C.A.

Per COZENS-HARDY, L.J., and SWINFEN EADY, J.—The intention of sub-section 1 of section 4 is that no allotment should be made until the company has actually received payment of the application money, and if cheques are sent with the applications they ought to be cleared before an allotment is made. *Ib.*

—"Public allotment" of Shares.—*Semble*, to constitute a "public allotment" of shares there

must be an issue to persons other than those taking shares in payment of wages or for work done or as a qualification for a seat on the board. *Smith v. Charing Cross, Euston, and Hampstead Railway*, 19 T. L. R. 614—Kekewich, J. Appeal compromised, 20 T. L. R. 465—C.A.

—Offer "to the public"—Circulation of Prospectus by Directors among Friends.—A syndicate was formed for the purpose of securing an option to purchase certain property, the syndicate not intending to work the property, but to promote a company for the purpose. The syndicate was incorporated under the Companies Acts, and a prospectus, marked "Strictly private and confidential; not for publication," was printed, and some of the directors, without the authority of the company, sent copies of it to their friends to see if they would join the syndicate. Certain shares in the syndicate were subscribed for and allotted, but the amount named in the prospectus as the minimum subscription was not subscribed. The plaintiff, who had subscribed for shares, brought an action, under section 4, sub-section 4 of the Companies Act, 1900, to recover the amount paid by him for his shares:—*Held*, that, on the facts, there had been no offer of shares to the public within the meaning of section 4, sub-section 4 of the Act, and that therefore the plaintiff was not entitled to succeed. An offer of shares to the public, within the meaning of the section, means an offer by the company, and not by an individual, to any one who chooses to come in and take shares. *Sherwell v. Combined Incandescent Mantles Syndicate*, 23 T. L. R. 482—Warrington, J.

—Irregular Allotment of Shares—Voidable or Void—Company Registered before Companies Act, 1900.—An allotment of shares made by the directors of a company before the minimum subscription is obtained is voidable, not void. If, owing to the fact of the company having been registered before the passing of the Companies Act, 1900, the time limit fixed under section 5 by reference to the statutory meeting is inapplicable, the shareholder may rescind his contract to take the shares at any time before he has affirmed it expressly or by conduct. *Finance and Issue, Lim. v. Canadian Produce Corporation*, 73 L. J. Ch. 751; [1905] 1 Ch. 37; 91 L. T. 685; 53 W. R. 170; 11 Manson, 412; 20 T. L. R. 807—Buckley, J.

An allotment by directors in contravention of section 4 is not *ultra vires*, but is simply a breach of a statutory duty for which the shareholder has his legal remedy. The Court will not, therefore, interfere by injunction to restrain the directors from proceeding with the allotment. *Ib.*

—Conditional Allotment—Right to Vote when Condition Unfulfilled.—An allotment of shares is an appropriation by the directors or managing body of a company of shares to a particular person, but it does not necessarily create the status of membership. The allotment may be subject to a condition—*e.g.* that the allottee should not only indicate his acceptance, but perform some other act, such as make payment of a sum of money; a company therefore may offer specified shares to a person on the terms that no title to the shares shall arise

until a condition provided for in the contract to accept the shares has been fulfilled, and, after the allotment and registration of such shares, the company may decline to treat such person as a member if he has neglected to comply with the condition. *Spitzel v. Chinese Corporation*, 80 L. T. 347; 6 Manson, 355—Stirling, J.

Issue not Bona Fide—Voting Power—Injunction.—Where shares had been issued by the directors, not for the general benefit of the company, but for the purpose of controlling the holders of the greater number of shares by obtaining a majority of voting power.—*Held*, applying the principle of *Fraser v. Whalley* (2 H. & M. 10), that they ought to be restrained from holding the meeting at which the votes of the new shareholders were to have been used. *Punt v. Symons & Co.*, 72 L. J. Ch. 768; [1903] 2 Ch. 506; 89 L. T. 525; 52 W. R. 41—Byrne, J.

Shares Partly Paid up—Forfeiture—Re-allotment—Sale—Credit for Money Paid.—Where a limited company has power to forfeit shares for non-payment of calls, and sell, re-allot, and dispose of them in such manner as the directors think fit, it can, in re-allotting forfeited shares partly paid up, give credit for the money already received in respect of the shares. Such a transaction is not an issue of shares, and is not contrary to the principle that a company under the Companies Acts cannot issue shares at a discount. *Morrison v. Trustees, Executors, and Securities Insurance Corporation*, 68 L. J. Ch. 11; 79 L. T. 605; 5 Manson, 356—C.A.

Share Warrant to Bearer—Negotiability—Payment of Dividends.—A share warrant to bearer issued by an English company registered under the Companies Act, 1867, certifying that “the bearer is entitled to one share of £1, which is fully paid up numbered _____” in the company is a negotiable instrument, and if such warrant is stolen and afterwards gets into the hands of a bona fide holder for value without notice of the fraud, such holder can enforce against the company payment of coupons for dividends due in respect of such share warrant. *Rumball v. Metropolitan Bank* (46 L. J. Q.B. 346; 2 Q.B. D. 194) followed. *Webb, Hale & Co. v. Alexandria Water Co.*, 93 L. T. 339; 21 T. L. R. 572—D.

(d) Preference Shares.

Memorandum of Association—Different Classes of Shareholders—Rights inter se Defined by Memorandum—Reservation of Power to Modify—Validity—Reduction of Capital.—The memorandum of association of a limited company provided that the capital should be divided into preference, ordinary, and deferred shares, and prescribed the rights and privileges of the different classes of shareholders *inter se*, and provided—clause 6 (f)—that the rights for the time being attached to the several classes of shares respectively might be modified or dealt with in the manner mentioned in clause 52 of the accompanying articles of association, but not otherwise, and that clause should be deemed to be incorporated therein:—*Held*, that the provision in clause 6 (f) was a valid provision, and

resolutions for the reduction of the capital of the company involving an alteration in the rights of the preference shareholders as regards the ordinary shareholders, which had been sanctioned as required by article 52, could be confirmed by the Court if not unfair in other respects. *Ashbury v. Watson* (54 L. J. Ch. 985; 30 Ch. D. 376) distinguished. *Welsbach Incandescent Gas Light Co., In re*, 73 L. J. Ch. 104; [1904] 1 Ch. 87; 89 L. T. 645; 52 W. R. 327; 11 Manson, 47; 20 T. L. 122—C.A.

Preference Stated in Memorandum of Association—Alteration of Holder's Rights.—Where the memorandum of association of a company contains a statement that the original preference shares therein mentioned shall confer a right to a fixed cumulative preferential dividend, but also contains a power for the company to issue new shares on such special conditions, as to priority or postponement, either for dividends or repayment of principal, as the company may determine, the company has power to issue new preference shares to rank *pari passu* with the original preference shares without altering the memorandum. *Underwood v. London Music Hall, Lim.*, 70 L. J. Ch. 743; [1901] 2 Ch. 309; 84 L. T. 759; 49 W. R. 507; 8 Manson, 396—Cozens-Hardy, J.

Cumulative Dividend—Memorandum and Articles.—A company, whose memorandum and articles provided for preference shares carrying a “cumulative preferential dividend,” was reconstructed, and the memorandum of association of the new company provided for preference shares carrying a “preferential dividend,” and article 95 of the articles of association of the old company was altered by striking out the word “cumulative” before “preference,” so as to read thus: “The net profit from time to time available for distribution as dividend shall be applied first in payment to the holders of the preference shares in the company of a preference dividend . . .”—*Held*, that the holders of the preference shares in the new company were entitled to a cumulative preferential dividend. *Staples v. Eastman Photographic Materials Co.* (65 L. J. Ch. 682; [1896] 2 Ch. 303) distinguished. *Foster v. Coles*, 22 T. L. R. 555—Joyce, J.

Articles of Association—Powers of Directors—Payment to Reserve Fund—Detriment to Preference Shareholders.—Under the original articles of association of a company whose capital consisted of cumulative preference shares and ordinary shares, the directors had power, before recommending any dividend, to set aside out of profits such a sum as they might think proper as a reserve fund. Subsequently it was arranged between the preference and ordinary shareholders that the ordinary shares should be split into preferred and deferred ordinary shares, and as part of that arrangement there was added to the articles of association a new article providing, *inter alia*, that, should the profits be sufficient to enable the payment of a dividend of 7 per cent. on the deferred ordinary shares (after paying 5 per cent. on the preference and preferred ordinary shares) the preference shareholders should be entitled to such additional dividend, not exceeding 1 per cent., as the balance of profit remaining would permit—this additional divi-

dend not being cumulative, but contingent on the profits of the year. In 1904, after paying a dividend of 5 per cent. on the preference and preferred ordinary shares, and a dividend of 7 per cent. on the deferred ordinary shares, there remained a balance which was more than sufficient to pay an additional 1 per cent. dividend on the preference shares, but of this the directors proposed to place to a reserve fund a sum which would preclude the payment of the additional dividend. In a question between the company and the preference shareholders as to whether the directors were entitled to deal with the balance in this way instead of applying it *primo loco* in the payment of an additional 1 per cent. dividend on the preference shares,—*Held*, on the construction of the articles of association, that the application of the balance proposed by the directors was *intra vires*. *Wemyss Collieries Trust v. Melville*, 8 F. 143—Ct. of Sess.

(e) *Payment for Shares.*

(Section 25 of the Companies Act, 1867, requiring shares to be paid in cash in the absence of a registered contract, repealed by the Companies Act, 1900.)

"Payment" in Cash—Set-off.—Where money has been paid to the promoter of a company in response to an invitation to subscribe for shares in the company when formed, the memorandum and articles of which were offered for inspection, and the money has been paid on the terms of prospectuses in respect of shares in the company when formed, and the directors acknowledge in writing the receipt of the money so paid to the promoter, who is also vendor to the company, the amount so paid may be set off against the purchase-money due from the company to the vendor, and is to be reckoned as payment in cash of the shares within the meaning of the New South Wales Companies Act, 1874, s. 57 (equivalent to section 25 of the Companies Act, 1867). *North Sydney Investment Co. v. Higgins*, 68 L. J. P.C. 42; [1899] A.C. 263; 80 L. T. 308; 47 W. R. 481; 6 Manson, 321—P.C.

Sufficiency of Contract.—A contract for the sale of a business to a company for a sum payable in fully paid-up shares, filed under section 25 of the Companies Act, 1867, is sufficient if it states generally on the face of the contract the nature of the consideration for the issue of such shares—for example, leasehold premises, machinery, and plant, &c.—and such a contract complies with the requirements of section 25, although in order to identify the particular subject-matter of the contract reference would have to be made to a prior contract which had not been filed. *Maynards, Lim., In re* (67 L. J. Ch. 186; [1898] 1 Ch. 515), overruled. *Frost & Co., In re*, 68 L. J. Ch. 544; [1899] 2 Ch. 207; 80 L. T. 849; 48 W. R. 39—C.A.

Statement of Consideration.—It is not a sufficient statement of the real nature of the consideration for the sale of a business to a company for a payment partly in cash and partly in shares if the contract filed under section 25 of the Companies Act, 1867, contains

merely a recital of a prior unfiled agreement to the effect that the vendors had agreed to sell, and the company to purchase, "the property in the agreement now in recital mentioned," and a statement that it was agreed "in consideration of the said sale" that certain shares should be issued and allotted. *Frost & Co., In re* (68 L. J. Ch. 544; [1899] 2 Ch. 207), distinguished. *Watson & Co., In re*, 68 L. J. Ch. 660; [1899] 2 Ch. 509; 81 L. T. 85; 48 W. R. 40; 7 Manson, 97—Kekewich, J.

Contract with Promoter.—One of the objects for which a company was established was to adopt a contract made between a promoter and the company, whereby the company agreed to allot to the promoter 3,500 fully paid shares, in consideration of an assignment of the benefit of certain options, businesses, and patent rights, and an undertaking to discharge the preliminary expenses of the company. The agreement was adopted and registered pursuant to section 25 of the Companies Act, 1867, and the shares allotted to the promoter and his nominees. The options, businesses, and patent rights were of no value. On the winding-up of the company the liquidator contended that there was no real consideration for the agreement, and that the allottees were liable to pay the full amount of the shares:—*Held*, that the promoter and his nominees were entitled to hold the shares as fully paid. *Baglan Hall Colliery Co.* (39 L. J. Ch. 591; L. R. 5 Ch. 346) followed. *Eddystone Marine Insurance Co.* (62 L. J. Ch. 742; [1893] 3 Ch. 9) distinguished. *Leinster Contract Corporation, In re*, [1902] 1 Ir. R. 349—M.R.

An agreement in writing was made and filed under section 25 of the Companies Act, 1867, whereby a company agreed to allot to vendors to the company 22,500 fully paid shares of 10s. each, and certain other shares of 10s. each upon each of which 8s. was to be deemed to have been paid; and the vendors agreed to give to the company possession of "the premises more particularly mentioned" in a previous unfiled agreement. Subsequently another agreement was filed whereby, in consideration of the vendors agreeing to give the company immediate possession of "the lands and premises situate in the mining district of Millwood, in Cape Colony, . . . more particularly mentioned and referred to in" the unfiled agreement, the company agreed to allot to the vendors 22,500 fully paid shares of 10s. each. This agreement made no mention of the shares upon each of which 8s. was to be deemed paid:—*Held*, in the winding-up of the company, that the agreements filed were sufficient under section 25 to enable the 22,500 shares allotted in pursuance thereof to be treated as fully paid, for the later agreement sufficiently shewed the consideration which the shareholder was to give for the fully paid shares, and it did not signify that it omitted to state that there were also other shares passing for the same consideration. *African Gold Concessions and Development Co., In re*; *Markham and Darter's Case*, 68 L. J. Ch. 724; [1899] 2 Ch. 480; 81 L. T. 145—C.A. Affirming, 47 W. R. 509; 6 Manson, 84—Wright, J.

Reconstruction—Option of Vendor to take Paid-up Shares.—The registration of a contract

for the sale of a business to a company partly in consideration of a given number of paid-up shares, stated therein to be issuable to the vendors on an option exercisable by them at a subsequent date, is a sufficient compliance with section 25 of the Companies Act, 1867, notwithstanding that the actual number of the shares to be deemed paid up cannot be determined until the vendors have exercised their option. *Common Petroleum Engine Co., In re; Elsner's and McArthur's Case* (65 L. J. Ch. 76; [1895] 2 Ch. 759), adopted. *Transvaal Exploring Co. v. Albion (Transvaal) Gold Mines*, 68 L. J. Ch. 670; [1899] 2 Ch. 370; 48 W. R. 108; 7 Manson, 51—Byrne, J.

Allottee of Vendors' Fully Paid Shares—Directors—Misfeasance—Private Company—Consent of Shareholders.]—The owners of a business and patent relating to shipping entered into negotiations with six persons interested in shipping (including the three appellants) to sell the business and patent to a private company (to be formed for the purpose, with a capital of 25,000*l.* in shares of 10*l.* each) for 6000*l.*, payable as to 3000*l.* in cash and as to 3000*l.* in fully paid shares, the rest of the capital to be dealt with so that each of the six persons was to subscribe for fifty shares in cash and to receive 800 shares as fully paid up; and the remaining 100 shares were to be allotted to the three appellants as fully paid for distribution to any other persons introducing business. The company was incorporated, the only shareholders being the two vendors and the six persons. An agreement was then made between one of the vendors, acting for both, and the company, whereby the vendor agreed to sell the business and patent to the company in consideration of 3000*l.* in cash and 22,000 shares to be allotted to the vendor or his nominees as fully paid. This contract was duly registered, and the shares were, with the consent of all the shareholders, allotted in the manner previously arranged. In the winding-up the liquidator sought to place each of the three appellants on his list of contributories in respect of the shares allotted to them as fully paid, or, alternatively, to make them liable for misfeasance as directors.—*Held*, that the registered contract constituted the true and only bargain between the vendors and the company, and that the appellants, as allottees of the vendors' shares thereby contracted to be issued as fully paid, could not be treated as holders of unpaid shares. *Held*, also, that the appellants could not be made liable on the footing of misfeasance, since what was done had the consent of all the shareholders who were *sui juris*, and no general meeting was necessary to sanction it. *Western of Canada Oil, Land, and Works Co., In re; Carling's Case* (45 L. J. Ch. 5; 1 Ch. D. 115), followed and applied. *Innes & Co., In re*, 72 L. J. Ch. 643; [1903] 2 Ch. 254; 89 L. T. 142; 51 W. R. 514; 10 Manson, 402—C.A.

Liability of Holder of Fully Paid Shares—Company formed to Trade in Foreign Country—Conflict of Laws.]—See INTERNATIONAL LAW.

Relief for Omission to File Contract—Companies Act, 1900—Jurisdiction.]—The power of the Court to give relief under the Companies Act, 1898, against the omission to file a con-

tract under section 25 of the Companies Act, 1867, in the case of an issue of shares of a company as fully paid for a consideration other than cash has not been taken away by the Companies Act, 1900. *Brutton & Burney, Lim., In re; and Burney's New Cross Brewery, Lim., In re*, 70 L. J. Ch. 309; [1901] 1 Ch. 637; 84 L. T. 180; 49 W. R. 360—C.A.

— Judge in Winding-up.]—The Judge to whom the Companies (Winding-up) business is assigned, has jurisdiction under the Companies Act, 1898, to grant relief for non-compliance with section 25 of the Companies Act, 1867, in cases where no order has been made to wind up the company, but it is more convenient that applications for such relief should be made to the Judges of the Chancery Division exercising their ordinary Chancery jurisdiction. *Concessions Acquisitions Syndicate, In re*, 68 L. J. Ch. 49; 79 L. T. 666; 5 Manson, 348—Wright, J.

Where, however, such applications are made to the Judge to whom the winding-up business is assigned, the notices of motion should not be entitled "Companies (Winding-up)." *Ib.*

— Application—Motion or Summons.]—The jurisdiction given by the Companies Act, 1898, is a jurisdiction which ought as a rule to be exercised in Court, and not in chambers. *Ib.*

An application under the Companies Act, 1898, should be heard in open Court. *Whitefriars Financial Co., In re*, 68 L. J. Ch. 79; [1899] 1 Ch. 184; 79 L. T. 546; 6 Manson, 72—Kekewich, J.

— Application by Some Shareholders only.]—Such an application may be made by the holders of some only of the shares affected in respect of the entire issue of such shares. *Ib.*

— Application by One Shareholder.]—An application under the Companies Act, 1898, s. 1, for leave to file a contract or a memorandum in lieu of a contract, may be presented by one or more of the persons holding shares of the class affected; and where an original contract has been filed, but not in proper time, the Court may authorise the filing of a memorandum under section 1, sub-section 4. *Ferguson (Petitioner)*, 4 F. 64—Ct. of Sess.

— Affidavit in Support.]—Upon an application for relief under the Companies Act, 1898, where no contract to make shares fully paid has been filed, or only a defective contract, it is not sufficient for the applicant to state in his affidavit in support that the omission to file a contract was due to "inadvertence" on his part. He must set out in his affidavit the particulars of the inadvertence. *Victoria Brick Works Co., In re; Seaton's Case*, 5 Manson, 350—Wright, J.

— "Inadvertence"—Filing of Supplemental Contract.]—The omission to file a contract pursuant to section 25 of the Companies Act, 1867, owing to the ignorance of the parties of the provisions of that Act, will be deemed an "inadvertence" within the meaning of section 1, sub-section 1 of the Companies Act, 1898; and where the contract is not sufficient in itself the

Court will direct a supplemental contract, supplying the deficiency, to be filed with the Registrar of Joint-Stock Companies, together with the original contract. *Jackson & Co., In re*, 68 L. J. Ch. 190; [1899] 1 Ch. 348; 79 L. T. 662; 6 Manson, 125—Kekewich, J.

— **Insufficient Contract Filed—Leave to File Contract after Issue.**—An order may be made on motion under the Companies Act, 1898, on the application of the parties interested in the shares with notice to the company; but *semble*, that in future cases the Court may direct notice to be given of the day for hearing the application, and that any one desiring to oppose can attend. *Northern Creosoting and Sleeper Co., In re*, 79 L. T. 407; 5 Manson, 347—Byrne, J.

— **Winding-up Commenced.**—Prior to the incorporation of a company, the promoter, on behalf of the intended company, entered into an agreement with the vendor, for the purchase of certain patents. By this agreement the promoter undertook to pay all promotion expenses, in consideration of which he was to be entitled to have fully paid shares in the company allotted to him to the extent of 10 per cent. of the subscribed capital for the time being. This agreement was not filed. Shortly after the incorporation of the company, a supplemental agreement was entered into between the promoter and the company, by which the company adopted the former agreement and agreed to allot to the promoter certain fully paid shares, and also from time to time further fully paid shares according to the amount of fresh capital subscribed, which shares were to be accepted by him in full satisfaction of the shares agreed to be allotted to him by the first agreement. In pursuance of the second agreement, which was duly filed, the shares were allotted to the promoter. The company subsequently went into liquidation, and the liquidator settled the promoter on the list of contributories in respect of the shares, there being no sufficient contract filed to satisfy section 25 of the Companies Act, 1867. On an application by the promoter for relief under section 1 of the Companies Act, 1898,—*Held*, that the promoter was entitled to the relief asked, and that, as the original agreements were not in his possession, he must file with the Registrar of Joint-Stock Companies copies of both agreements, which must first be properly stamped, together with an office copy of the order on the present application. *Mays' Metals Separating Syndicate, In re; Smithson's Case*, 68 L. J. Ch. 46; 79 L. T. 663; 5 Manson, 342—Wright, J.

— **Costs of Liquidator.**—On an application for relief under the Companies Act, 1898, there is no hard-and-fast rule as to allowing a liquidator his costs as between solicitor and client. It is a matter for the discretion of the Court. In exercising such discretion the Court will be guided by how far the applicant has furnished the liquidator with materials for determining whether the application is one which the liquidator ought to oppose or not. If the applicant has not done so, he may be ordered to indemnify the liquidator. *Farmers' United, Lim., In re; Stephenson's Case*, 69 L. J. Ch. 684; [1900] 2 Ch. 442; 83 L. T. 406—Wright, J.

— **Vendor's Shares—Relief—Conduct of Applicant—Speculative Transaction.**—To entitle an applicant to relief under the Companies Act, 1898, where he has acquired shares out of the ordinary course, the onus lies on him to shew that he has acted with due caution and conscientiousness and has done nothing to dis-entitle himself to relief at the cost of innocent parties. *Rooburgh Press, In re; Spiers & Bevan's Case*, 68 L. J. Ch. 111; [1899] 1 Ch. 210; 80 L. T. 280; 47 W. R. 281; 6 Manson, 57—Wright, J.

Where, therefore, accountants agreed with the promoter of a company, in consideration of an allotment of fully paid shares, to circulate amongst their clients the prospectus of the company, accompanied by a letter recommending subscriptions for shares, but abstained from making enquiry, except from the promoter, as to the truth of the statements contained in the prospectus, the Court refused to grant relief at the expense of *bona fide* contributories and creditors. *Ib.*

— **No Contract in Writing—Memorandum.**—Where no contract in writing has ever been made, the Court can under sub-section 4 direct a memorandum to be filed in lieu of the requisite contract. Form of order and memorandum. *Whitefriars Financial Co., In re*, 68 L. J. Ch. 79; [1899] 1 Ch. 184; 79 L. T. 546; 6 Manson, 72—Kekewich, J.

— **Issue of Shares before Contract Filed—Memorandum—Motion.**—A company was formed on the reconstruction of another company, the shareholders in which took shares credited as partly paid up in the new company. These shares were issued pursuant to two agreements, but before these agreements were filed with the Registrar of Joint-Stock Companies the directors allotted a number of the shares. Subsequently the agreements were filed. The company moved for an order that the two filed contracts should operate as if they had been filed at or before the issue of the shares:—*Held*, that as the contracts were actually on the file, an order could not well be made under sub-section 1 of section 1 of the Companies Act, 1898, that the same contracts should be filed; the case came under sub-section 4 of section 1, and a memorandum must be filed in accordance with that section. *Lucky Guss, Lim., In re*, 79 L. T. 722—Kekewich, J.

— **Shares Subscribed for in Memorandum—Identity of Shares—Relief.**—A number of fully paid shares in a company were allotted to a shareholder in consideration of the sale to the company of his business. The contract for such issue was duly filed with the Registrar under section 25 of the Companies Act, 1867. The same shareholder had previously subscribed the company's memorandum of association for a similar number of shares, which thus became issued to him, immediately on the registration of the company—that is, before the filing of the contract. It being intended that he should take only one set of shares—namely, those allotted in consideration of the sale—it was sought to give effect to such intention by an application to file a memorandum to this effect under section 1, sub-section 4 of the Companies Act, 1898:—*Held*, that the Act did not apply

to the case. *Jarvis & Co., In re*, 68 L. J. Ch. 145; [1899] 1 Ch. 193; 79 L. T. 727; 47 W. R. 186; 6 Manson, 116—Romer, J.

— **Sale of Business to Subscriber for 4,069 Paid-up Shares—Filed Contract—Identity of Shares.**—A company was incorporated with the object of acquiring the business of D. D. signed the memorandum of association for 4,069 shares. D. subsequently entered into an agreement with the company to sell his business to it for 4,069 fully paid shares. After this agreement had been duly filed, 4,069 shares were under it allotted to D. as fully paid. Upon motion to file a memorandum in writing under the Companies Act, 1898, s. 1, sub-s. 4, setting forth that the shares allotted to D. were the shares for which he signed the memorandum of association,—*Held*, that the Court had no power under the Companies Act, 1898, to grant the relief asked. *Jarvis & Co., In re* ([1899] 1 Ch. 193), followed. *Dawney, Lim., In re*, 83 L. T. 47; 48 W. R. 600—Kekewich, J.

— **Identity of Shares.**—A company formed to take over the business of a vendor was incorporated on August 9, 1870. The vendor signed the memorandum of association for 1,068 shares of 100l. each, and executed an agreement on October 21, 1870, for the sale of the business to the company. The consideration was 130,000l., of which 106,800l. was to be paid by the allotment of 1,068 fully paid-up shares to the vendor. The whole of the remaining 232 shares were applied for by and allotted to the other signatories to the memorandum of association:—*Held*, on motion under section 1, sub-sections 1 and 4 of the Companies Act, 1898, that the shares mentioned in the agreement were the same shares as those subscribed for in the memorandum of association. *Held also*, that the issue of the certificate of incorporation of the company operated as the issue of all shares signed for in the memorandum of association. The company were therefore ordered to file a sufficient contract in writing, within the meaning of section 25 of the Companies Act, 1867, which should operate as if it had been duly filed on or before the issue of the shares so subscribed for. *Jarvis & Co., In re* (68 L. J. Ch. 145; [1899] 1 Ch. 193), distinguished. *Whitehead Brothers, In re*, 69 L. J. Ch. 607; [1900] 1 Ch. 804; 82 L. T. 670; 48 W. R. 585—Cozens-Hardy, J.

The contract to take shares and pay for them in cash which, under the law prior to the Companies Act, 1900, was involved in subscribing a company's memorandum of association, is not satisfied by a subsequently filed agreement by the subscriber with the company to pay for the same number of shares in property other than cash. Such a case is not one for relief under the Companies Act, 1898. *Jarvis & Co., In re* (68 L. J. Ch. 145; [1899] 1 Ch. 193), and *Archibald D. Dawney, In re* (35 L. J. N.C. 412; W. N. (1900), 152), followed. *Whitehead & Brothers, In re* (69 L. J. Ch. 607; [1900] 1 Ch. 804), distinguished. *Timmins (Ebenezer) & Sons, Lim., In re*, 71 L. J. Ch. 121; [1902] 1 Ch. 238; 9 Manson, 47—Buckley, J.

Whether, having regard to section 33 of the Companies Act, 1900, the liability in respect of

the shares for which the memorandum of association was subscribed could be enforced, *quære. Ib.*

(f) Register of Members.

Shareholder Indebted to Company—Company's Lien—Memorandum on Register—"Clean" Certificate.—A company formed under the Companies Acts had under its articles (which incorporated in part Table A) a "first and paramount lien upon all the shares registered in the name of each member for his debts, liabilities and engagements to and with the company, whether the period for the payment, fulfilment, or discharge thereof shall have actually arrived or not." A shareholder having been adjudicated bankrupt, the trustee in his bankruptcy applied, under Table A, clause 13, to be entered on the register in his place. The company claimed the right to enter, in addition to the particulars required by section 25 of the Companies Act, a memorandum that the company claimed a lien (to establish which an action was pending) on the shares, and to issue the share certificate with a similar memorandum:—*Held*, on an application under section 35 of the Companies Act, that the company had no right to put the memorandum on the register, and that the trustee was entitled to be registered without the memorandum and to have a "clean certificate." *Key & Son, In re*, 71 L. J. Ch. 254; [1902] 1 Ch. 467; 86 L. T. 374; 50 W. R. 234; 9 Manson, 181—Byrne, J.

Registration of Transfer—Unreasonable Delay—Reconstruction—Rectification.—The power of the Court to rectify the register of members conferred by section 35 of the Companies Act, 1862, can be exercised after the liquidation of the company, and is not then reduced to merely settling the list of contributories. *Sussex Brick Co., In re*, 73 L. J. Ch. 308; [1904] 1 Ch. 598; 90 L. T. 426; 52 W. R. 371; 11 Manson, 66—C.A.

Where, owing to unnecessary delay, a transfer of shares was not registered prior to the company going into voluntary liquidation for the purpose of reconstruction under the Companies Act, 1862, s. 161, the Court, in rectifying the register, directed the registration to take effect from the time when in the ordinary course of business the transfer ought to have been registered, the effect being to make valid a notice of dissent under section 161 given by transferees who at the time ought to have been, but were not, registered as members of the company. *Joint-Stock Discount Co., In re; Nation, ex parte* (86 L. J. Ch. 112; L. R. 3 Eq. 77), approved and followed. *Ib.*

Inspection—Right to Take Extracts—Payment.—The right to inspect the register of members of a company given by section 32 of the Companies Act, 1862, does not carry with it a right to take extracts from or make copies of the register. Such right is excluded by the express provision in the section requiring the company to furnish a copy of the register, or of any part thereof, on payment of sixpence for every hundred words required to be copied. *Boord v. African Consolidated Land and Trad-*

ing Co. (67 L. J. Ch. 451; [1898] 1 Ch. 596) overruled. *Mutter v. Eastern and Midlands Railway* (57 L. J. Ch. 615; 38 Ch. D. 92) and *Nelson v. Anglo-American Land Mortgage Agency* (66 L. J. Ch. 112; [1897] 1 Ch. 130) distinguished. *Balaghât Gold-Mining Co., In re*, 70 L. J. K.B. 866; [1901] 2 K.B. 665; 85 L. T. 8; 49 W. R. 625—C.A.

— **Right of Members and Non-members—Voluntary Winding-up.**] The right of inspecting the register of members of a company under the Companies Act, 1862, given to all persons by section 32 of that Act, ceases upon the commencement of the winding-up of the company, and is replaced by the provisions of section 156, which provides for the inspection of the books and papers of a company which is being wound up under an order of the Court by its creditors and contributories, and can be applied to a voluntary winding-up by section 133 of the Act. *Kent Coalfields Syndicate, In re*, 67 L. J. Q.B. 500; [1898] 1 Q.B. 754; 78 L. T. 443; 46 W. R. 453; 5 Manson, 88—C.A.

Rectification—Petition.]—The question whether a petition under section 35 of the Companies Act, 1862, for rectification of the register of a company is a proper process for trying a question between a shareholder and the company as to whether the petitioner is entitled to be relieved of shares allotted to him is one of circumstances. *Gowans v. Dundee Steam Navigation Co.*, 6 F. 613—Ct. of Sess.

— **Misrepresentation in Prospectus—Application to Remove Names of Shareholders from Register—Ex parte Application.**]—An application to rectify the register of a company by removing therefrom the names of a large number of shareholders on the ground that they had been induced to take shares by misrepresentations in a prospectus was allowed to be made *ex parte*, so as to save expense. *London Electrobis Co., In re*, 22 T. L. R. 677—Buckley, J.

— **Costs Incurred but not Ordered to be Paid before Winding-up—Proceedings to Rectify Register.**]—Where applications are made by shareholders under section 35 of the Companies Act, 1862, for the removal of their names from the register of the company, and the return of the money paid for their shares, and a test case is tried and succeeds, and the company is afterwards ordered to be wound up, the costs incurred by those of the shareholders whose applications had not been tried can be added to the amounts due to them on the rectification of the register, and proved for in the winding-up of the company, though no order has been made as to such costs. *British Gold Fields of West Africa, In re*, 68 L. J. Ch. 412; [1899] 2 Ch. 7; 80 L. T. 638; 47 W. R. 552; 6 Manson, 334—C.A.

(g) *Certificates.*

Estoppel—Forgery by Secretary—Warranty of Title—Estoppel.]—A company is not liable in damages for loss sustained by the purchaser for value of a share certificate on which the names of the directors, whose signature under the articles of association is necessary to the validity of the certificate, have been forged by the

secretary. The fact that the certificate is in proper form and delivered by the secretary in the ordinary course of his duty does not operate in such a case as a warranty or representation of genuineness or estop the company from denying the validity of the certificate. *Shaw v. Port Philip Gold-Mining Co.* (53 L. J. Q.B. 369; 13 Q.B. D. 108) doubted. *Ruben v. Great Fingall Consolidated, Lim.*, 75 L. J. K.B. 843; [1906] A.C. 439; 95 L. T. 214; 13 Manson, 248; 22 T. L. R. 712—H.L. (E.)

— **Certification by Secretary—Statement by Managing Director.**]—A company is not bound by the representations of its secretary, who is only a servant with powers limited to his instructions; and the certification by the secretary of the transfer of shares by a person who had no power of dealing with such shares cannot operate as an estoppel against the company from denying the title of the alleged transferee, or make it liable in damages for refusing to register such transferee as a shareholder. Nor can the recognition by a managing director of such certification, or even the representation by him that the certification would be acted upon by the company and entitle the transferee to be placed on the register, create such estoppel—as a representation, to be effective for such a purpose, must be one of an existing fact, and not constitute a mere promise of future action. *Whitechurch (George), Lim. v. Cavanagh*, 71 L. J. K.B. 400; [1902] A.C. 117; 85 L. T. 349; 50 W. R. 218; 9 Manson, 351—H.L. (E.)

Difference between a certificate and certification explained. *Ib.*

Grant v. Norway (20 L. J. C.P. 93; 10 C.B. 665) approved, LORD ROBERTSON doubting its application, but concurring on other grounds. *Ib.*

— **Return of Certificate to Transferor—Subsequent Fraudulent Transfer—Liability of Company to Subsequent Transferee—Negligence of Company—Proximate Cause of Loss.**]—On April 19, 1904, B. became the registered owner of shares in the defendant company, and certificates of his ownership were made out, but were not sent to him. On the same day a transfer by B. to H. and M. of 1,500 shares was presented to the secretary of the company, and the secretary indorsed upon it a certification certifying that the certificates had been forwarded to the company's office, and the transfer so certified was returned to H. and M., and they then executed it, and had since become the registered owners of the shares. On April 22 the secretary, having occasion to send B. certificates for other shares in the company, by mistake inclosed the certificates for the 1,500 shares which had been transferred to H. and M. Subsequently the plaintiffs made advances to B. on a deposit of the certificates for the 1,500 shares, with transfers of the shares. The loans not being repaid, the plaintiffs sent in the transfers to the company for registration. Finding that they were unable to obtain registration, they brought the action for registration of the transfers and delivery of the certificates, and damages. They based their claim on estoppel arising from the negligence of the secretary in returning the certificates to B. after the certification:—*Held*, that, admitting that there was negligence for which the company might have been liable to

those who were entitled to rely on the certification, the plaintiffs were not persons who could rely on it, and they had failed to shew that there was any duty on the part of the company to retain the certificates, either to them personally or to the public, or to any section of the public, or to persons desirous of becoming members of the company; under section 81 of the Companies Act, 1862, a certificate was only *prima facie* evidence of title to shares, and the plaintiffs were not entitled to assume as against the company, without enquiry, that there had been no dealing with the shares since the issue of the certificates to B., from the mere fact of finding them in his possession; further, the negligence was not the real or proximate cause of the plaintiffs' loss, but the improper use of the certificates made by B. after they were returned to him; and mere negligence would not raise estoppel. The circumstances, therefore, were not sufficient to raise a case of estoppel against the company. *Longman v. Bath Electric Tramways*, 74 L. J. Ch. 424; [1905] 1 Ch. 646; 92 L. T. 743; 53 W. R. 480; 12 Manson, 147; 21 T. L. R. 373—C.A.

Statements of the law in *Swan v. North British Australasian Co.* (32 L. J. Ex. 273, 277, 280; 2 H. & C. 175, 182, 192) and *Bishop v. Balkis Consolidated Co.* (59 L. J. Q.B. 565, 571; 25 Q.B. D. 512, 519) adopted and applied. *Ib.*

The secretary of the company, on receipt from the plaintiffs of the transfers to them, gave an acknowledgment of the receipt of them for registration in favour of the transferees "subject to the approval of the directors," with a note appended that the receipt must be returned to the company's office in exchange for the relative share certificates, which would be ready on a day named.—*Held*, that the receipts were not a recognition on behalf of the company of the plaintiffs' title, and did not bind the company to issue certificates on the day named. *Ib.*

— **Putting to Rest—Insolvent Broker—Detriment—Onus of Proof—Duty of Director—Damages.**—In January, 1897, the plaintiff employed L., a broker, to purchase for her thirty shares in a joint-stock company, and paid him the purchase money. L., who was also secretary to the company, prepared a transfer of thirty shares (omitting the denoting numbers) from his clerk to the plaintiff, both of whom executed the transfer. The clerk never had thirty shares in the company, and was a man of no substance. T., the chairman of the company, was the holder of 333 shares in the company, numbered 1 to 333. At a directors' board meeting, at which T. was presiding, the above-mentioned transfer was passed, no mention being made of the denoting numbers. At the same meeting, L. submitted for execution a certificate specifying that the plaintiff was the registered holder of thirty shares, numbered 115 to 144. This certificate was passed round at the meeting, and the directors relying on L.'s trustworthiness did not verify it. Two of the directors (other than T.) signed it, and it was duly issued under the company's seal and countersigned by L., who in May, 1897, sent it to the plaintiff. In March, 1898, L. sent dividend warrants in respect of the shares to both T. and the plaintiff. In June, 1898, L. was dismissed by the company for

misconduct, and in August, 1898, was adjudicated bankrupt. In 1899, the company on discovering the fraud refused to recognise the plaintiff as entitled to any shares. In an action against the company and T. to compel them to recognise her title to the shares, or pay damages,—*Held*, that the directors individually had not been guilty of any breach of duty towards the plaintiff by reason of their not having verified the certificate in question; that they had properly left the verification of the certificates to the secretary, who was believed to be trustworthy; that the mere fact that the certificate was passed round at the board meeting was not sufficient to estop T. from denying the plaintiff's title; and that as against T. the action failed. *Dixon v. Kennaway*, 69 L. J. Ch. 501; [1900] 1 Ch. 833; 82 L. T. 527; 7 Manson, 446—Farwell, J.

Held also, on the authority of *Knights v. Wiffen* (40 L. J. Q.B. 51; L. R. 5 Q.B. 660), that as the plaintiff had been put to rest by the certificate until the time when by reason of L.'s bankruptcy she could no longer recover against him, the onus was upon the company to shew that she could not have recovered against him if she had sued him before he became insolvent. *Ib.*

The company having failed to discharge this onus,—*Held further*, that the plaintiff had rested on the certificate to her detriment; that in the circumstances, there was an estoppel arising on the certificate and binding on the company; and that as against the company the plaintiff was entitled to damages. *Simm v. Anglo-American Telegraph Co.* (49 L. J. Q.B. 392; 5 Q.B. D. 188) distinguished. *Ib.*

— **Liquidator, as Against.**—A statement in a share certificate that the shares are fully paid will not estop the liquidator in the winding-up of the company from denying the sufficiency of the filed contract. *African Gold Concessions and Development Co., In re; Markham and Darter's Case*, 68 L. J. Ch. 215; [1899] 1 Ch. 414; 80 L. T. 282; 47 W. R. 509; 6 Manson, 84—Wright, J.

(h) Calls.

Duty in Making—Signatory of Memorandum of Association—Agreement—Liability for Unpaid Portion of Share.—It is a breach of duty on the part of directors to place themselves in a more advantageous position as regards payment of the amount due on their shares than the other shareholders, notwithstanding that by the articles of association the directors are empowered to make arrangements for a difference between the holders of shares in the amount of calls to be paid and in the time of payment, unless the other shareholders know of the arrangement and sanction it. *Alexander v. Automatic Telephone Co.*, 69 L. J. Ch. 428; [1900] 2 Ch. 56; 82 L. T. 400; 48 W. R. 546—C.A.

Representative Action—Right of Plaintiff to Sue—Form of Relief.—The breach of duty to the company consists in depriving it of the use of the money which the directors ought to have made themselves pay up like the other share-

holders; and where the directors hold a majority of the shares, the Court will grant relief in an action by one shareholder on behalf of himself and all others, the case not being one of mere internal management within the rule in *Foss v. Harbottle* (2 Hare, 461), and will make an order declaring that the directors are guilty of a breach of duty as directors in not paying to the company in respect of their shares the amount obtained from the other shareholders, and giving the plaintiff liberty to apply for an order for payment if necessary. *Ib.*

Summons by Liquidator for Call on Shares—Action for Amount of Call—Unconditional Leave to Defend—Set-off—Resolution for Winding-up.]

—A limited company commenced an action by specially indorsed writ against a shareholder for a call. The defendant obtained unconditional leave to defend, under Order XIV., on affidavit evidence setting up a debt against the company, which he claimed to set off. The company went into voluntary liquidation. The defendant put in his defence claiming set-off, but the action had not come on for trial. The liquidator took out a summons for the amount of the call:—*Held*, that the shareholder could not set off his debt against the liquidator's claim. *Hiram Maxim Lamp Co., In re*, 72 L. J. Ch. 18; [1903] 1 Ch. 70; 51 W. R. 74—Byrne, J.

Calls—Insolvent Estate of Shareholder.]—See EXECUTOR AND ADMINISTRATOR.

Calls Paid by Registered Owner—Indemnity.]

—See *Hardoon v. Belilios*, 70 L. J. P.C. 9; [1901] A.C. 118; 83 L. T. 573; 49 W. R. 209—P.C.

(i) *Dividends.*

Reserve Fund—Investment—Remuneration of Directors, &c.]—There is no principle which compels a company, while a going concern, to divide the whole of its profits among the shareholders, and the reserve fund may, subject to the control of a general meeting, be invested in such securities as the directors may select, the question being one of internal management, as is also the amount of remuneration to be paid to directors and officers of the company. *Burland v. Earle*, 71 L. J. P.C. 1; [1902] A.C. 83; 85 L. T. 553; 50 W. R. 241—P.C.

Declaration of Interim Dividend by Directors—Withdrawal—Indefeasible Right of Shareholders to Payment—Articles of Association.]

It was provided by the articles of association of a company that "the directors might from time to time pay to the members on account of the next forthcoming dividend such interim dividends as, in their judgment, the position of the company justified." On March 16, 1897, at a meeting of the directors, it was resolved that an interim dividend be declared for the current year at the rate of 4 per cent. per annum, payable on April 20, 1897. On April 12, 1897, the directors resolved that, having regard to certain litigation then pending, the payment of the proposed interim dividend should be postponed; and on April 13, 1897, the company requested their bankers to set aside out of money in their

hands belonging to the company, under a special account entitled "Interim dividend account," a sum of 36,000*l.* to cover the dividend, pending the company's instructions. The company now claimed a declaration that neither they nor their bankers were bound to apply the said sum of 36,000*l.* or any part thereof in payment of that dividend:—*Held*, that the company were entitled to such a declaration. *Lagunas Nitrate Co. v. Schroeder*, 85 L. T. 22—Joyce, J.

"Profits available for dividend"—Reserve Fund—Memorandum and Articles of Association.]

—The memorandum of association of a limited company provided that the "profits from time to time available for dividend" should be applicable—first, to the payment of a dividend of 15 per cent. to the ordinary shareholders; and secondly, should be divided between the ordinary shareholders and the holders of founders' shares in specified proportions. The articles adopted Table A, expressly excluding some articles in Table A, but made no express mention of article 74, which enables directors to create a reserve fund:—*Held*, that article 74 of Table A was not excluded by implication, and that the words "profits from time to time available for dividend" in the memorandum meant the net profits after deducting all sums properly appropriated by the directors for other purposes, and that the application of part of the profits to a reserve fund was a proper purpose under article 74. *Fisher v. Black and White Publishing Co.*, 70 L. J. Ch. 175; [1901] 1 Ch. 174; 84 L. T. 305; 49 W. R. 310; 8 Manson, 184—C.A.

Per ROMER, L.J.—Article 74 of Table A was so far modified that the reserve fund could not be used for equalising dividends. *Ib.*

Profits—Accretion to Capital—Injunction.]

In 1897 the defendant company purchased the property and assets of another company. Among the property and assets so purchased was a debt of 100,000 dollars secured by promissory notes. This debt and the notes were not specifically mentioned in the agreement for sale. Subsequently new promissory notes were given to the defendant company for 127,000 dollars, being the amount of the old debt and notes and interest accrued in respect thereof. In respect of the new notes the defendant company received 26,258*l.* 16*s.* English currency. It did not appear that the amount of these notes had ever been included in any balance-sheet:—*Held*, that an interlocutory injunction must be granted restraining the defendants from distributing as dividends so much of the amount received as represented the original debt of 100,000 dollars (to which the plaintiffs limited their claim) without having regard to the value of the total capital assets of the defendant company, and the result of the year's trading. *Foster v. New Trinidad Lake Asphalt Co.*, 70 L. J. Ch. 123; [1901] 1 Ch. 208; 49 W. R. 119; 8 Manson, 47—Byrne, J.

Payment of Dividends out of Capital—Net Profits—"Interest."]—The necessity for the declaration of a dividend as a condition precedent to an action for the recovery of such dividend applies as well to shares on which a fixed preferential dividend is payable as to

ordinary shares. *Bond v. Barrow Hematite Steel Co.*, 71 L. J. Ch. 246; [1902] 1 Ch. 353; 86 L. T. 10; 50 W. R. 295; 9 Manson, 69—Farwell, J.

"Interest" is not an apt word to describe the return to which a shareholder is entitled in respect of shares—preference or ordinary—paid up in due course, and not by way of advance. "Interest" is compensation for delay in payment, and is not accurately applied to a share of profits of trading, although it may be used as an inaccurate mode of expressing the measure of the share of such profits. *Ib.*

— **Knowledge of Shareholders—Action against Directors for Recoupment by Shareholder on Behalf of Self and other Shareholders—Retention by Plaintiff of Share of Dividend at Time of Action—Right of Action.**—Directors of a company in March, 1900, paid an interim dividend to the shareholders which was in fact a payment out of capital. The payment appeared on the balance-sheet presented to the shareholders for the year ending July 31, 1900, and approved by them, and the amount of the dividend was in process of being recouped out of the profits of subsequent years. In March, 1903, two of the shareholders of the company who had received their respective shares of the dividend, with full knowledge of all the facts, and still retained them, brought an action on behalf of themselves and other shareholders of the company against the company and the directors to make the directors repay the amount of the dividend, on the ground that the payment was an *ultra vires* payment:—*Held*, that the plaintiffs could not, in the circumstances of the case, maintain the action. *Towers v. African Tug Co.*, 73 L. J. Ch. 395; [1904] 1 Ch. 558; 90 L. T. 298; 52 W. R. 532; 11 Manson, 198; 20 T. L. R. 292—C.A.

Per VAUGHAN WILLIAMS, L.J., and COZENS-HARDY, L.J.—A shareholder who has, with full knowledge of the facts, received part of the capital of the company as dividend, cannot maintain an action against the directors of the company to make them repay the amount of the dividend, on the ground that the payment was *ultra vires*, while he retains his share of the proceeds of the *ultra vires* act; and the fact that he brings the action in the name of himself and the other shareholders gives him no greater right. *Dictum* of BRETT, L.J., in *Exchange Banking Co., In re; Flitcroft's Case* (52 L. J. Ch. 217, 219; 21 Ch. D. 519, 535), applied by COZENS-HARDY, L.J. *Ib.*

Apportionment—Bequest of Income—Dividend Declared after Death for Period Preceding it—Capital or Income—Express Stipulation.—A testator bequeathed shares in a company upon trust to pay the income to his wife. After his death the company declared a dividend for a period prior to the death. The 90th of its articles of association provided that "every dividend whether arising from past or current profits shall for all purposes be deemed to accrue and fall due upon the day on which it is declared and not before":—*Held*, that this did not constitute such an express stipulation against apportionment of the dividends as would satisfy section 7 of the Apportionment

Act, 1870, and that the Act took effect. *Oppenheimer, In re; Oppenheimer v. Boatman*, 76 L. J. Ch. 287; [1907] 1 Ch. 399; 96 L. T. 631; 14 Manson, 139—Swinfen Eady, J.

Whether apportionment of dividends can be negated by anything in the articles of the company declaring the dividends, *quare. Ib.*

Arrears of—Sums Due as Return of Capital in Pursuance of Reduction of Capital—Statute of Limitations.—The right of a shareholder in a limited company to sue for dividends on ordinary shares in arrear for more than six years but less than twenty years is not barred by the Statute of Limitations, as such arrears are in the nature of specialty and not simple contract debts. The same principle applies to sums due for capital returnable to the shareholders in pursuance of a resolution for reduction of capital sanctioned by the Court. *Artisans' Land and Mortgage Corporation, In re*, 73 L. J. Ch. 581; [1904] 1 Ch. 796; 52 W. R. 330—Byrne, J.

— **On Ordinary Shares—Statute of Limitations.**—Dividends on ordinary shares in a company had been declared and become payable more than six and less than twenty years before the claims for them were made by the shareholders:—*Held*, that the share certificates, as governed by the articles of association, constituted a specialty debt, and that consequently the arrears of dividend were recoverable after the lapse of six years. *Drogheda Steam Packet Co., In re*, [1903] 1 Ir. R. 512—M.R.

— **Statute of Limitations.**—The right of a shareholder in a limited company to sue for dividends on ordinary shares in arrear for more than six years but less than twenty years is not barred by the Statute of Limitations, as such arrears are in the nature of specialty and not simple contract debts. *Artisans' Land and Mortgage Corporation, In re*, 73 L. J. Ch. 581; [1904] 1 Ch. 796; 52 W. R. 330; 12 Manson, 98—Byrne, J.

Dividends—Right of Water Company to make up Deficiency.—*See* WATER.

Maximum Dividends—Income Tax.—*See* GAS COMPANY.

(j) Surrender.

Voluntary Surrender of Shares when Partly Paid—Release from Liability—Ultra Vires.—A surrender of partly paid-up shares in a limited company to the company, although voluntarily made for the benefit of the company, will, if it involves a release of the shareholder's liability for the amount remaining unpaid on the shares, constitute in effect a purchase by the company of those shares, and will be *ultra vires* of the company and void within the principle of *Trevor v. Whitworth* (57 L. J. Ch. 28; 12 App. Cas. 409). *Bellerby v. Rowland & Marwood's Steamship Co.*, 71 L. J. Ch. 541; [1902] 2 Ch. 14; 86 L. T. 671; 50 W. R. 566; 9 Manson, 291—C.A.

Since the decisions in *Trevor v. Whitworth*, 57 L. J. Ch. 44; 12 App. Cas. 409, *Ooregum Gold Mining Co. of India v. Roper* (61 L. J. Ch.

337; [1892] A.C. 125), and *British and American Trustee and Finance Corporation v. Couper* (63 L. J. Ch. 425; [1894] A.C. 399), a surrender of shares in a company which has the effect of reducing capital can only be supported in circumstances which would justify forfeiture, and make it, in effect, a form of forfeiture. *Ib.*

Per STIRLING, L.J.—*Teasdale's Case* (43 L. J. Ch. 578; L. R. 9 Ch. 54) is distinguishable from *Eichbaum v. City of Chicago Grain Elevators* (61 L. J. Ch. 28; [1891] 3 Ch. 459), the resolutions for the surrender of the shares having been passed in the former case in 1865, before the passing of the Companies Act, 1867, and it ought not to have been followed in *Eichbaum v. City of Chicago Grain Elevators* (*supra*). *Quære*, whether the decision in *Teasdale's Case* (*supra*) can in the face of later decisions be supported. *Ib.*

Restoration to Register—Lapse of Time.]—Where a shareholder has purported to make a surrender of his shares which is invalid, and he brings an action claiming to be restored to the register, he is asserting a legal right, never having ceased in law to be the owner of the shares, and he is not obliged to rely on any equity to have the register rectified. The company cannot set up lapse of time or acquiescence as a defence to such a claim, the surrender being altogether void; and where the shareholder makes no claim for back dividends, so that the position of no one will be altered by his restoration to the register, his name ought to be restored, even after the lapse of several years, and though the company has in the meanwhile become prosperous instead of unfortunate. Observations of LORD MACNAGHTEN in *Trevor v. Whitworth* (57 L. J. Ch. 44, 45; 12 App. Cas. 439, 440) distinguished by COLLINS, M.R., and STIRLING, L.J. *Ib.*

Cancellation of Shares—Re-allotment—Transfer—Surrender—Contributory.]—W. agreed to be a director of a company, and qualification shares were allotted to him. Shortly afterwards, on his desiring to have nothing to do with the company, he received back from the company the amount he had paid on his shares, an entry was made in the register of members that his shares were cancelled, and shares bearing the same numbers were allotted to two other persons, who paid for them in cash. The company had more than enough shares apart from these to satisfy the applications of these two persons. The articles provided forms in which transfers of shares should be made, and that surrenders might be made on terms agreed upon. The company having gone into liquidation,—*Held*, that there had been no effectual surrender or transfer of W.'s shares, and that he was liable as a contributory. *Companies Guardian Society, In re*; *Lord Wallscourt's Case*, 7 Manson, 235—Wright, J.

Power of Company to Acquire and Hold Shares for Class of Shareholders—Trust—Surrender of Shares.]—A company was formed for the acquisition of certain copper mines with a capital consisting of preferred and deferred shares. The deferred shares, which were bearer shares, were issued as fully paid to the vendors, who subsequently sold part of these shares. Thereafter the company having made certain claims

against the vendors, an agreement was entered into by the company and the vendors by which these claims were compromised on certain terms, one of these being that the vendors should transfer to the company "or its nominees, for behoof of the preferred shareholders," all the deferred shares then held by them. These deferred shares were duly delivered to the company. Thereafter in an action at the instance of a preferred shareholder against the company for declarator that the deferred shares were held in trust for the preferred shareholders, the defenders maintained that the transaction was the same as a purchase of the deferred shares by the company from the vendors, and that the transfer was meant to be and was in law equivalent to a surrender of the shares to the company as a whole, and that it was *ultra vires* of the company to acquire and hold its own shares, or in any event to use its funds for the acquisition of a benefit for a particular class of its shareholders:—*Held*, that the agreement being of the nature of a compromise, and the shares in question being fully paid, it was not *ultra vires* of the company to acquire them as it did, and that the transfer was not equivalent to a surrender of the shares to the company, but that the company was bound to hold them in trust for the preferred shareholders. *Trevor v. Whitworth* (12 App. Cas. 409) distinguished. *Gill v. Arizona Copper Co.*, 2 F. 843—Ct. of Sess.

Power to Modify Rights Attaching to Class of Shares without Consent of Each Holder—Ultra Vires.]—The contract rights of a shareholder cannot be extinguished by a majority of the class of shareholders to which he belongs or by the company. *Ib.*

Part of the deferred shares of a company came, in terms of an agreement, to be held by the company in trust for the preferred shareholders. Subject to the payment of a preferential dividend on the preferred shares, the annual profits of the company fell to be equally divided between the preferred and deferred shareholders, and in the event of a winding-up the surplus assets, after repayment of the amount paid on the preference shares, also fell to be divided equally between them. One of the articles of association provided: "All or any of the rights and privileges attached to the preferred or any other particular class of share may be modified by agreement between the company and any person purporting to contract on behalf of that class, provided the agreement was passed and confirmed by the shareholders of that class." An agreement was thereafter entered into between the company and persons acting on behalf of the preferred and deferred shareholders respectively, which provided for a subdivision and consolidation of the preferred and deferred shares, and one of the clauses declared that thereupon the holders of preferred and deferred shares should have no right to, or interest in, any deferred shares previously held by the company for the preferred shareholders. Resolutions were thereafter passed and confirmed by a majority of both classes of shareholders approving of the agreement:—*Held*, that the agreement provided in substance, not for a modification, but for the extinction of the right of the preferred shareholders to the deferred shares and was *ultra vires*. *Ib.*

(k) *Forfeiture.*

Partly Paid Shares—Rescission Adversely to Shareholder — Articles of Association.]—The articles of a company provided that the directors might forfeit the shares of a shareholder if the calls made thereon were not paid by a specified day, and that they might at any time before any shares so forfeited were sold, re-allotted, or otherwise disposed of, annul the forfeiture thereof upon such conditions as they thought fit:—*Held*, that the directors had no power under the articles to rescind a forfeiture of shares adversely to a shareholder whose shares had been forfeited, so as to reinstate him with a liability of which he had been relieved by the operation of the forfeiture. *Exchange Trust, Lim., In re; Larkworthy's Case*, 72 L. J. Ch. 387; [1903] 1 Ch. 711; 88 L. T. 56; 10 Manson, 191—Buckley, J.

Call for Whole Amount Remaining Unpaid — Non-payment — Forfeiture — Sale — Condition that Purchaser be Discharged from Prior Calls — Subsequent Call — Liability of Purchaser.]—A limited company, having power to do so, forfeited shares for non-payment by the holders of a call for the full amount remaining unpaid thereon. The company then sold the shares to the appellants, the contract of sale providing that the shares were to be deemed discharged from all prior calls. Subsequently the call on the former shareholders remaining unpaid by them, the company made a call on the appellants:—*Held*, that the contract of sale did not protect the appellants from liability for the subsequent call. *New Balkis Eersteling, Lim. v. Randt Gold-Mining Co.*, 73 L. J. K.B. 384; [1904] A.C. 165; 90 L. T. 494; 52 W. R. 561; 11 Manson, 159; 20 T. L. R. 396—H.L. (E.)

Article 22 of Table A in Schedule I. of the Companies Act, 1862, provides a mode by which a good title can be given to the purchaser of forfeited shares; it preserves such purchaser from liability in respect of calls made prior to his purchase, but does not relieve him from liability in respect of money remaining due on the shares. *Id.*

Sale by Company — Calls — Liability of Purchaser.]—A limited company, having power to do so, forfeited shares for non-payment by the holders of a call for the full amount remaining unpaid thereon. The company sold the shares to purchasers, the contract of sale providing that the shares were to be deemed discharged from all prior calls. Subsequently the forfeiting holders paid a portion of the call. The company having gone into liquidation, the liquidator sought to recover from the purchaser the full amount of the call:—*Held*, that the liquidator was not entitled to receive the amount of the call twice over, and that the purchasers must be allowed the benefit of the payment made by the forfeiting holders in respect of the shares. *Randt Gold-Mining Co., In re*, 73 L. J. Ch. 598; [1904] 2 Ch. 468; 91 L. T. 174; 53 W. R. 90; 12 Manson, 93; 20 T. L. R. 619—Buckley, J.

Voting Power — Forfeited Shares — “Call or other sum due.”]—Where the articles of association of a company provide that after forfeiture

of shares for non-payment of calls the company shall be entitled to recover the calls from the original holder, and also that no member shall have a vote so long as any calls, or other sums, are due and payable in respect of any share, the calls upon a forfeited share are “sums due in respect thereof,” and the purchaser from the company of forfeited shares cannot vote so long as the calls have not been recovered from the former shareholder. *Randt Gold-Mining Co. v. Wainwright*, 70 L. J. Ch. 90; [1901] 1 Ch. 184; 84 L. T. 348; 8 Manson, 61—Kekewich, J.

Charge on Uncalled Capital in Favour of Trustees for Debenture-holders—Power of Directors to Forfeit Shares for Non-payment of Calls.]—A company had power under its memorandum and articles of association to borrow on debentures or debenture stock and to charge all its property, including its uncalled capital, on the unpaid shares. The company created debentures which subsequently were converted into debenture stock. By the deeds creating such debentures and debenture stock the company expressly charged in favour of the trustees the whole of its property, including all its uncalled and unpaid capital and future calls. Subsequently, an order was made by Buckley, J., sanctioning a scheme of arrangement between the company and its debenture stockholders, by which the company was to realise the property forming the security of the debenture debt and to make certain calls upon the shareholders, the proceeds of all calls to be paid to the credit of the trustees for debenture stockholders at a bank to be named by them:—*Held*, that the power of the directors to forfeit shares for non-payment of calls was not taken away by the charge on the uncalled capital in favour of the trustees for debenture-holders or by the scheme. *Agency, Land, and Finance Co. of Australia, In re*, 20 T. L. R. 41—Joyce, J.

Notice of.]—See NOTICES, col. 400.

(l) *Transfer and Priorities.*

“Usual common form” Necessary—Omission of Address of Transferor and Denoting Number of Share—Materiality—Refusal to Register Transfer.]—Where the articles of association of a company provide that all transfers of shares are to be in the “usual common form,” a transfer will not be deemed to have failed to comply with that requirement merely because it omits matters which would be contained in a common form, but are wholly immaterial—for example, the address of the transferor and the denoting number of the share, where both of these are well known to the directors. *Letheby & Christopher, Lim., In re; Jones's Case*, 73 L. J. Ch. 509; [1904] 1 Ch. 815; 90 L. T. 774; 52 W. R. 460; 11 Manson, 209—Buckley, J.

Power of Directors to Refuse Registration — Consideration Untruly Stated in Transfer Deed — Stamp Consequently Insufficient.]—It came to the knowledge of the secretary of a company that the consideration stated upon the face of a transfer of shares lodged with the company for registration was untrue, and that the stamp upon the transfer, which was in accordance with the consideration stated, was consequently

insufficient, having regard to the true consideration. The directors refused to register the transfer:—*Held*, that the directors were justified in their refusal, as by virtue of section 14, sub-section 4 of the Stamp Act, 1891, the transfer could not be given in evidence or be available for any purpose whatever in a Court of law, either as a means of enforcing the obligations of the transferee or as justifying the directors in altering the register of the company by removing the name of the transferor and substituting that of the transferee. *Maynard v. Consolidated Kent Collieries Corporation*, 72 L. J. K.B. 681; [1903] 2 K.B. 121; 88 L. T. 676; 52 W. R. 117; 10 Manson, 386—C.A.

— **Rights of Transferee.**—A sold to B certain shares in a company whose articles of association provided (as was known to both A and B at the date of the sale) that the directors might, without assigning any reason, refuse to register any transfer of shares to any person not approved of by them. In an action at the instance of A against B, the latter was ordered to pay the price of the shares in exchange for a transfer of them in ordinary form. B thereupon paid the price, and having received a transfer from A presented it to the company, who refused to register B as proprietor of the shares or pay him the dividends accruing thereon. A, whose name remained on the register and who did not propose to annul the contract of sale and return the price, declined to receive from the company the dividends accruing on the shares:—*Held*, in an action by B against A that B had the sole beneficial right, title, and interest in the shares and dividends thereon, that the shares were held by A and his heirs, representatives, and successors in trust for B so long as A's name should remain on the register in respect of the shares, and B continued to hold the beneficial interest therein, and that decree should be granted ordaining A from time to time to make payment to B of all dividends accruing on the shares. *Stevenson v. Wilson*, [1907] S.C. 445—Ct. of Sess.

Blank Transfer of Shares—Mortgage—Estoppel—Notice to Company not to Register.—A person who executes a transfer of shares thereby comes under an implied obligation not to hinder the transferee from obtaining registration, and this applies to a case where the transfer is originally made in blank by the transferor and subsequently filled in by a *bona fide* holder for value, in whose favour it is binding by estoppel against the transferor. *Dictum* of LORD ESHER, M.R., in *London Founders' Association v. Clarke* (57 L. J. Q.B. 291, 293; 20 Q.B. D. 576, 582) followed and applied. *Hooper v. Herts*, 75 L. J. Ch. 253; [1906] 1 Ch. 549; 94 L. T. 324; 54 W. R. 350; 13 Manson, 85—C.A.

Measure of Damages for Delay.—The measure of damages for the breach of such obligation is the difference between the value of the shares at the time when in the ordinary course they would but for the delay caused by the transferor have been registered in the name of the transferee, and their value at the time when the transferee's right to registration is established; in estimating which all the material circumstances affecting the selling value of the shares must be taken into account. *Id.*

W. executed a blank transfer of shares, and placed it, together with the share certificate, in the hands of H. for the purpose of raising money under circumstances which the Court held to estop W. from denying that he had given to H. the necessary authority. H. applied to the plaintiff, who made a small advance out of his own money (which was afterwards repaid), and also at H.'s request borrowed 700l., for H.'s use, from a bank, on the deposit of the blank transfer and share certificate and on the plaintiff's personal security, H. undertaking to indemnify the plaintiff and to repay to him the 700l. within fifteen days. The loan not having been repaid, the bank, with a view to realise the security, filled up the blank transfer with the plaintiff's name as transferee, and sent it to the company for registration. W. thereupon gave notice that he disputed the validity of the transfer, thus preventing the plaintiff from dealing with the shares, which had since fallen in value. The plaintiff brought this action claiming damages against W. Since the commencement of the action the plaintiff had repaid the 700l. to the bank:—*Held*, that W., in preventing the registration of the plaintiff's name as transferee, had committed a breach of his implied obligation arising out of the transfer, and that the plaintiff was in a position to claim damages for that breach. *Id.*

Note on Certificate as to Production before Registration—Duty of Company as regards Transfer—False Statement by Shareholder—Notice of Prior Charge through Officers.—C., the registered holder of shares in the defendant company, in May, 1903, deposited the certificate for the shares with the plaintiff as security for a loan, and executed a transfer to the plaintiff with the date left in blank. There was a note at the foot of the certificate: "without the production of this certificate no transfer of the shares mentioned therein can be registered." C., who was in the employment of the company, in June, 1903, entered into an arrangement with the managing director and two of the officers of the company for an advance to be made to him by the company, part of the arrangement being that he should sell his shares in the company, and that the proceeds of sale should be paid to the company in part repayment of the loan. C. sold his shares to Y. for 90l. and the money was paid by Y. to the company. C. lodged a transfer of the shares to Y. with the company for registration without the certificate, but with a declaration that the certificate was held by a friend of his, but not "as a charge against any loan or other consideration." C. was trusted by the directors, and they, acting in good faith, accepted his statement, and registered the transfer to Y., and issued a new certificate to him:—*Held*, on the facts, that the company had received the 90l. with such knowledge and under such circumstances that they ought to be treated as having received it to the use of the plaintiff, and the plaintiff was entitled to recover it from the company. *Rainford v. James Keith & Blackman Co.*, 74 L. J. Ch. 531; [1905] 2 Ch. 147; 92 L. T. 786; 54 W. R. 189; 12 Manson, 278; 21 T. L. R. 582—C.A.

Certificated Transfers—Estoppel—Secretary.—The secretary of a company is in the position of a servant, and has no power to bind the company by representations beyond the scope of his

instructions and duties. The secretary of a company, in order to assist a shareholder in carrying out a fraud, falsely certified that certificates of shares had been deposited with him to meet certain transfers, when in fact no such certificates had been deposited:—*Held*, that the company were not thereby estopped from denying the right of the proposed transferee to be put upon the register of shareholders. *Grant v. Norway* (10 C. B. 665) followed, *LORD ROBERTSON* doubting on this point. *Whitechurch (George), Lim. v. Cavanagh*, 85 L. T. 349—H.L. (E.)

Managing Director.—The articles of association of a limited company gave the managing director very wide powers as to the commercial business of the company:—*Held*, that this gave him no special powers to act as the representative of the company in relation to a proposed transfer of shares, so as to raise an estoppel against the company. *Ib.*

A representation as to a future course of conduct cannot create an estoppel. *Ib.*

Authority of Secretary to Pass.—By one of the articles of association of a company, "the directors may decline to register any transfer of shares upon which the company has a lien, and in case of shares not fully paid up may refuse to register a transfer to a transferee of whom they do not approve." The defendant, who was the registered holder of partly paid shares in a company, executed a transfer of them, and the transfer was lodged with the secretary, who at once entered the name of the transferee in the register. The transfer came subsequently before the directors, who, acting under the above article, refused to pass it, and the secretary struck the name of the transferee out of the register. The directors afterwards made a call upon the shares. In an action to recover the calls the secretary in his evidence stated that he had no authority to pass transfers, and that he made the entry in the register merely in order to keep pace with the work, and that the directors had never before refused to sanction a transfer:—*Held*, that the secretary had no authority to enter the transfers at once, and that, therefore, the defendant remained the registered holder of the shares, and was liable for calls. *Chida Mines, Lim. v. Anderson*, 22 T. L. R. 27—Walton, J.

Voluntary Liquidation—Invalid Resolutions—Interlocutory Injunction—Pending Action—Registration of Transfers in the Meantime.—A transferee of shares under transfers executed before the date of the confirmatory resolution for voluntary liquidation is not entitled to insist on the registration of such transfers after the date of the confirmatory resolution merely because an action has been brought to declare the resolution invalid, and an interlocutory order has been made to restrain the company from acting upon the resolution. *Violet Consolidated Gold Mining Co., In re*, 68 L. J. Ch. 535; 80 L. T. 684—Kekewich, J.

Forged Deed of Transfer—Innocent Transferee—Registration—Implied Indemnity.—When a person is requested to discharge a statutory duty by and for the benefit of another, a contract is implied on the part of the latter to indemnify the former from the consequences

of his act. Thus, where a corporation registers a transfer of its stock, apparently valid but in reality forged, and the corporation has been compelled to make good the loss to the true owner of the stock, it is entitled to recover the loss sustained from the person at whose request the forged transfer was registered. Decision of *LINDLEY, J.*, in *Anglo-American Telegraph Co. v. Spurling* (49 L. J. Q.B. 392; 5 Q.B. D. 188) overruled. *Sheffield Corporation v. Barclay*, 74 L. J. K.B. 747; [1905] A.C. 892; 93 L. T. 83; 54 W. R. 49; 69 J. P. 385; 10 Com. Cas. 287; 12 Manson, 248; 3 L. G. R. 992; 21 T. L. R. 642—H.L. (E.)

Bankruptcy—Compulsory Transfer of Shares on—Articles of Association—Repugnancy—Fraud on Bankruptcy Law.—A provision in the articles of association of a company for the compulsory transfer of shares is neither repugnant to the nature of personal property nor obnoxious to the rule against perpetuity. The rule against perpetuity has no application in the case of personal contracts. *Borland's Trustee v. Steel*, 70 L. J. Ch. 51; [1901] 1 Ch. 279; 49 W. R. 120—Farwell, J.

The fact that the liability to such compulsory transfer is to arise only in the event of the shareholder's bankruptcy, and the fact that the transfer is to be effected at a pre-arranged valuation which may possibly be less than the actual market value of the share at the time of transfer, do not in themselves constitute a fraud upon the bankruptcy law; provided that both these provisions are made without undue preference, and *bona fide* with a view to the successful working of the company. *Ib.*

Transfer of Shares to Bankrupt—Refusal to Register Transfer.—A company cannot refuse to register a transfer of shares to a bankrupt director on the ground that, if registered, the shares will pass to the trustee in bankruptcy. *Sutton v. English and Colonial Produce Co.*, 71 L. J. Ch. 685; [1902] 2 Ch. 502; 87 L. T. 438; 50 W. R. 571; 10 Manson, 101.

Stock Exchange—Sale of Shares for Settlement "coming out"—Reasonable Time.—Partly paid shares in a company were sold, subject to the rules of the London Stock Exchange, for the settlement "coming out." The rules of the Stock Exchange provided for the transaction being completed by the handing over of a transfer and a certificate. The articles of association of the company provided for certificates being issued to members, and contemplated certificates being issued for partly paid shares. The company refused to issue certificates for partly paid shares, and in consequence no settlement in those shares took place. The purchaser called upon the seller to complete within a reasonable time:—*Held*, that it was a term of the contract that the "coming out"—that was, the coming out of the certificate—was to be within a reasonable time, and in considering what was a reasonable time regard must be had to the regulations of the company; but that delay occasioned by the arbitrary conduct of the directors in refusing to issue certificates until the shares were fully paid could not be counted. *Goldmann v. Kann*, 23 T. L. R. 287—Channell, J.

Equitable Title to Shares—Priority—Notice—

Distringas—Negligence—Registration—Lien of Stockbrokers.]—The owner of shares assigned all his property to the plaintiffs for the benefit of his creditors. The plaintiffs demanded the certificates, but were told that they were abroad. They then gave notice of the assignment to the company, but did not proceed under Order XLVI. The owner subsequently instructed the defendants, his stockbrokers, to sell the shares, which they did, paying the proceeds to the owner and receiving from him the certificates, which they lodged with the company for certification. The company, having notice of the assignment, refused to register the transfers to the purchasers. The stockbrokers thereupon purchased and delivered to the purchasers other shares in substitution for those originally sold. These latter shares the stockbrokers now claimed to have registered in their names:—*Held*, that the plaintiffs had not disentitled themselves by negligence, and that their prior equitable title must prevail. *Peat v. Clayton*, 75 L. J. Ch. 344; [1906] 1 Ch. 659; 94 L. T. 465; 54 W. R. 416; 13 Manson, 117; 22 T. L. R. 812—Joyce, J.

— Transfer in Blank—Registration—Notice of Trust.]—Where the articles of association of a company provide that a transferor of a share shall be deemed to remain the holder until the transferee is entered on the register in respect thereof, a legal title to shares is not acquired, as against the title of a prior equitable owner of the same, before the registration of the transfer, or, at all events, until the date when the person seeking to register has a present, absolute, and unconditional right to have the transfer registered. Directors are not bound to register a transfer at the next meeting after it has been handed in, when it has come to their knowledge that the transferor objects to the registration, although the transfer is in order, and nothing further is required to be done on the part of the transferee. *Ireland v. Hart*, 71 L. J. Ch. 276; [1902] 1 Ch. 522; 86 L. T. 385; 50 W. R. 315; 9 Manson, 209—Joyce, J.

Forged Transfer—Liability of Stockbroker—Implied Warranty.]—*See* PRINCIPAL AND AGENT.

Sale on Stock Exchange.]—*See* PRINCIPAL AND AGENT.

(m) Mortgage.

Implied Power of Sale—Notice Demanding Payment.]—In cases unaffected by the Conveyancing and Law of Property Act, 1881, s. 19, the law is that a mortgagee of stock or shares may sell the same at any time after the day originally fixed for payment of the loan, or, if no day was originally fixed, then after reasonable notice has been given to the mortgagor and default made by him in payment after such notice. *De Verges v. Sandeman, Clark & Co.*, 71 L. J. Ch. 328; [1902] 1 Ch. 579; 86 L. T. 269; 50 W. R. 404—C.A.

— Requisites of Notice—Reasonable Time—Measure of Damages.]—The requisites of such a notice considered. *Per* VAUGHAN WILLIAMS, L.J.—The object of such notice is to give to the mortgagor a reasonable opportunity to redeem, and it must fix a day certain for payment by the mortgagor. *Per* STIRLING, L.J.—Such

notice must give a reasonable opportunity to the mortgagor to pay what is due under the mortgage, and it is at least desirable that it should fix a day for that purpose, and also convey to the mind of the mortgagor that if he fails to avail himself of the opportunity to redeem, the mortgagee will be in a position to put in force his rights. *Per* COZENS-HARDY, L.J.—The notice need not state that the mortgagee will sell; it is sufficient that the notice requires payment of the mortgage-money; but before the power can be exercised a reasonable time must elapse after the notice requiring payment. A mistake as to the amount due will not destroy the effect of the notice. *Ib.*

Brokers who advanced the money on a purchase of shares by their client had the shares registered in their names under a verbal agreement to hold them by way of mortgage to secure the debt. The mortgagees frequently wrote pressing for payment. In August, 1898, a reconstruction of the company was proposed, under which assenting shareholders were to obtain new shares with 3s. liability in lieu of the old shares. On August 22, 1898, the mortgagees wrote to the mortgagor asking whether he intended to participate in the scheme, or whether he would adopt the only other alternative of allowing his shares to be forfeited. They also gave him notice that they would not take up the new shares (which must be done before a named day) on his behalf; also that, as they were unprotected by any security, they should take any necessary steps to recover the debt owing to them. The mortgagor did not pay, and the mortgagees ultimately took up the new shares, paying the 3s. per share themselves; and, acting under the belief that they were absolute owners thereof, sold the shares, which subsequently to the sale rose in value. The mortgagor, who did not know of the sale till after the rise in value, claimed damages for a wrongful sale:—*Held* (*dissentiente* VAUGHAN WILLIAMS, L.J.), that sufficient notice had been given by the mortgagees to entitle them to exercise their implied power of sale over the old shares; that such notice remained in force as to the new shares acquired under the reconstruction scheme, and that the sale could be justified under the power of sale though made by the mortgagees under the mistaken belief that they were absolute owners. *Held*, by VAUGHAN WILLIAMS, L.J., that no sufficient notice had been given by the mortgagees to enable them to exercise their implied power of sale, and that the plaintiff was entitled to damages for a wrongful sale, which, however, under the circumstances of this case, must be estimated at the price of the shares at the time of sale (less the amount owing to the mortgagees), and not at the highest price which the shares had subsequently obtained. *Ib.*

(n) Notices.

Forfeiture — Special Resolutions — Deceased Member—Service of Notice at Registered Address —Articles of Association—Alteration to Prejudice of Deceased Member.]—A company, whose articles provide for the service of notices by post addressed to a member at his registered address, cannot, after knowledge of the death of a member, so serve either a notice on which

to found a forfeiture of the deceased member's shares, or notices of meetings for altering the articles by special resolution in order to give the company a lien on his shares. *Allen v. Gold Reefs of South Africa*, 68 L. J. Ch. 540; [1899] 2 Ch. 40; 80 L. T. 750; 47 W. R. 568—Kekewich, J.

Quære, whether a company can by special resolution alter its articles of association after the death of the only holder of fully paid shares in order to give itself a lien upon his fully paid shares. *Ib.*

(o) *Lien on.*

Lien of Company on Shares for Debts Due from Shareholders—Advances—Security.]—The articles of a company gave the company a lien on all the shares held by any shareholder indebted to the company, and gave the directors power to sell such shares in certain events. They also empowered the board to lend money, or give credit with or without security, but no advances without security were to be made, or credit given to any director:—*Held*, that the lien given by the articles on the shares constituted a security, and advances could be made both to shareholders and directors on such security if the board considered the shares of adequate value. *National Bank of Wales, In re; Cory's Case*, 68 L. J. Ch. 634; [1899] 2 Ch. 629; 81 L. T. 363; 48 W. R. 99—C.A.

Deceased Member—Notices of Meetings—Service at Registered Address.]—Where the articles of a company provide for the service of notices by post addressed to a member at his registered address, and that the representatives of a deceased member are not to be entitled to receive notices of, or to attend at meetings, until they shall have registered themselves as owners of the shares, notices of meetings addressed and posted to the registered address of a deceased member are properly served, although the directors were aware at the time of the member's death. *Allen v. Gold Reefs of West Africa*, 69 L. J. Ch. 266; [1900] 1 Ch. 656; 82 L. T. 210; 48 W. R. 452; 7 Manson, 417—C.A.

Articles—Alteration—Lien Created on Fully Paid Shares—Antecedent Debts—Vendor's Shares—Shares Paid in Full in Advance of Calls.]—Section 50 of the Companies Act, 1862, authorises a limited company formed with articles which confer no lien upon fully paid shares, and which allow them to be transferred without any fetter, to alter those articles by special resolution, and to impose a lien and restrictions on the registration of transfers of those shares by members indebted to the company; and that can be done so as to impose a lien or restriction in respect of a debt contracted before and existing at the time when the articles were altered, so long as the alteration is *bona fide* for the benefit of the company, and not to defeat the rights of any particular shareholder. *Ib.*

The altered articles, however, may not be binding as regards some particular fully paid-up shareholder, even though passed *bona fide*, as he may have special rights by contract, or otherwise, against the company which may

exempt him from the operation of the articles as altered. *Ib.*

Per LINDLEY, M.R., and ROMER, L.J.—Shares allotted as fully paid to the vendor of the property purchased by the company in payment of the purchase-money are not, in the absence of any special bargain with the vendor, exempt from the operation of the altered articles; nor, *per* ROMER, L.J., are shares which the company has allowed the shareholder to pay up in full in advance of calls. *Ib.*

The fact that the original articles provided for a limited lien upon unpaid shares only would not justify a person who acquired fully paid shares in assuming that those shares would never be made subject to a lien by the alteration of the articles. *Ib.*

Per VAUGHAN WILLIAMS, L.J.—A company cannot by altering its articles impose a lien on fully paid vendor's shares, as the effect of that would be to make those shares less marketable, and so affect the consideration given for the property purchased. *Ib.*

Whether it can impose a lien in that way upon shares which the shareholder has been allowed to pay up in full in advance of calls, *quære. Ib.*

12. GENERAL MEETINGS.

Extraordinary General Meeting—Notice—Ratification—Unauthorised Notice.]—On December 10, 1900, the secretary of a company sent out a notice convening an extraordinary general meeting to be held on December 18. The notice purported to be issued by order of the board. A requisition had been served on the company in accordance with the articles requiring the calling of the meeting. In fact no meeting of directors was held after the receipt of the requisition, but a meeting of directors was held on December 16, the day after the writ was issued, at which it was resolved that the directors should adopt, ratify, and confirm the action of the secretary in issuing the notice convening the meeting. The only question for determination was whether the meeting had been validly summoned:—*Held*, that on ratification by the directors the notice became good for all purposes. *Hoozer v. Kerr, Stuart & Co.*, 83 L. T. 729—Cozens-Hardy, J.

— **Two Meetings Convened by One and the Same Notice—Special Regulation of Company.]**—A provision in the articles of association of a limited company—that whenever it is intended to pass a special resolution the two meetings may be convened by one and the same notice, and it shall be no objection that the notice only convenes the second meeting contingently on the resolution being passed by the requisite majority at the first meeting—is not *ultra vires* or inconsistent with the letter or the spirit of section 51 of the Companies Act, 1862; and a notice given in conformity with this provision would be a valid notice, and the second meeting summoned by it would be duly summoned. *Alexander v. Simpson* (59 L. J. Ch. 137; 43 Ch. D. 139) distinguished. *North of*

England Steamship Co., In re, 74 L. J. Ch. 404; [1905] 2 Ch. 15; 99 L. T. 1; 53 W. R. 499; 12 Manson, 174; 21 T. L. R. 481—C.A.

— **Conditional Notice—Validity.**—The articles of association of a company required thirty days' notice of every general meeting. On February 19 the company issued a notice of an extraordinary general meeting for March 23 following, at which a resolution for reduction of capital was to be proposed. In the same document the company also gave notice of an extraordinary general meeting for April 7, at which the said resolution, if passed at the first meeting, should be confirmed. The notice then continued: "Should the said resolution not be passed by the requisite majority at the meeting to be held on March 23, due notice will be given to the shareholders that the meeting on April 7, of which notice is now given, will not be held:—Held, that the notice convening the second meeting was valid. *Espuela Land and Cattle Co., In re*, 48 W. R. 684—Byrne, J.

Amendment of Resolution at First Meeting—Subsequent Confirmation—Non-conformity with earlier Notice—Validity.—In passing a special resolution under section 51 of the Companies Act, 1862, the resolution confirmed at the second meeting must be in the same form as that passed at the first meeting, but it is not necessary that the resolution passed at the first meeting should be in the identical terms of the resolution specified in the notice of such meeting. If, therefore, a proper and sufficient notice of the intention to propose a special resolution at a general meeting has been given, the resolution will not be invalidated if, owing to an amendment at the first meeting, the resolution then passed and afterwards confirmed at the subsequent general meeting, of which notice specifying the amended resolution has been duly given, is not identical with the proposed resolution specified in the earlier notice. *Torbock v. Westbury (Lord)*, 71 L. J. Ch. 845; [1902] 2 Ch. 871; 87 L. T. 165; 51 W. R. 183—Swinfen Eady, J.

De Facto Directors—Irregularity—Ratification.—Where a general meeting is called by the only acting directors of a company, acting as a board and pursuant to a resolution of the board, and notice thereof is duly sent to the shareholders of the company, and one of the objects of the meeting is to confirm past proceedings, the fact that one or more of the directors had been irregularly appointed will not invalidate a resolution passed at a meeting. *Browne v. La Trinidad* (57 L. J. Ch. 292; 37 Ch. D. 1) and *British Asbestos Co. v. Boyd* (73 L. J. Ch. 81; [1903] 2 Ch. 439) followed. *State of Wyoming Syndicate, In re* (70 L. J. Ch. 727; [1901] 2 Ch. 431), distinguished. *Boschoek Proprietary Co. v. Fuke*, 75 L. J. Ch. 261; [1906] 1 Ch. 148; 94 L. T. 398; 54 W. R. 359; 13 Manson, 100; 22 T. L. R. 196—Swinfen Eady, J.

Where the amount of directors' remuneration is fixed by the articles of association, and the directors have voted themselves a sum in excess of that amount, a general meeting cannot ratify the irregularity without first altering the articles. *Id.*

Notice—Sufficiency.—Where a notice convening a general meeting states that the share-

holders will be asked to ratify the election of a director and to receive the directors' report and accounts, this is a sufficient notice to bring the question of ratification within the competency of the meeting. *Irvine v. Union Bank of Australia* (46 L. J. P.C. 87; 2 App. Cas. 366) followed. *Id.*

Powers of Directors—Postponement of General Meeting.—In the absence of express power in the articles of association, directors have no power to postpone a general meeting of shareholders which has been properly convened. The fact that the directors have power to fix the time and place of the meeting and to adjourn the meeting does not give them the power. *Smith v. Paringa Mines*, 75 L. J. Ch. 702; [1906] 2 Ch. 193; 94 L. T. 571; 13 Manson, 316—Kekewich, J.

Notice—Sufficiency—Reconstruction—Interest of Directors.—Where the directors of a company are personally interested in the adoption of a proposed scheme for its reconstruction, and are to be remunerated by means of a call on shares, the notice convening the extraordinary general meeting to pass the requisite resolutions must disclose such interest in order that the matter upon which the shareholders are to vote may be fairly brought before them. Where this has not been done, and the resolutions for reconstruction have been passed and confirmed, the notice will not be sufficient to bind absent shareholders, and the directors and the company will be restrained by injunction from carrying such resolutions into effect. *Tiessen v. Henderson*, 68 L. J. Ch. 353; [1899] 1 Ch. 861; 80 L. T. 483; 47 W. R. 459; 6 Manson, 340—Kekewich, J.

Whether Notice Conditional—Validity.—A notice of a meeting to be held at a certain place, time, and date, which states that, in the event of certain specified resolutions not being passed, another meeting will be held immediately afterwards to confirm resolutions which have been already provisionally passed, is not bad on the ground of being conditional. *Alexander v. Simpson* (59 L. J. Ch. 137; 43 Ch. D. 139) distinguished. *Id.*

Nature of Business, Stating.—See *Normandy v. Ind., Coope & Co., Lim.*, 77 L. J. Ch. 82; [1908] 1 Ch. 84.

Different Classes of Shareholders—Quorum—Articles of Association.—The articles of association of a company, the capital of which was divided into preference and ordinary shares, provided (article 13) that the rights and privileges of each class might be modified by agreement between the company and a person contracting on behalf of that class, provided that the agreement was confirmed at a separate general meeting of the holders of shares of that class, and the provisions of the articles as to general meetings were to apply *mutatis mutandis* to every such meeting, "but so that the quorum thereof shall be members holding or representing by proxy three-fourths of the nominal amount of the issued shares of the class." Under the regulations as to general meetings it was provided that the quorum for a general meeting should be (in effect) the holders of one-tenth of the issued capital of the company; and

that if a *quorum* were not present within a certain time of the convening of the meeting, the meeting should stand adjourned for a week, and then those members who were present should be a *quorum*:—*Held*, that the requirements of article 13 as to the *quorum* ran through all the provisions that were incorporated therewith by reference; and though the regulations as to general meetings could be made use of for a class meeting, it must be subject to there being at every such meeting, whether adjourned or not, the three-fourths *quorum* required by article 13. *Hemans v. Hotchkiss Ordnance Co.*, 68 L. J. Ch. 99; [1899] 1 Ch. 115; 79 L. T. 681; 47 W. R. 276; 6 Manson, 52—C.A.

Deceased Member — Registered Address — Notice — Forfeiture of Shares — Alteration of Articles—Retrospective Operation.—Apart from special provisions in their articles of association, a company having notice of the death of a member cannot bind his estate by posting to him at his registered address—(a) a notice preliminary to forfeiting his shares for non-payment of calls due at his death, or (b) a notice of an extraordinary general meeting to be held for the purpose of altering the articles in such manner as to impose a fresh liability on his shares. *New Zealand Gold Extraction Co. v. Peacock* ([1894] 1 Q.B. 622) and *James v. Buena Ventura Nitrate Grounds Syndicate* ([1896] 1 Ch. 456) discussed and applied. *Allen v. Gold Reefs of West Africa*, 68 L. J. Ch. 540; [1899] 2 Ch. 40; 80 L. T. 750; 47 W. R. 568—Kekewich, J.

Closure of Discussion—Power of Chairman.—At a general meeting of a company, the chairman by the vote of the majority can stop the debate after the resolutions have been reasonably discussed. *Wall v. London and Northern Assets Corporation* (No. 1), 67 L. J. Ch. 596; [1898] 2 Ch. 469; 79 L. T. 249; 47 W. R. 219—C.A.

Amendment of Resolution—Validity.—An amendment altering the terms of a resolution cannot be moved at a second meeting which has been called simply for the purpose of confirming or rejecting the resolution. *Ib.*

Resolution to Distribute Sums of Money among Officers and Servants—Validity—Ultra Vires.—A company having sold its undertaking and property, the directors sent out to the shareholders notices of an extraordinary general meeting to consider a resolution for the voluntary winding-up of the company with the directors as liquidators, and another resolution determining what sum should be distributed among the officers and servants of the company. The directors also issued circulars inviting shareholders to send them their proxies. At the meeting the resolution for voluntary winding-up was duly carried, and the chairman and managing director then proposed a resolution that a sum equal to five years' salary should be paid to himself and the secretary and accountant, and a further sum be distributed among the servants. This was lost on a show of hands, but carried upon a poll. The directors then sent out notices of a second meeting to confirm these resolutions, and again issued circulars inviting proxies. At the second meeting the resolution for the payment to the officers and servants

was again lost on a show of hands, but carried on a poll. A dissentient shareholder then brought an action to restrain the directors from giving effect to the resolution on the grounds that its carrying and confirmation were improperly obtained, and that it was *ultra vires* of the company and invalid:—*Held*, without deciding the first point, that the resolution was *ultra vires* and invalid. *Stroud v. Royal Aquarium Society*, 89 L. T. 243—Joyce, J.

Votes.—The private interest of a shareholder does not affect the validity of his vote on a resolution affecting that interest. *Burland v. Earle*, 71 L. J. P.C. 1; [1902] A.C. 83; 85 L. T. 553; 50 W. R. 241—P.C.

Right to Vote—Conditional Allotment of Shares.—A person who agrees to become a member of a company and whose name is entered on the register of shareholders as the holder of certain shares is not thereby constituted a member entitled to vote at meetings of the company in respect of such shares unless it can be shewn that the company have agreed to accept such person as a member. When, therefore, a company have agreed to give a person certain shares upon certain conditions which remain unfulfilled, such person does not become a member, notwithstanding the allotment of shares to him in part performance of the agreement incorporating such conditions and registration of the same in his name, so long as the certificates for such shares are deposited with the intention that they shall not operate according to their purport until the event happens on which they are to issue. *Spitzel v. Chinese Corporation*, 80 L. T. 347; 6 Manson, 355—Stirling, J.

—“**Personally or by proxy**”—**Poll—Voting Papers—Power of Chairman.**—The articles of association of a limited company provided that votes might be given either personally or by proxy, and that if a poll were demanded it should be taken in such a manner as the chairman of the meeting should direct. A poll being demanded, the chairman directed the poll to be taken by means of voting papers:—*Held*, that taking the poll by voting papers was unauthorised and invalid. *McMillan v. Le Roi Mining Co.*, 75 L. J. Ch. 174; [1906] 1 Ch. 331; 94 L. T. 160; 54 W. R. 281; 13 Manson, 65; 22 T. L. R. 186—Joyce, J.

Issue to Control Voting Power—Bona Fides—Injunction.—Where shares had been issued by the directors, not for the general benefit of the company, but for the purpose of controlling the holders of the greater number of shares by obtaining a majority of voting power,—*Held*, applying the principle of *Fraser v. Whalley* (2 H. & M. 10), that they ought to be restrained from holding the meeting at which the votes of the new shareholders were to have been used. *Punt v. Symons & Co.*, 72 L. J. Ch. 768; [1903] 2 Ch. 506; 89 L. T. 525; 52 W. R. 41; 10 Manson, 415—Byrne, J.

Proxy—Qualification of—“Named”—Shareholder—Articles of Association.—Although by one of the articles of association of a company no person is to be allowed to vote as a proxy unless the instrument appointing him is deposited as therein prescribed before “the meeting at which the person named in such

instrument proposes to vote," it is not necessary that the proposed proxy should actually be "named" if he is sufficiently described for all business purposes. *Bombay-Burmah Trading Corporation v. Shroff*, 74 L. J. P.C. 41; [1905] A.C. 213; 91 L. T. 812; 12 Manson, 169; 21 T. L. R. 148—P.C.

An article requiring that no person shall be appointed as proxy "who is not a shareholder in the company" is sufficiently complied with if he is a shareholder at the time when he is called upon to act as a proxy, though he was not a shareholder at the date of the appointment. *Ib.*

— **Blanks in Proxy—Subsequent Filling in—Validity.**—So long as a proxy is properly stamped at the time of execution its operative parts, such as the name of the proxy or the date of the meeting at which it is to be used, may be filled in afterwards by any person properly authorised to do so. *Saagrove v. Bryden*, 76 L. J. Ch. 184; [1907] 1 Ch. 318; 96 L. T. 361; 14 Manson, 47; 23 T. L. R. 255—Parker, J.

S., a shareholder in a company, on going abroad, left with P., another shareholder, a proxy duly stamped and executed, but with the date of execution and the date of the meeting at which the proxy was to be used left blank. P. wrote to S. informing him that a requisition for a meeting had been lodged, and stating generally the objects of the meeting, and requesting S. to cable consent, which P. would take as authority to complete the proxy as soon as the date of the meeting had been fixed. S. cabled accordingly, and the cablegram was afterwards stamped as a letter of attorney. The requisition, however, was withdrawn on account of an informality and a subsequent one substituted, on which a meeting was held. P. filled in the blanks in S.'s proxy and used it at this meeting:—*Held*, that S. intended to authorise the proxy to be filled in and used at the meeting intended to be called for the purposes mentioned in P.'s letter, whether such meeting was actually called pursuant to the requisition lodged as mentioned in the letter, or to a subsequent requisition substituted therefor; that the case was governed by *Ernest v. Loma Gold Mines Co.* (65 L. J. Ch. 850; [1896] 2 Ch. 572; 66 L. J. Ch. 17; [1897] 1 Ch. 1), and was not distinguishable from it on the ground that the date of the meeting was not actually fixed when the proxy was executed, as in that case; and that the proxy was therefore valid. *Ib.*

Proxies—Cancellation of Stamp.—*See REVENUE.*

Poll—Allowance of Votes by Chairman—Conclusive Evidence.—A provision in a company's articles of association that no objection shall be made to any vote except at the meeting at which it is tendered or an adjournment thereof, and that any vote, whether given in person or by proxy, not then disallowed, shall be deemed valid for all purposes, is conclusive; and votes not disallowed at such meeting or adjournment cannot in the absence of fraud be challenged by legal proceedings. *Wall v. London and Northern Assets Corporation* (No. 2), 68 L. J. Ch. 248; [1899] 1 Ch. 550; 80 L. T. 70; 6 Manson, 312—North, J.

Declaration of Chairman—"Conclusive evidence."—The provision of section 51 of the Companies Act, 1862, that the declaration of the chairman in the case of a special or extraordinary resolution, that the resolution has been carried, "shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same," precludes the Court from enquiring into the question whether the requisite proportion of votes was in fact given. *Young v. South African and Australian Exploration and Development Syndicate* (65 L. J. Ch. 638; [1896] 2 Ch. 268) not followed. *Gold Co., In re* (48 L. J. Ch. 281; 11 Ch. D. 701), followed. *Hadleigh Castle Gold Mining Co., In re*, 69 L. J. Ch. 631; [1900] 2 Ch. 419; 83 L. T. 400—Cozens-Hardy, J.

— The provisions of section 51 of the Companies Act, 1862, that the declaration of the chairman in the case of a special or extraordinary resolution, that the resolution has been carried, "shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour or against the same," precludes the Court from enquiring into the question whether the requisite proportion of votes was in fact given. *Arnot v. United African Land Co.*, 70 L. J. Ch. 306; [1901] 1 Ch. 518; 84 L. T. 309; 49 W. R. 322; 8 Manson, 179—C.A.

Gold Co., In re (48 L. J. Ch. 281; 11 Ch. D. 701), followed. *Hadleigh Castle Gold-Mining Co., In re* (69 L. J. Ch. 631; [1900] 2 Ch. 419), approved. *Horbury Bridge Coal, Iron, and Waggon Co., In re* (48 L. J. Ch. 341; 11 Ch. D. 109), distinguished. *Ib.*

— **When not Conclusive—"Conclusive Evidence."**—The declaration of the chairman of a meeting held for the purpose of passing a special resolution under section 51 of the Companies Act, 1862, is not conclusive where it is manifest on the face of it that the statutory majority has not been obtained. *Hadleigh Castle Gold-Mining Co., In re* (69 L. J. Ch. 631; [1900] 2 Ch. 419), and *Arnot v. United African Land Co.* (70 L. J. Ch. 306; [1901] 1 Ch. 518) distinguished. *Caratal (New) Mines, Lim., In re*, 71 L. J. Ch. 883; [1902] 2 Ch. 498; 87 L. T. 437; 50 W. R. 572; 9 Manson, 414—Buckley, J.

13. MANAGEMENT.

(a) *Interference of Court.*

Internal Management—Jurisdiction—Right of Company or Minority to Sue.—The Court has no jurisdiction to interfere with the internal management of a company acting within its powers; and actions to redress a wrong done, or to recover money or damages due to a company, must be brought by the company itself, except where a minority of shareholders complain of conduct on the part of the majority which is either fraudulent or beyond the company's powers. No mere informality or irregularity which can be remedied by the majority of shareholders can of itself entitle the minority to sue. *Burland v. Earle*, 71 L. J. P.C. 1;

[1902] A.C. 83; 85 L. T. 553; 50 W. R. 241; 9 Manson, 17—P.C.

(b) *Audit of Accounts.*

Balance-sheet — Reserve Fund not Disclosed by Balance-sheet — Auditors not to Disclose Information — Duty of Auditors—Ultra Vires.]—Sections 21 and 23 of the Companies Act, 1900, require by implication that there shall be annually an audit of the accounts of a company resulting in a balance-sheet, to the accuracy of which the auditors shall speak. The purpose of the balance-sheet is primarily to shew that the financial position of the company is at least as good as there stated, not to shew that it is not or may not be better; and a balance-sheet so worded as to shew that there is an undisclosed asset, the existence of which makes the financial position better than is shewn, is not necessarily inconsistent with the Act. *Newton v. Birmingham Small Arms Co.*, 75 L. J. Ch. 627; [1906] 2 Ch. 378; 95 L. T. 135; 54 W. R. 621; 13 Manson, 267; 22 T. L. R. 664—Buckley, J.

The statutory majority of shareholders may resolve that as to particular items of the company's business it is to the company's interest that there shall be secrecy, and that the auditors shall not disclose them to the shareholders unless their duty under the Act requires it; and it is a compliance with the Act if the auditors report that they have examined the accounts as to those items and are satisfied with them, and that the funds have been employed in manner authorised by the company's regulations, provided the auditors are *bona fide* satisfied that in making this report and nothing further they are truly reporting as to the true and correct view of the state of the company's affairs. *Ib.*

But it is inconsistent with the Act that the auditors should be bound, even when they think that the true state of the company's affairs is affected by facts relating to the undisclosed funds, to withhold all information with regard to them from the shareholders; and any regulations which preclude the auditors from availing themselves of all the information to which under the Act they are entitled as material for the report which the Act requires them to make as to the true and correct state of the company's affairs are inconsistent with the Act. *Ib.*

At extraordinary general meetings of a company there were carried and confirmed special resolutions for the formation of an internal reserve fund, which need not be shewn in or disclosed by the balance-sheet, and as to which the directors need not give any information to the shareholders. The directors were to have an absolute discretion as to the investment of the fund, and as to its application for any purpose serving, protecting, or advancing the interests of the company or preserving or promoting the value of the company's undertaking, assets, or goodwill. The fund and all particulars relating to it were to be disclosed to the auditors, whose duty should be to see that it was applied for the purposes of the company as above mentioned, but not to disclose any

information with regard to it to the shareholders or otherwise:—*Held*, that, in regard to the last-mentioned provision, the resolutions went too far, and that the company must be restrained from acting upon them. *Ib.*

(c) *Summary and List of Members.*

Default in Forwarding to Registrar—Default not Wilful.]—The word "default" in section 27 of the Companies Act, 1862 (which imposes a penalty for non-compliance with the requirement of section 26 as to forwarding to the Registrar in every year a list of the members of the company), implies a wilful continued neglect to do the act required, and does not apply to a case where the default cannot be remedied. *Dorté v. South African Super-aëration, Lim.*, 20 T. L. R. 425—D.

14. DEBENTURES AND DEBENTURE STOCK.

(a) *Borrowing Power.*

Power to Borrow Money not Exceeding Amount of Preference Share Capital.]—The articles of one of the companies gave the directors various powers, in addition to their general powers, and in particular power to borrow on the security of the property of the company "any sum or sums of money not exceeding the amount of the preference share capital of the company":—*Held*, that this was not a prohibition of borrowing unless and until preference shares had been issued, but was intended for the protection of the preference shareholders if they existed, and until they came into existence the company could borrow under its general powers without regard to this limitation. *Johnston Foreign Patents Co., In re; Johnston Die Press Co., In re; Johnstons Engraving Co., In re*, 73 L. J. Ch. 617; [1904] 2 Ch. 234; 91 L. T. 124; 53 W. R. 189; 11 Manson, 378—C.A.

Unauthorised Purposes—Ultra Vires—Duty of Lender to Enquire.]—Where money is being borrowed by a company within the limits of its powers of borrowing, there is no obligation on the lender to enquire for what purposes the borrowing is made or whether the money borrowed is to be applied for objects within the powers of the borrowing company. *Davis's Case* (41 L. J. Ch. 124; L. R. 12 Eq. 516), so far as it is an authority to the contrary, overruled. *Payne & Co., In re; Young v. Payne & Co.*, 73 L. J. Ch. 849; [1904] 2 Ch. 608; 91 L. T. 777; 11 Manson, 437; 20 T. L. R. 590—C.A.

Knowledge of Director of Lending Company—Notice.]—Where a director of a lending company has in his private capacity acquired knowledge as to the purposes to which a borrowing company intends to apply money borrowed by them upon the security of a debenture, there is no duty on the director to disclose that knowledge to the lending company, and such knowledge will not be imputed to them so as to avoid the debenture if the purposes are improper and *ultra vires*. *Ib.*

Statutory Corporation—"Undertaking"—Power to Mortgage Chattels.]—A company, which was

formed under a private Act for the maintenance of the navigation of a river, had power to borrow money on a mortgage of its undertaking. The company was empowered to levy tolls and own barges for carrying goods:—*Held*, upon the authority of *Stagg v. Medway (Upper) Navigation Co.* (72 L. J. Ch. 177; [1903] 1 Ch. 169), that the company had power to mortgage their barges. *Reeve v. Medway (Upper) Navigation Co.*, 21 T. L. R. 400—Joyce, J.

“Property and effects”—Realisation of Security—Goodwill—Appointment of Manager.]—

An hotel company by its debentures charged “all its lands, buildings, property, stock-in-trade, furniture, chattels, and effects whatsoever, both present and future.” Upon motion for a receiver and manager in a debenture-holder’s action to enforce the security,—*Held*, that the words “property and effects” were sufficient to include the goodwill and business of the company in the security, and that consequently a manager could be appointed for the purpose of realisation. *Leas Hotel Co., In re; Salter v. Leas Hotel Co.*, 71 L. J. Ch. 294; [1902] 1 Ch. 332; 86 L. T. 182; 50 W. R. 409; 9 Manson, 168—Kekewich, J.

Surplus Lands—Power to Charge—Additional Security—Existing Debt—Ultra Vires.]—A company owing a properly incurred debt may give the creditor a charge as well upon its surplus lands as upon the proceeds of sale of such lands; but such a transaction must not be used as a cloak for unauthorised borrowing. *Stagg v. Medway (Upper) Navigation Co.*, 72 L. J. Ch. 177; [1903] 1 Ch. 169; 87 L. T. 705; 51 W. R. 329—C.A.

The defendant company, in exercise of its powers, raised money upon a mortgage of its undertaking, and subsequently upon a transfer of the mortgage proposed to charge its surplus land in favour of the transferee by way of additional security for the mortgage-debt. The Act incorporating the company did not contain any express power enabling it to mortgage its surplus lands, but did confer an express power enabling it to sell its surplus lands:—*Held*, that this was not a transaction of borrowing, and that the company had power to give the transferee a charge upon its surplus lands in respect of such debt; and that this power ought to be implied notwithstanding the express power of sale conferred by the Act. The law laid down by CAIRNS, L.J., in *Gardner v. London, Chatham, and Dover Railway* (36 L. J. Ch. 323, 330, 331; L. R. 2 Ch. 201, 219), followed and applied. *Ib.*

Reserve Capital—Power to Charge.]—Where a company has passed a resolution under section 5 of the Companies Act, 1879, that a portion of its uncalled capital shall not be capable of being called up except for the purpose of the company being wound up, such portion of its capital cannot be mortgaged by the company. *Dictum* of LINDLEY, L.J., in *Pyle Works, In re* (59 L. J. Ch. 489, 504; 44 Ch. D. 534, 536), followed. *Mayfair Property Co., In re; Bartlett v. Mayfair Property Co.*, 67 L. J. Ch. 337; [1898] 2 Ch. 28; 78 L. T. 302; 46 W. R. 465; 5 Manson, 126—C.A.

Per VAUGHAN WILLIAMS, L.J.—Such a re-

solution is, in the case both of an unlimited and a limited company, irrevocable. *Ib.*

Hypothecation of Remittances—Receiver.]—

A limited company owned a railway and also valuable coal mines in a foreign country. In 1888 it issued 5 per cent. debentures on the security of its railway, it being provided by the trust deed securing the same that the security should not, except in the case of suspension of payment by or liquidation of the company, affect its other property. In 1892 it issued 6 per cent. debentures charged on all its property, and ranking as a first charge on its property other than its railway, in respect of which the 1892 debentures ranked as a second charge after the 1888 debentures, it being provided by the trust deed securing the 1892 debentures that the company, notwithstanding that issue, should be at liberty in the ordinary course of its business, and for the purpose of carrying on the same, to sell, lease, and deal with its property for the time being, but not to create any mortgage or charge on its railway or coal mines in priority to the debentures, and not to sell its undertaking or any substantial part thereof without the concurrence of the trustees for the debenture-holders. The ordinary course of business was for its foreign agents when they had sufficient cash in hand on account of the company to remit it to the company by bills through its agents in England, who sent the bills to the company’s bankers for discounting or for collection on account of the company, and the bankers placed the proceeds to the credit of their account with the company. In August, 1896, the company being in need of money to pay interest on its 6 per cent. debentures, obtained an advance from its bankers on the security of a letter hypothecating all remittances to be received from its foreign agents; and in September the company, being in need of money to pay off certain debentures, obtained another advance from its bankers on a similar letter of hypothecation. In March, 1897, the company made default in payment of interest on its debentures, and a debenture-holder’s action was brought against it and a receiver appointed on March 27. On March 18, and again on March 27, the foreign agents having no notice of the appointment of the receiver, sent remittances to the company, which were handed to the receiver on April 23 and May 3 respectively:—*Held*, that the bankers, by virtue of the two letters of hypothecation, were entitled to these remittances in priority to the debenture-holders. *Arauco Co., In re*, 79 L. T. 336—North, J.

Loan Applied to Pay Interest on Successive Issues of Debenture Stock—Subrogation of Lender—Security—Priority.]—

A person who advances money to a company whose borrowing powers are exhausted is entitled to be treated as a simple contract creditor of the company for so much of his loan as has been expended in paying debts due by the company, but he is not entitled to the benefit of securities held by creditors so paid off, or of their priorities over other creditors. Remarks of FRY, L.J., in *Wenlock (Baroness) v. Dee River Co.* (56 L. J. Q.B. 589, 592; 19 Q.B. D. 155, 165), dissented from. *Wretham, Mold, and Connah’s Quay Railway, In re* (No. 1), 68 L. J. Ch. 270; [1899] 1 Ch. 440; 80 L. T. 130; 47 W. R. 464; 6 Manson, 218—C.A.

(b) *Issue of.*

Issue of Part of Series—Action Commenced by Debenture-holders—Further Issue of Same Series after Writ.] Where a company has resolved to raise a sum of money by the issue of debentures constituting a floating charge on its undertaking and assets, and has issued a part only of such series, the company is not debarred from issuing the remaining debentures of the series by the fact that the earlier debenture-holders have called in the principal and issued a writ to enforce their security, provided they have not at the date of the further issue obtained the appointment of a receiver. *Colonial Trusts Corporation, In re; Bradshaw, ex parte* (15 Ch. D. 465, 472), and *Government Stock &c. Investment Co. v. Manila Railway* (64 L. J. Ch. 740; [1895] 2 Ch. 551, 561) followed. *Hubbard & Co., In re; Hubbard v. Hubbard & Co.*, 68 L. J. Ch. 54; 79 L. T. 665; 5 Manson, 360—Wright, J.

“Ordinary course of business.”] *Scoble*, it is in the “ordinary course of business” for a company which has power under its memorandum and articles of association to issue debentures, to issue debentures to its solicitor as security for his costs of defending an action brought by debenture-holders. *Ib.*

Issue of Debentures by Companies Jointly and Severally—Charge on Several Undertakings of the Companies—Proceeds Divided between Companies.]—Three companies, each of which had general power to borrow on mortgage or debentures, issued twenty-five mortgage debentures for 1,000l. each. The debentures were headed in the names of the three companies, and were stated to be an issue by the companies jointly. The three companies thereby jointly and severally agreed to pay to the debenture-holders the principal sum and interest, and they thereby charged with such payments their several undertakings and all their present and future properties and assets. The debentures were issued in pursuance of resolutions of the boards of directors of the three companies, who were in each case the same persons, and the moneys advanced were paid to a joint banking account, and were appropriated in different amounts to each company. Orders had been made for the winding-up of each company, and the debenture-holders had brought an action to enforce their security:—*Held*, that, having regard to the several obligations of the companies respectively, assuming it was *ultra vires* the companies to issue debentures jointly, the debentures were a valid charge against each company to the extent to which the money advanced came to the coffers of that company. *Johnston Foreign Patents Co., In re; Johnston Die Press Co., In re; Johnstonia Engraving Co., In re*, 73 L. J. Ch. 617; [1904] 2 Ch. 234; 91 L. T. 124; 53 W. R. 189; 11 Manson, 378—C.A.

Option to Call for—Equitable Security.]—An option to call at any time for a specific amount of mortgage-debentures of a given issue in satisfaction of a debt is a good equitable security, while the issue remains unexhausted, and may be exercised after judgment in a debenture-

holder's action. *Queensland Land and Coal Co., In re; Davis v. Martin* (63 L. J. Ch. 810; [1894] 3 Ch. 181), followed. *Pegge v. Neath District Tramways Co.*, 67 L. J. Ch. 17; [1898] 1 Ch. 183; 77 L. T. 550; 46 W. R. 243—North, J.

— Lapse of Time—Waiver.]—A company borrowed money from a first mortgage debenture-holder, giving him promissory notes and an option to call at any time for the equivalent in second mortgage debentures out of a series then being issued. In spite of repeated pressure by the company, the creditor refused to exercise his option, preferring to retain the notes as bearing a higher rate of interest and being more readily enforceable than the debentures. Ten years having elapsed, the creditor joined in a debenture-holder's action as plaintiff in respect of his first mortgage debenture, but, finding after judgment that there would be no funds available for ordinary creditors, and that there were still mortgage debentures of the second series unissued, he exercised his option, claiming in the alternative to rank as a debenture-holder of the second series:—*Held*, that the above facts raised no case of waiver, and that the creditor was entitled to rank as a debenture-holder of the second series. *Ib.*

Contract to Lend Money to Company on Debentures—Specific Performance.]—*See* SPECIFIC PERFORMANCE.

Debentures—Rights of Holders—Fraudulent Assignment—Transfer of Business.] *See* BANKRUPTCY.

Negotiability—Custom.]—*See* NEGOTIABLE INSTRUMENT.

(c) *Re-issue of.*

(*See now Companies Act, 1907, s. 15.*)

Issue as Security for Loan—Return to Company on Repayment of Loan—Transfer to Fresh Holder—Rights of Holder against other Debenture-holders.]—A company issued a series of debentures to rank *pari passu* as a first charge, the company not to be at liberty to create any mortgage or charge on the security in priority to or *pari passu* with those debentures. Certain of the debentures having been issued as security for loans were, on repayment of the loans, returned to the company with blank transfers. These debentures were subsequently assigned to fresh holders for value by completing the transfers:—*Held*, that on payment off of the loans for which they were issued as security the debentures were paid off, and that the holders of these debentures could not rank *pari passu* with the other debenture-holders. *Tasker & Sons, Lim., In re; Hoare v. Tasker and Sons, Lim.*, 74 L. J. Ch. 643; [1905] 2 Ch. 587; 93 L. T. 195; 54 W. R. 65; 12 Manson, 302; 21 T. L. R. 736—C.A.

Blank Debentures Deposited by Company as Security for Loan—“Issue” Equitable Security—Loan Repaid and Debentures Returned to the Company—Re-issue of Debentures.]—A company issued debentures as a second charge on the property of the company. Twenty-one

debentures were sealed in blank—that is to say, without the insertion of any name as the creditor of the company, or of any date—and were deposited with a bank as security for a loan. The loan was afterwards paid off by the company, whereupon the bank returned the debentures to the company. Subsequently the company filled in six of these debentures with the date and with the name of a syndicate, and issued them to the syndicate for value. The company claimed to be entitled to issue the remaining fifteen in a similar manner. The company had no power to re-issue debentures which had been paid off:—*Held*, that the bank having advanced money on the security of the debentures was entitled to be placed in the position of a secured creditor, and there being in effect a contract by the company to issue the debentures to the bank by way of security, that in the view of equity amounted to an issue of them. The decision in *W. Tasker & Sons, Lim., In re; Hoare v. W. Tasker & Sons, Lim.* (74 L. J. Ch. 643; [1905] 2 Ch. 587), was therefore applicable to the case, and none of the twenty-one debentures could be validly re-issued, but must be cancelled. *Perth Electric Tramways, In re; Lyons v. Tramways Syndicate*, 75 L. J. Ch. 534; [1906] 2 Ch. 216; 94 L. T. 815; 54 W. R. 535; 13 Manson, 195; 22 T. L. R. 533—Swinfen Eady, J.

Deposit of Debentures with Bankers—Collateral Security—Credit Exceeding Nominal Value—Payment off of Amount Secured—Debentures Retained by Bankers—Further Advance on Same Security—Fresh Issue.—A company issued a series of debentures, secured by a trust deed whereby the company charged its undertaking and all its property, including uncalled capital, with the payment of the debentures and interest, and such charge was to be a floating security, but the company was not to be at liberty without the authority of an extraordinary resolution of the debenture-holders to create any mortgage or charge upon such assets ranking *pari passu* with or in priority to the charge thereby created. Certain of the debentures were not issued to the public, but deposited by the company with a firm of bankers as collateral security for a credit with that firm. The debt secured by the debentures at one time amounted to more than the nominal value of the debentures, but according to the evidence then before the Court it had been reduced to 500l. *Warrington, J.*, held that, as against the holders of debentures of the same issue, the company had no power to charge the debentures in question with any further sum; and he considered that even if the debentures had been issued to secure a current account, and the account had been in debit to the full nominal value of the debentures and had been paid off, any further borrowing on the security of the debentures would be the issuing of a fresh security. *Russian Petroleum and Liquid Fuel Co., In re; London Investment Trust, Lim. v. Russian Petroleum and Liquid Fuel Co.*, 77 L. J. Ch. 21; [1907] 2 Ch. 540; 97 L. T. 564; 14 Manson, 318; 23 T. L. R. 746—C.A.

The company appealed. It appeared from further evidence, which had been filed after the hearing in the Court below, that the whole of the debt secured by the debentures in question had been paid off and that the 500l. had been advanced by the bankers for the

purpose of keeping alive the debentures which were still in their possession:—*Held*, that on payment off of the amount for which the debentures were originally a security the debentures were just as much dead as if they had been actually handed back to the company, and that consequently the 500l. was not secured by such debentures. *Tasker & Sons, Lim., In re; Hoare v. Tasker & Sons, Lim.* (74 L. J. Ch. 643; [1905] 2 Ch. 587), applied. *Ib.* [See 7 Edw. 7, c. 50, s. 15.]

(d) Interest.

Security to Bank for Advances—Interest—Right to Prove for.—A company issued to a bank, as security for advances, six debentures of the company for 1,000l. each, bearing interest at 5 per cent., accompanied by a letter of charge. The bank charged interest on the overdraft of the company. The company was afterwards wound up. At the date of the winding-up the company was indebted to the bank in a sum larger than the amount of the debentures, exclusive of interest thereon, which had not been paid:—*Held*, that the bank was entitled to interest on the debentures. *Vint, In re*, [1905] 1 Ir. R. 112—M.R.

Debenture Stock—Money Borrowed for Purposes of Construction—Incidence of Interest—Profits.—There is no general rule of law compelling a company to charge interest on money borrowed for purposes of construction against revenue and prohibiting it from charging it, during construction, to capital account. *Hinds v. Buenos Ayres Grand National Tramways Co.*, 76 L. J. Ch. 17; [1906] 2 Ch. 654; 95 L. T. 780; 13 Manson, 411; 23 T. L. R. 6—Warrington, J.

A company borrowed money, by the issue of 5 per cent. conversion debenture stock, for the purpose of converting its tramway system to electric traction, at the estimated cost of 10,000l. per mile:—*Held*, that it was entitled to charge against capital not only the 10,000l., but also 500l. interest, in respect of each mile until completion and open to traffic. *Ib.*

(e) Floating Charge.

Mortgage of Book Debts—Registration.—A mortgage of the book debts, present and future, of a company (but not including uncalled capital), by which the mortgagees were empowered, but were under no obligation, to give notice to the debtors, and on such notice to receive the debts or appoint a receiver thereof, and on default of the mortgagors to exercise their power of sale, —*Held*, to be a “floating charge” within the meaning of the Companies Act, 1900, s. 14, sub-s. 1 (d). *Illingworth v. Houldsworth*, 73 L. J. Ch. 739; [1904] A.C. 355; 91 L. T. 602; 53 W. R. 113; 12 Manson, 141; 20 T. L. R. 633—H.L. (E.). Affirming *Yorkshire Woolcombers Association, In re; Houldsworth v. Yorkshire Woolcombers Association*, 72 L. J. Ch. 635; [1903] 2 Ch. 284; 88 L. T. 811; 10 Manson, 276—C.A.

Issue of Debentures by Companies Jointly and Severally—Charge on Several Undertakings of the Companies—Proceeds Divided between Companies.]—Three companies, each of which had general power to borrow on mortgage or debentures, issued twenty-five mortgage debentures for 1,000l. each. The debentures were headed in the names of the three companies, and were stated to be an issue by the companies jointly. The three companies thereby jointly and severally agreed to pay to the debenture-holders the principal sum and interest, and they thereby charged with such payments their several undertakings and all their present and future properties and assets. The debentures were issued in pursuance of resolutions of the boards of directors of the three companies, who were in each case the same persons, and the moneys advanced were paid to a joint banking account, and were appropriated in different amounts to each company. Orders had been made for the winding-up of each company, and the debenture-holders had brought an action to enforce their security:—*Held*, that, having regard to the several obligations of the companies respectively, assuming it was *ultra vires* the companies to issue debentures jointly, the debentures were a valid charge against each company to the extent to which the money advanced came to the coffers of that company. *Johnston Foreign Patents Co., In re; Johnston Die Press Co., In re; Johnstonia Engraving Co., In re*, 73 L. J. Ch. 617; [1904] 2 Ch. 284; 91 L. T. 124; 53 W. R. 189—C.A.

Articles of Association—Construction—Power to Borrow Money not Exceeding Amount of Preference Share Capital.]—The articles of one of the companies gave the directors various powers, in addition to their general powers, and in particular power to borrow on the security of the property of the company “any sum or sums of money not exceeding the amount of the preference share capital of the company”.—*Held*, that this was not a prohibition of borrowing unless and until preference shares had been issued, but was intended for the protection of the preference shareholders if they existed, and until they came into existence the company could borrow under its general powers without regard to this limitation. *Ib.*

Charge on all “Property” of Company, Present and Future.]—A debenture which charges the undertaking of a company, and “all the property to which it now is or shall at any time hereafter become entitled, and all the estate, right, title, and interest of the company in, to, and upon the said premises,” does not constitute a charge upon the uncalled capital of the company. *Russian Spratt's Patent, Lim., In re; Johnson v. Russian Spratt's Patent, Lim.*, 67 L. J. Ch. 381; [1898] 2 Ch. 149; 78 L. T. 480; 46 W. R. 514—C.A.

Charge on all “Property” of Company, Present and Future.]—A debenture which charges the undertaking of a company, and “all the property to which it now is or shall at any time hereafter become entitled, and all the estate, right, title, and interest of the company in, to, and upon the said premises,” does not constitute a charge upon the uncalled capital of the company. *Russian Spratt's Patent, Lim., In re; Johnson v. Russian Spratt's Patent, Lim.*, 67 L. J. Ch. 381; [1898] 2 Ch. 149; 78 L. T. 480; 46 W. R. 514—C.A.

Debenture and Garnishee Order—Priority—Interpleader.]—A garnishee order creates no charge on the property or assets of the garnishee; therefore, where a company, after service upon them of a garnishee order absolute, issued for good consideration to a person having notice of the garnishee order a debenture which, on process being issued against them, became a charge on the whole of their

assets,—*Held* (KENNEDY, J., *dubitante*), that the debenture-holder in respect of goods of the company was entitled to priority over the garnishee issuing execution under his garnishee order. *Geisse v. Taylor*, 74 L. J. K.B. 912; [1905] 2 K.B. 658; 93 L. T. 534; 54 W. R. 215; 12 Manson, 400—D.

Misfeasance Summons—Right of Holder to Money Recovered.]—Moneys recovered on a misfeasance summons are the property of the company, and the right of debenture-holders to the property is no higher than that of the company. *Goy & Co., In re; Farmer v. Goy & Co.*, 69 L. J. Ch. 481; [1900] 2 Ch. 149; 83 L. T. 309; 48 W. R. 425; 8 Manson, 221—Stirling, J.

Receiver—Charge on Property of Company in Foreign Country—Attachment of French Debt—Locality of Debt—Interference with Receiver—Contempt.]—Receivers had been appointed in debenture-holders' actions of the undertaking and property, whatsoever and wheresoever, present and future, of the defendant company. Certain creditors of the company attached a debt due from a French firm to the company in France, and claimed to be entitled to payment of their debt out of the assets coming to the company from the French firm:—*Held*, that though the debenture-holders had by contract with the company a charge upon all their assets, including the French debt, they could not prevent the creditors from asserting and enforcing such rights as were given to them by French law against the French debt, which was situate in France. *Maudslay, Sons & Field, In re; Maudslay v. Maudslay, Sons & Field*, 69 L. J. Ch. 347; [1900] 1 Ch. 602; 82 L. T. 378; 48 W. R. 568; 8 Manson, 38—Cozens-Hardy, J.

Debenture-holders of a company having according to English law a good assignment of a French debt due to the company, but according to French law no such assignment, cannot prevail against creditors who have according to French law a good inchoate charge or assignment of the French debt. *Ib.*

A receiver is not put in possession of foreign property by the mere order of an English Court; the requirements of the law of the country where the property is situate must also be complied with. Until this is done, a person not a party to the action taking proceedings in the foreign country is not guilty of contempt of Court either on the ground of interfering with the receiver's possession or otherwise. *Ib.*

Sale of Property and Assets—Dissentient Debenture-holders—Injunction.]—The power of a company, which has issued debentures expressed to be a charge by way of floating security on the property, undertaking, and assets for the time being, whether present or future, of the company, to deal with its property and assets in the ordinary course of business, extends to a sale thereof, in accordance with its memorandum of association, without making any specific provision for the satisfaction or discharge of the debentures. *Government Stock &c. Investment Co. v. Manila Railway* (66 L. J. Ch. 102; [1897] A.C. 81) applied. *Borax Co., In re; Foster v. Borax Co.*, 70 L. J. Ch. 162; [1901] 1 Ch. 326; 83 L. T. 638; 49 W. R. 212—C.A.

Per VAUGHAN WILLIAMS, L.J. — Quere, whether the carrying out of an agreement for sale containing a covenant by the company not to exercise its powers in respect of one of its principal objects as defined by the memorandum of association could not be restrained upon the application either of shareholders or the holders of debentures of the company. *Ib.*

Company's Power to Deal with Property—Sale of Entire Undertaking.]—The power of a company, which has issued debentures expressed to be a charge by way of floating security on the property, undertaking, and assets for the time being, whether present or future, of the company, to deal with its property and assets in the ordinary course of business, extends to a sale thereof, in accordance with its memorandum of association, without making any specific provision for the satisfaction or discharge of the debentures. *Government Stock &c. Investment Co. v. Manila Railway* (66 L. J. Ch. 102; [1897] A.C. 81) applied. *In re Borax Co.; Foster v. Borax Co.*, 70 L. J. Ch. 162; [1901] 1 Ch. 326—C.A.

Per VAUGHAN WILLIAMS, L.J. — Quere, whether the carrying out of an agreement for sale containing a covenant by the company not to exercise its powers in respect of one of its principal objects as defined by the memorandum of association could not be restrained upon the application either of shareholders or the holders of debentures of the company. *Ib.*

Branch Businesses — Sale of Assets of One Branch — Injunction.]—A company carried on its undertaking in three distinct branches, and issued debentures operating as a floating charge upon the property of the company. The debentures were secured by a covering trust-deed under which the company covenanted to carry on their business in a proper and efficient manner. The company resolved to sell to another company the stock-in-trade and plant of one of the branches of the business which had been carried on at a loss. In an action by the debenture-holders, *—Held*, that the sale could not be restrained, as it was not contrary to the terms of the debentures or trust-deed, and was consistent with the carrying on of the business of the company in a proper manner. *Vivian & Co., In re; Metropolitan Bank v. Vivian & Co.*, 69 L. J. Ch. 659; [1900] 2 Ch. 654; 82 L. T. 674; 48 W. R. 636; 7 Manson, 470—Cozens-Hardy, J.

Pledge — Priority — A distillery company, with power to create debentures and to borrow on mortgage, issued debentures, and executed a trust deed to further secure the debentures. By the debentures, the undertaking and all the property, present and future, of the company (not comprised in the trust deed) were charged with the moneys borrowed as a first charge thereon. By the conditions indorsed on the debentures, the company was to be permitted, until default in payment of interest &c., in course of its business, and for the purpose of carrying on same, to deal with the property thereby charged in such manner as the company might think fit, and in particular might sell, lease, or exchange the same, pay and receive money, and might declare and pay dividends out of profits, but nothing therein should be

taken to authorise the creation of any mortgage or charge on the property for the time being of the company in priority to the charge thereby created. By the trust deed the company mortgaged the freehold and leasehold premises of the company to secure the repayment of the debentures to the lenders *pari passu*, and the company covenanted to pay the principal and interest secured by the debentures, and that the same should be a first charge on the mortgaged premises, and should take precedence over all moneys which might thereafter be raised by the company by any means whatsoever. The company obtained advances from their bankers to enable them to purchase grain for the purpose of manufacturing whisky, to secure the repayment of which the company pledged to the bank certain whisky by delivering to the bank the warrants for the whisky, with invoices:—*Held*, that the transaction came within the restriction against creating any mortgage or charge on the property in priority to the debentures, and the provision that the debentures should take precedence over all moneys which might be raised by the company by any means whatsoever, and that the bank were not entitled to the whisky as against the debenture-holders. *Held* also, on the evidence, that the bank had notice of the debentures at the date of the pledge of the whisky to them, and were consequently not in the position of purchasers for value without notice. *Cox v. Dublin Distillery Co.*, [1906] 1 Ir. R. 446—C.A.

Deposit with Banker — Restrictive Condition — Priority — Notice — Ordinary Course of Business—Interest of Director in Contract.]—The C. company for the purpose of raising capital issued mortgage debentures amounting to 38,000*l.* secured by a trust deed. By each debenture the C. company thereby charged its undertaking and property whatsoever and wheresoever, including its uncalled capital. By indorsed conditions the debentures were to rank *pari passu* on the property charged, but so that the company might from time to time mortgage or charge the premises up to 20,000*l.* with its bankers. With that exception the charge thereby created was to be a floating security, but so that the company should not be at liberty to create any mortgage or charge ranking in priority to or *pari passu* with the charge hereby created. The C. company was to keep a register of the names of debenture-holders and particulars of their debentures. The money secured by the debentures was to become payable if the C. company created any charge in priority to them. The debentures were duly registered under section 14 of the Companies Act, 1900, in the year 1903. The four directors of the C. company having an overdrawn account with the M. bank (who were not the company's ordinary bankers), on April 10, 1905, transferred 5,000 shares in the R. company which were standing in the share register of that company in the name of the C. company to the M. bank, executing a banker's memorandum of deposit under the C. company's common seal as security for the overdraft. A receiver and manager of the C. company's property was appointed in a debenture-holder's action on July 14, 1906, who, on presentation to the R. company of the transfer for registration, objected to registra-

tion of the shares in the M. bank's name and gave notice to the bank not to deal with the shares. By article 65 of the articles of association of the C. company the directors of the C. company were empowered to borrow money for the purposes of the company. On an application by the M. bank to have their names inserted on the register of members of the R. company, —*Held*, that the transaction with the M. bank was within the ordinary course of business of the C. company, and that the power of charge fell within the powers of the directors; further, that, even if a proportion of the advance was applied in wiping off a private overdraft of the directors, that would not, unless the whole transaction was *ultra vires*, prevent the bank obtaining registration in order to enforce their mortgage security. Also, assuming that the bank had notice that there were debentures which required to be filed under section 14 of the Companies Act, 1890, that if they had inspected the register they would not have found out in that way that the debentures did include a provision that no charge should be created on the C. company's property in priority to them, only that there were debentures which charged the property of the company, and that, not having notice in that way, they were entitled to an order for registration of the shares. *Standard Rotary Machine Co., In re*, 95 L. T. 829—Kekewich, J.

Set-off—Assignment of Debt—Events on which a Floating becomes a Fixed Security—Appointment of Receiver.—The defendants, who owed the plaintiffs N. & Co. 2,000*l.* for goods supplied, held two debentures of N. & Co., each for 1,500*l.* These were expressed to be subject to an existing issue of prior debentures. The plaintiff banks held two of the prior debentures which fell due on August 1, 1900, and August 1, 1901, respectively, and which charged the undertaking of the company and all its property. By the conditions indorsed on these debentures the charge was to be a floating security, but so that the company was not to be at liberty to create any mortgage or charge in priority to or upon an equality with the debentures. The conditions further provided that, notwithstanding the charge, the company should be at liberty in the course of its business to deal with all or any part of its property until default in payment of any principal moneys secured by the debentures, or until a receiver of the company's undertaking should be appointed, but that thereafter the liberty given to the company should forthwith cease, and the charge created by the debentures be immediately enforceable. N. & Co., having made default in payment of the debentures held by the plaintiff banks, a receiver was appointed on October 2, 1901, who took possession of the company's property and carried on their business. No formal notice was given by the plaintiff banks to the defendants.—*Held*, that the defendants were entitled to set off against the amount due from them to N. & Co. the amount due to them on the debentures held by them, and that they were entitled to such set-off as well against the plaintiff banks as against N. & Co. *Nelson & Co. v. Faber*, 72 L. J. K.B. 771; [1903] 2 K.B. 367; 89 L. T. 21; 10 Manson, 427—Joyce, J.

Mortgage—Possession of Title-deeds—Negligence of First Mortgagee.—Bankers of a

company who in the usual course of business have without notice or enquiry advanced moneys to the company on a deposit of title-deeds coupled with a memorandum of equitable charge, are, under ordinary circumstances, entitled to priority over debenture-holders of the company, notwithstanding that the property comprised in the title-deeds is included in the debenture security, and by the express terms of the debenture itself prohibited from being charged by the company in priority to the debentures. *Castell & Brown, Lim., In re; Roper v. Castell & Brown*, 67 L. J. Ch. 169; [1898] 1 Ch. 315; 78 L. T. 109; 46 W. R. 248—Romer, J.

(f) Trust Deed.

Realisation of Security Covered by Debentures—Payment on Account Generally—Income Tax—Trust Deed—Construction of Orders—Principal and Interest.—A company's debenture trust deed provided that money arising from realisation of securities should be applied in payment first of arrears of interest on debentures, and secondly of principal. By a judgment in a debenture-holders' action it was declared that the trusts of the deed ought to be carried into effect, and the usual accounts and enquiries were directed. The order on further consideration was made on the footing of the assets being insufficient, and ceased to continue an account distinguishing between capital and income. By a subsequent order of June 15, 1896, the trustees were authorised to pay the balance of interest to a date found by the chief clerk's certificate (on which income tax was duly paid), and out of any surplus to pay a dividend of 1 per cent. on account of what was due on the debentures, and by an order of July 21, 1897, and by subsequent similar orders, the trustees were authorised to pay further dividends on account generally of what was due on the debentures for principal and interest. Realisation was almost completed, and the past payments made under the above orders, together with any further sum which might be available if applied solely in discharge of principal, would not be sufficient to pay the principal in full. The Crown claimed income tax on the dividend of 1 per cent. under the order of June 15, 1896, and on all subsequent dividends paid on account generally:—*Held*, that, according to the true meaning of the orders, and having regard to the insufficiency of assets, these payments ought not to be governed by the order of payment prescribed by the trust deed, but ought now to be attributed to principal, and that income tax was not therefore payable in respect of any part of such payments. *Smith v. Law Guarantee and Trust Society*, 73 L. J. Ch. 733; [1904] 2 Ch. 569; 91 L. T. 545; 12 Manson, 66; 20 T. L. R. 789—C.A.

Receiver—Power to Appoint—Debentures Ranking *Pari Passu*—Fiduciary Power.—A power for a debenture-holder of a company to appoint a receiver, conferred by a debenture which states that all the debentures are to rank "*pari passu*," is a fiduciary power, and must be exercised for the benefit of all the debenture-holders. *Maskelyne British Typewriter, Lim., In re; Stuart v. Maskelyne British Typewriter, Lim.*, 67 L. J. Ch. 125; [1898] 1 Ch. 133; 77 L. T. 579; 46 W. R. 294—C.A.

If such a power is exercised by a debenture-holder not in the interests of all the debenture-holders, but with a view to the benefit of the shareholders of the company, the Court has jurisdiction to appoint and will appoint its own receiver. *Ib.*

Power to Arrange and Compromise Claims—Power to Invest in Licensed Property—Public-house—Refusal to Renew Licence—Compensation Moneys.—The debenture trust deed of a brewery company contained the usual common form powers for the trustees to settle, adjust, refer to arbitration, compromise, and arrange all accounts, questions, claims, &c., with regard to the mortgaged premises, and also generally to act in relation to the mortgaged premises in such manner as they might think expedient in the interest of the debenture stockholders. It also contained a power, which was said to be common form in debenture deeds of the kind in question, to invest capital money arising (*inter alia*) under the powers first mentioned in the purchase of new licensed premises. Renewal having been refused of the licence of part of the premises comprised in the trust deed under the power conferred on the licensing authority by the Licensing Act, 1904, and compensation money having been paid for such refusal, *Held*, that this money came to the trustees by virtue of the power to settle, adjust, &c., all accounts, questions, claims, &c., mentioned above, and that they were therefore entitled under the power of investment mentioned above to reinvest the money in the purchase of fresh licensed premises. *Noakes v. Noakes & Co.*, 76 L. J. Ch. 151; [1907] 1 Ch. 64; 95 L. T. 606; 71 J. P. 180; 14 Manson, 28; 23 T. L. R. 16—Neville, J.

Brewery Company—Licensed Premises—Compensation for Non-renewal of Licence—Investment—Purchase of other Licensed Premises.—A debenture trust deed of a brewery company provided that, until the security became enforceable, the trustees might sell and convert, or concur in selling and converting, the mortgaged property, and should hold the capital moneys arising therefrom upon trust to lay out the same in the purchase of other property suitable for the purposes of the company. Compensation having been paid for refusal to renew the licence of part of the mortgaged premises, *Held*, that the compensation money was capital money arising under the trust deed, and might be applied in the purchase of other licensed premises. *Noakes v. Noakes & Co.* (76 L. J. Ch. 151; [1907] 1 Ch. 64) followed. *Dawson v. Braime's Tadcaster Breweries, Lim.*, 76 L. J. Ch. 588; [1907] 2 Ch. 359; 97 L. T. 83; 14 Manson, 254—Kekewich, J.

Sale by Order of Court—Purchase-money in Court—Trustees' Remuneration.—Trustees for debenture-holders who, by the terms of their trust-deed, are entitled to remuneration, to be paid by the company, are not, in the absence of express provision in the trust deed, entitled to be paid such remuneration, in priority to the debenture-holders, out of proceeds paid into Court of a sale of the mortgaged property in a debenture-holders' action. *Accles, Lim.*, *In re*; *Hodgson v. Accles*, 51 W. R. 57—Farwell, J.

(g) *Meetings of Debenture-holders.*

Voting—Sum "secured by" Debentures—Debentures Issued as Security for Debt—Power to Issue Debentures in Place of those Paid off—Alteration in Trust Deed.—A company issued debentures which were to rank *pari passu* with each other, and which were secured by a trust deed. By the deed the registered holders of the debentures were entitled to vote at any meeting of debenture-holders, and each voter at a poll was entitled to one vote in respect of every principal sum of 10*l.* secured by his debentures. The deed also gave power to a meeting, by extraordinary resolution, to modify the rights of debenture-holders and the provisions of the deed; and extraordinary resolution was defined as meaning a resolution passed by a majority consisting of holders of not less than three-fourths in value of the debentures represented at the meeting. At a meeting of debenture-holders called for the purpose of modifying the trust deed so as to enable the directors (*inter alia*) to re-issue paid-off debentures, a bank, to whom the company had issued debentures for 55,000*l.* as security for an overdraft of 25,000*l.*, voted in respect of the face value of their debentures; *Held*, that the bank were entitled to do so under the provisions of the trust deed; and that the trust deed might be modified so as to empower the company to issue debentures in the place of those paid off in such a way as to make them rank *pari passu* with the outstanding debentures. *Kent Collieries, In re*, 23 T. L. R. 559—C.A.

(h) *Registration of Mortgages and Charges.*
(See now Companies Act, 1907, s. 10.)

"Creation" of Charge.—Under section 14 of the Companies Act, 1900, mortgages or charges being floating charges or other securities specified in sub-section 1 must be registered within twenty-one days from their creation (unless there is registration under section 14, sub-section 4). The "creation" of the charge is not by the resolution, but takes place when the debenture is issued to the holder. The registration of each debenture within twenty-one days is required even when the debentures form a series (if registration under sub-section 4 is not effected). When registration under sub-section 4 is effected, the time-limit of twenty-one days does not apply except to this extent, that the registration protects debentures issued within twenty-one days prior to such registration. The registration therefore protects all debentures of the *pari passu* series whenever subsequently issued, and this is the case whether the charge is created by the covering deed or by the debentures, or by both. *Harrogate Estates, Lim.*, *In re*, 72 L. J. Ch. 313; [1903] 1 Ch. 498; 88 L. T. 82; 51 W. R. 334; 10 Manson, 113—Buckley, J.

In sub-section 4 of section 14 "debentures containing any charge" is equivalent to "debentures which have the benefit of a charge." *Ib.*

Sub-demise to Trustees.—Debenture stock was secured by a covering deed made in 1897, under which the proceeds of sale of any specifically mortgaged property and the property on

which the same should be invested were to be held by the trustees upon the trusts of the covering deed. A leasehold public-house was subsequently purchased out of the proceeds of sale of certain of the specifically mortgaged property, and was in August, 1902, sub-demised by the company to the trustees to be held by them upon the trusts of a covering deed:—*Held*, that the sub-demise was a "mortgage or charge" created by the company upon the property thereby sub-demised, and consequently required registration under section 14, subsection 1 of the Companies Act, 1900. *Cornbrook Brewery Co. v. Law Debenture Corporation*, 73 L. J. Ch. 121; [1904] 1 Ch. 103; 89 L. T. 680; 52 W. R. 242; 11 Manson, 60; 20 T. L. R. 140—C.A.

Debentures "Created" before but Issued after the Companies Act, 1900.]—Debentures "created" (that is, sealed by the company) before the Companies Act, 1900, came into operation, but not actually issued until after that date, do not require to be registered under section 14 of the Act. *Spiral Globe, Lim., In re; Watson & Co. v. Spiral Globe, Lim.*, 71 L. J. Ch. 538; [1902] 2 Ch. 209; 86 L. T. 499—Joyce, J.

Application for Relief—Extension of Time—Form of Order.]—Where the omission to register debentures was due to inadvertence, and the assets of the company, which was in voluntary liquidation, were insufficient to satisfy the general creditors without recourse to the property charged by the debentures, the Court, in extending the time within which registration might be effected, qualified the order by the words: "This order to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." *Spiral Globe Co., In re*, 71 L. J. Ch. 128; [1902] 1 Ch. 396; 85 L. T. 778; 50 W. R. 187; 9 Manson, 52—Swinfen Eady, J.

In all orders under section 15 of the Companies Act, 1900, extending the time limited by section 14 of the Act for registering debentures, the following words should be added: "But this order is to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." *Joplin Brewery Co., In re*, 71 L. J. Ch. 21; [1902] 1 Ch. 79; 85 L. T. 411; 50 W. R. 75; 8 Manson, 426—Buckley, J.

Extension of Time for Registration—Winding-up.]—Where an order on the conditions imposed in *Joplin Brewery Co., In re* (71 L. J. Ch. 21; [1902] 1 Ch. 79), has been obtained under section 15 of the Companies Act, 1900, extending the time for registering a charge under section 14 of the Act, but before the registration an order is made to wind up the company, the registration will not operate retrospectively so as to defeat the rights of unsecured creditors which have arisen at the date of the winding-up order. *Anglo-Oriental Carpet Manufacturing Co., In re*, 72 L. J. Ch. 458; [1903] 1 Ch. 914; 88 L. T. 891; 51 W. R. 634; 10 Manson, 207—Buckley, J.

Form of Order.]—In all orders under section 15 of the Companies Act, 1900, extending

the time limited by section 14 of the Act for registering debentures, the following words should be added: "But this order is to be without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered." *Joplin Brewery Co., In re*, 71 L. J. Ch. 21; [1902] 1 Ch. 79; 85 L. T. 411; 50 W. R. 75; 8 Manson, 426—Buckley, J.

Terms—"Just and expedient"—Protection of Unsecured Creditors.]—Debentures of a company, issued in 1905, were not registered within the time limited by section 14 of the Companies Act, 1900. The omission to register them was due to inadvertence, and the financial position of the company was sound. On an application under section 15 of the Act of 1900 for an order extending the time for registration,—*Held*, that in the circumstances of the case an order might be made on the terms imposed in *Johnson & Co., In re* (71 L. J. Ch. 576; [1902] 2 Ch. 101), without inserting any words for the protection of unsecured creditors, although it had been decided in *Ehrmann Brothers, Lim., In re* (75 L. J. Ch. 575), that that form of order does not protect unsecured creditors; but that in a case of sufficient magnitude it might be well to give notice to unsecured creditors of substantial amount so as to give them an opportunity of being heard on the question of what is "just and expedient" in their interest. *Cardiff Workmen's Cottage Co., In re*, 75 L. J. Ch. 769; [1906] 2 Ch. 627; 95 L. T. 669; 13 Manson, 382; 22 T. L. R. 799—Buckley, J.

Winding-up.]—In every case of granting extension of time for registering debentures under section 15 of the Companies Act, 1900, except under very special circumstances, the order should be "without prejudice to the rights of parties acquired prior to the time when such debentures shall be actually registered," as in *Joplin Brewery Co., In re (supra)*. After a winding-up has commenced such an order is useless, as the rights of parties are already settled, and it will therefore not be made. *Abrahams & Sons, In re*, 71 L. J. Ch. 307; [1902] 1 Ch. 695; 86 L. T. 290; 50 W. R. 284; 9 Manson, 176—Buckley, J.

Where some of a series of debentures were issued before, and the rest after, the Companies Act, 1900, came into operation, but none were registered as the Act was supposed by the parties not to require it, an application, after a winding-up had commenced, for an order extending the time for registration without the words "without prejudice," &c., was dismissed. *Id.*

Rights of Holders of Previously Issued Debentures.]—Where through a slip part only of a series of debentures (all of which ranked *pari passu*) had been omitted to be registered under the Companies Act, 1900, s. 14, the Court granted an extension of time under section 15, and directed the order to be drawn up so as not to affect, as between themselves, the rights of the entire series of debenture-holders. Form of order settled. *Joplin Brewery Co., In re* (71 L. J. Ch. 21; [1902] 1 Ch. 79), distinguished and discussed. *Johnson & Co., In re*, 71 L. J. Ch. 576; [1902] 2 Ch.

101; 86 L. T. 791; 50 W. R. 482; 9 Manson, 307—C.A.

— **Rights of Unsecured Creditors.**—Where the time for registration of debentures has been extended by an order under section 15 of the Companies Act, 1900, containing the usual proviso for the protection of rights acquired prior to the date of actual registration, the holders of such debentures are in a winding-up of the company entitled to priority over ordinary unsecured creditors whose debts were in existence at the date of the registration. The proviso is merely intended to protect rights acquired against or affecting the property of the company which intervene between the expiration of the twenty-one days within which the debentures are required to be registered under section 14 of the Act and the extended time allowed by the order, and does not protect the existing unsecured creditors who have not obtained any security or charge upon the property subject to the debentures. *Anglo-Oriental Carpet Manufacturing Co., In re* (72 L. J. Ch. 458; [1908] 1 Ch. 914), approved, but distinguished. *Johnson & Co., In re* (71 L. J. Ch. 576; [1902] 2 Ch. 101), discussed and explained. *Ehrmann Brothers, Lim., In re; Albert v. Ehrmann Brothers, Lim.*, 75 L. J. Ch. 817; [1906] 2 Ch. 697; 95 L. T. 664; 18 Manson, 368; 22 T. L. R. 734—C.A. Reversing, 54 W. R. 555—Joyce, J.

Cancellation and Issue of Fresh Debentures in Substitution.—Where a company has issued a series of debentures, but has omitted to register them within the twenty-one days limited by section 14 of the Companies Act, 1900, it is competent to the company to cancel the issue, and to issue and register a fresh series of debentures bearing a later date in substitution for them, and such issue and registration will be valid under sections 14 to 16 of the Act. *Defries & Co., In re; Bowen v. Defries & Co.*, 73 L. J. Ch. 1; [1904] 1 Ch. 87; 52 W. R. 253; 12 Manson, 51—Buckley, J.

Series of Debentures not Ranking *Pari Passu*—Registrar's Certificate—Conclusive Evidence—“Filed with the Registrar.”—The certificate of the Registrar of Joint-Stock Companies of the registration of any mortgage or charge registered in pursuance of section 14 of the Companies Act, 1900, is by sub-section 6 of that section declared to be conclusive evidence that the requirements of that section as to registration have been complied with. Where, therefore, a certificate, given pursuant to sub-section 6 of section 14, stated that a series of second debentures (not secured by a trust deed) contained a charge to the benefit of which the debenture-holders of the series were—contrary to the fact, as was alleged by the liquidator of the company—entitled *pari passu*, and also stated the date of the resolution creating the series, and that one of such debentures had been produced, and certified the amount secured by the series, and that all the particulars required by sub-section 4 of section 14 (which deals only with a series of debentures ranking *pari passu*) in relation to the series had been complied with, it was held that, whether the Registrar had made a mistake or not, the certificate was conclusive as to the validity of the charge against unsecured credi-

tors. *Yolland, Husson & Birkett, Lim., In re; Leicester v. Yolland, Husson & Birkett, Lim.*, 77 L. J. Ch. 43—C.A. Affirming, [1907] 22 Ch. 471—Warrington, J.

In section 14, sub-section 1, which requires every mortgage or charge of the kind therein mentioned to be filed with the Registrar for registration, the expression “filed with the Registrar” means “supplied or furnished to the Registrar for registration.” *Ib.*

(i) *Redemption.*

Paying off—Conditions—Giving Notice by Advertisement—General Notice to Pay off Part of Issue.—The defendants issued a number of debentures payable to bearer, several of which were held by the plaintiffs. They contained a covenant that the defendants would, on July 1, 1903, or on such earlier day as the principal moneys thereby secured became payable in accordance with the conditions indorsed thereon, pay to the bearers on presentation of the debentures the sum of 100*l.* One of the conditions indorsed was as follows: “The company may at any time give notice by advertisement [in certain newspapers] of its intention to pay off this debenture, and upon the expiration of two calendar months from such notice being given the principal moneys hereby secured shall become payable, and the company shall have the option of paying the same either in cash or by the issue to the bearer or his nominee of a debenture or debentures or debenture stock of the company for 100*l.*, carrying interest at such rate, not being less than 6 per cent. per annum, and payable as to principal and interest at such time or times and secured in such manner as the company may determine, and when the principal moneys hereby secured become payable as aforesaid, they shall cease to carry interest unless the company makes default in paying or satisfying the same as aforesaid.”—*Held*, that this condition meant notice to pay off before the date at which the principal money would otherwise become due, and that a general notice to pay off such of the debentures falling due on July 1, 1903, as had not already been redeemed, by substituting another security for payment in cash, without identifying the particular debentures to be paid off, was invalid as against the plaintiffs. *First National Bank of Chicago v. Orinoco Shipping and Trading Co.*, 21 T. L. R. 89—Farwell, J.

“Sinking Fund”—Annual Amount Specified—Cumulative or Non-Cumulative—“Redeemable” within Seventeen Years—Option or Obligation.—The expression “sinking fund” does not necessarily connote accumulation at compound interest, or any mode of application equivalent thereto. The word “redeemable” applied to debentures *prima facie* imports an option and not an obligation to redeem. *Chicago and North-Western Granaries Co., In re; Morrison v. Chicago and North-Western Granaries Co.*, 67 L. J. Ch. 109; [1898] 1 Ch. 263; 77 L. T. 677—North, J.

1,200 6*l.* per cent. debenture bonds of 100*l.* each were issued with seventeen years to run, the conditions providing that “a sinking fund

for the redemption of debentures of this issue shall be established, and to the credit thereof the company shall in each half-year carry the sum of 2,500*l.*, which shall be applied in redeeming at a premium of 10*l.* on January 1 and July 1 in each year so many of the said debentures as the sum from time to time standing to the credit of such sinking fund shall suffice to pay off." The prospectus under which the debentures were issued described them as "redeemable within seventeen years by half-yearly drawings on January 1 and July 1 in each year, at 110*l.* per bond, by the application of a sinking fund of 5,000*l.* per annum." It being assumed that a cumulative application of the 5,000*l.* per annum, treating the sinking fund as entitled to the unpaid interest coupons of redeemed bonds, would redeem the entire issue practically within seventeen years, but that a non-cumulative application would be utterly insufficient for that purpose.—*Held*, that neither the conditions nor the prospectus (if it could be referred to) implied that the sinking fund would be cumulative or sufficient to redeem the entire issue of debentures within seventeen years, or cast any obligation on the company to provide for their redemption within that period, and that consequently the company was not bound to carry over the coupons of redeemed bonds, or anything more than 2,500*l.* half-yearly to the sinking fund. *Id.*

Winding-up—Sale of Undertaking—Borrowing Powers—"Irredeemable" Debenture Stock—Ultra Vires—Right to Redeem.—Where the memorandum of association of a railway company, incorporated under the Companies Acts, 1862 to 1882, and not governed by the Companies Clauses Acts, enables it to borrow money by the issue of debenture stock, and the articles of association provide that the board may issue such stock as redeemable or irredeemable, debenture stock issued as irredeemable is nevertheless redeemable at par on the winding-up of the company. *Southern Brazilian Rio Grande do Sul Railway, In re*, 74 L. J. Ch. 392; [1905] 2 Ch. 78; 92 L. T. 598; 53 W. R. 489; 12 Manson, 323; 21 T. L. R. 451—Buckley, J.

(j) *Transfer.*

Transfer by Delivery—Debenture to Bearer.—Where a mercantile usage to treat as negotiable the debentures of an English company has been proved, the Court will give effect to such usage notwithstanding that it may be of recent origin only. *Crouch v. Credit Foncier of England* (42 L. J. Q.B. 183; L. R. 8 Q.B. 374) discussed and questioned. *Bechuanaland Exploration Co. v. London Trading Bank*, 67 L. J. Q.B. 986; [1895] 2 Q.B. 658; 79 L. T. 270—Kennedy, J.

Winding-up—Set-off or Cross-claim.—Notwithstanding the voluntary winding-up of a company, and after judgment in a debenture-holder's action, debentures in the company may be transferred, and the transferee may insist upon the transfer being registered, upon complying with the conditions indorsed on the debenture so far as applicable to his case. *Goy & Co., In re; Farmer v. Goy & Co.*, 69 L. J. Ch. 481; [1900] 2 Ch. 149; 83 L. T. 309; 48 W. R. 425; 8 Manson, 221—Stirling, J.

A condition that "the principal and interest secured by this debenture will be paid without regard to any equities between the company and any original or intermediate holder thereof," enables a holder to transfer a debenture to a transferee for value and in good faith, free from any equities as between him and the company, notwithstanding the voluntary winding-up and after judgment in a debenture-holder's action. *Id.*

Transfer of Debentures to Trustee for Creditors—Transferor Indebted to Company—Debenture-holders' Action—Money Available for Dividend—Claim by Trustee—Cross-claim by Company.—Where debentures, the conditions of each of which were that the moneys thereby secured were to be paid without regard to any equities between the company and the original or any intermediate holder, and that the registered holder was to be treated as exclusively entitled to the benefit of the debenture, and that the company was not bound to enter on the register notice of any trust or to recognise any right in any other person, were by deed assigned, by persons who were indebted to the company, to a trustee for creditors, and the trustee was entered on the register as the holder of the debentures, and neither the company nor the other debenture-holders had come in under the deed, it was held that the trustee, being simply general assignee in trust for creditors, took the debentures subject to the same equities as his assignors were subject to, and that, consequently, notwithstanding the conditions on the debentures, he was not entitled to share in a fund in Court in a debenture-holders' action, which was available for dividend, without bringing into account the debt due to the company by his transferors. *Goy & Co., In re; Farmer v. Goy & Co.* (69 L. J. Ch. 481; [1900] 2 Ch. 149), distinguished. *Brown & Gregory, Lim., In re; Andrews v. Brown & Gregory Lim.*, 73 L. J. Ch. 480; [1904] 1 Ch. 627; 52 W. R. 412; 11 Manson, 218—Byrne, J. Affirmed without prejudice, 73 L. J. Ch. 770; [1904] 2 Ch. 448; 11 Manson, 402—C.A.

Conditions—Deposit—Voluntary Winding-up—Transfer—Equities between Company and Transferor—Rights of Transferee.—Debentures obtained from a company by misrepresentation were, after the company had gone into voluntary liquidation, transferred for value to a person having no notice that the transferor's title was open to dispute. The transferee gave notice of the transfer to the liquidator, but did not demand registration. The debentures contained a covenant for payment by the company to the registered holder; and indorsed conditions provided that the registered holder or his personal representative would be regarded as exclusively entitled to the benefit, that a transfer would be registered on delivery at the registered office of the company with the prescribed fee and evidence of title or identity, and that the principal and interest would be paid without regard to equities between the company and the original or any intermediate holder, and the receipt of the registered holder should be a good discharge.—*Held*, that the transferee was not entitled to hold the debentures free from equities between the company and the transferor. *Palmer's Decoration and Furnishing Co., In re*, 73 L. J. Ch. 828; [1904]

2 Ch. 743; 91 L. T. 772; 53 W. R. 142—Buckley, J.

Semble, even if the transferee had demanded registration, the company would have been entitled to enforce its equities. *Ib.*

Conditions such as those indorsed are only a protection to the transferee when he has been placed upon the register. *Goy & Co., In re; Farmer v. Goy & Co.* (69 L. J. Ch. 481; [1900] 2 Ch. 149), distinguished. *Ib.*

Deposit of Debenture by Registered Holder with Bank—Right of Set-off by Company against Registered Holder.—The registered holder of debentures issued by a limited company deposited them with a bank to secure advances, but no transfer was executed, nor any notice of the deposit given to the company. At the date of the deposit and of the winding-up the registered holder was indebted to the company in a larger sum than the amount of the debentures, and was also indebted to the bank in a less sum for advances. The conditions of the debentures provided that the registered holder would be regarded as exclusively entitled to the benefit of the debentures, and that all persons might act accordingly, that the company should not be bound to enter in the register notice of any trust, or to recognise the right of any other person, save as therein provided; that the money secured by the debentures would be paid without regard to any equities between the company and the original or any intermediate holder thereof, and the receipt of a registered holder for such money should be a good discharge to the company:—*Held*, that the company was entitled to set off the amount due to it from the registered holder as against the amount of the debentures payable to him, and that the company was not bound to have regard to the claim of the bank as against the registered holder. *Smith & Co., In re*, [1901] 1 Ir. R. 73—M.R.

Purchase by Company of its own Debentures—Re-sale by Company—Rights of Purchasers.—The effect of a company purchasing its own debentures is to extinguish the debt, for the company cannot be at the same time both mortgagor and mortgagee of its own property. Where therefore a company had taken transfers to itself of its own debentures, and had registered them in its own name and had afterwards re-sold the debentures, the purchasers were held to have acquired no right to share with the other debenture-holders of the same series in the distribution of the proceeds of the security. *Routledge & Sons, Lim., In re; Hummell v. Routledge & Sons, Lim.*, 73 L. J. Ch. 843; [1904] 2 Ch. 474; 91 L. T. 288; 53 W. R. 44—Buckley, J.

(k) Priorities.

Execution Creditors—Priority as against.—Where a limited company has power to borrow money upon debentures, the *bona fide* holder of a debenture regular upon the face of it, and issued to him without notice of any informality in consideration of money advanced by him to

the company, has priority to an execution creditor although the debenture is in fact informally issued. *Duck v. Tower Galvanising Co.*, 70 L. J. K.B. 625; [1901] 2 K.B. 814; 84 L. T. 847—D.

Seizure of Goods—Intervention of Debenture-holders—Priorities.—Where the debentures of a limited company create a floating charge on the real and personal property of the company, the circumstance that the rights of the debenture-holders have not become “crystallised”—that is, that the moneys secured by the debentures have not become payable—and that no receiver for the debenture-holders has been appointed, does not debar them from intervening to protect their security, as against an execution creditor, where certain of the company's goods have been seized by the sheriff under a writ of *fi. fa.* *Davey v. Williamson*, 67 L. J. Q.B. 699; [1898] 2 Q. B. 194; 78 L. T. 755; 46 W. R. 571—D.

Dealing in Ordinary Course of Business.—Such a seizure of the company's goods is not a dealing with them by the company in the ordinary course of business, but a compulsory legal process directed against them. *Ib.*

Agreement that Company should Pay Money to Sheriff in Consideration of his Withdrawing from Possession—Receiver for Debenture-holders—Title to Money—Judgment Creditor or Receiver.—The goods of a limited company having been seized under a writ of *fi. fa.* at the instance of a judgment creditor, an agreement was entered into between the company and the sheriff, with the consent of the judgment creditor, by which, in consideration of the sheriff withdrawing from possession, the company undertook to pay him a certain sum daily out of their takings in respect of the debt. Subsequently a receiver was appointed on behalf of the debenture-holders of the company. A question having arisen whether the judgment creditor or the receiver was entitled to the money paid by the company to the sheriff under the agreement,—*Held*, that the title of the judgment creditor must prevail, inasmuch as the agreement was within the scope of the implied licence given by the debenture-holders to the company to do whatever might be necessary to enable the business of the company to be carried on in the ordinary way. *Robinson v. Burnell's Vienna Steam Bakery Co.*, 73 L. J. K.B. 911; [1904] 2 K.B. 624; 91 L. T. 375; 52 W. R. 526; 20 T. L. R. 284—Channell, J.

Agreement to Issue Debentures—Execution—Priority.—Where an agreement has been made by a joint-stock company to issue debentures containing a charge upon all its property, an execution creditor who, subsequently to the agreement but before the issue of the debentures, seizes property of the company, is only entitled to the property subject to the charge which is created in equity by the agreement to issue the debentures. *Simultaneous Printing Syndicate v. Foweraker*, 70 L. J. K.B. 453; [1901] 1 K.B. 771; 8 Manson, 307—Wright, J.

Garnishee Order—Priority—Interpleader.—A garnishee order creates no charge on

the property or assets of the garnishee; therefore, where a company, after service upon them of a garnishee order absolute, issued for good consideration to a person having notice of the garnishee order a debenture which, on process being issued against them, became a charge on the whole of their assets,—*Held* (KENNEDY, J., *audibante*), that the debenture-holder in respect of goods of the company was entitled to priority over the garnishor issuing execution under his garnishee order. *Geisse v. Taylor*, 74 L. J. K.B. 912; [1905] 2 K.B. 658; 93 L. T. 534—D.

Action by Unsecured Creditor in Scotland—Receiver—Injunction to Restrain Creditor from Proceeding.]—An injunction to restrain an unsecured creditor from continuing proceedings in Scotland against an English company (against which jurisdiction had been founded by an arrestment served upon a debtor in Scotland of the company) where a receiver had been appointed on behalf of the debenture-holders, was ordered by Kekewich, J., to stand over pending the decision of the Scotch Court. The Scotch Court having decided in favour of the unsecured creditor, an appeal from Kekewich, J.'s order was dismissed with costs. *Derwent Rolling Mills Co., In re*; *York City and County Banking Co. v. Derwent Rolling Mills Co.*, 21 T. L. R. 701—C.A.

Purchase by Company of its Own Debentures—Re-sale by Company—Rights of Purchasers.]—The effect of a company purchasing its own debentures is to extinguish the debt, for the company cannot be at the same time both mortgagor and mortgagee of its own property. Where therefore a company had taken transfers to itself of its own debentures, and had registered them in its own name and had afterwards re-sold the debentures, the purchasers were held to have acquired no right to share with the other debenture-holders of the same series in the distribution of the proceeds of the security. *Routledge & Sons, Lim., In re*; *Hummell v. Routledge & Sons, Lim.*, 73 L. J. Ch. 843; [1904] 2 Ch. 474; 91 L. T. 288; 53 W. R. 44—Buckley, J.

(1) Remedies.

Debenture-holder's Action—Action by one Holder to Realise Security—Costs.]—The plaintiff in an action, brought to realise the security by one debenture-holder on behalf of all other debenture-holders of the same class against the company, is not entitled to costs, as between solicitor and client, out of the property realised, whether it is or is not sufficient to pay all the charges upon it. *Queen's Hotel (Cardiff) Co., In re*; *London and Provincial Bank v. Queen's Hotel (Cardiff) Co.* *Vernon Tin-plate Co., In re*; *London and Provincial Bank v. Vernon Tin-plate Co.*, 69 L. J. Ch. 414; [1900] 1 Ch. 792; 82 L. T. 675; 48 W. R. 567; 7 Manson, 238—Cozens-Hardy, J.

Insufficient Assets—Costs of Plaintiff—Solicitor and Client Costs.]—In an action by a debenture-holder on behalf of himself and all other the debenture-holders of a company to enforce their security, where the assets are insufficient for the payment of the debentures in full, the plaintiff is entitled to be allowed

costs as between solicitor and client, and not as between party and party only. The principle laid down in *Thomas v. Jones* (29 L. J. Ch. 570, 571; 1 Dr. & S. 134, 136) applied. *Queen's Hotel Co., Cardiff, Lim., In re* (69 L. J. Ch. 414; [1900] 1 Ch. 792), distinguished. *New Zealand Midland Railway, In re*; *Smith v. Lubbock*, 70 L. J. Ch. 595; [1901] 2 Ch. 357; 84 L. T. 852; 49 W. R. 529; 8 Manson, 363—C.A.

Costs of Second Mortgage Debenture-holders made Defendants.]—In an action by first mortgage debenture-holders of a limited company, in which the company and the second mortgage debenture-holders were made defendants, the assets proved insufficient to satisfy the claims of the first mortgage debenture-holders. On the further consideration of the action the question was raised whether the second mortgage debenture-holders made defendants ought to be allowed their costs:—*Held*, that the second mortgage debenture-holders made defendants were not entitled to costs. *Clayton Engineering and Electrical Construction Co., In re*, 90 L. T. 283—Swinfen Eady, J.

Solicitor's Costs—Taxation—Joint and Several Retainer—Company and Trustees for Debenture-holders Represented by Same Solicitor.]—In a debenture-holders' action where the same solicitor appeared for the defendant company and for two sets of trustees for debenture-holders, and where the funds were insufficient to pay the first mortgage debentures in full, a direction was given by the Court to the Taxing Master that, in taxing the costs of the defendants (other than the defendant company), he should allow the trustee defendants a full set of costs, except as regarded any separate costs of the defendant company. *Mortgage Insurance Corporation v. Canadian Agricultural Coal and Colonisation Co.*, 70 L. J. Ch. 684; [1901] 2 Ch. 377; 84 L. T. 861—Kekewich, J.

Stay of Proceedings after Judgment—Plaintiff Suing "on behalf of himself and all other debenture-holders"—Dominus Litis.]—A plaintiff, expressed to be suing "on behalf of himself and all other debenture-holders" of a company, who has had his claims satisfied after the decree in the action has been pronounced, is *dominus litis* and may discontinue further proceedings, although this cannot be done by a plaintiff suing in a similar manner in a creditor's administration action. *Handford v. Storie* (3 L. J. (o.s.) Ch. 110; 2 Sim. & S. 196) discussed. *Alpha Co., In re*; *Ward v. Alpha Co.*, 72 L. J. Ch. 91; [1903] 1 Ch. 203; 87 L. T. 646; 51 W. R. 201; 10 Manson, 237—Kekewich, J.

Debenture Bond—Covenant to Pay—Action or Proceeding to Enforce Security—Action on Covenant.]—Where by a mortgage debenture bond the debtor acknowledges that he is bound to pay a sum of money to the registered holder, and by a condition endorsed upon the bond the holder is not to "commence any action or take any proceedings to enforce the security hereby created, or to procure the appointment of a receiver, or to procure a sale to be ordered of the property subject hereto, or for foreclosure," unless he shall serve a written notice upon the trustees for the debenture bondholders requir-

ing them to take all steps necessary for the protection of the debenture-holders, and the trustees shall for a period of six calendar months have neglected to comply with such requirements, the holder cannot sue upon the covenant for payment contained in the debenture bond until he has given the notice to the trustees required by the condition, and the trustees have neglected for six calendar months to take the steps required. *Rogers & Co. v. British and Colonial Colliery Supply Association*, 68 L. J. Q.B. 14; 79 L. T. 494; 6 Manson, 305—Bruce, J.

Immediate Sale—Third Debenture-holders not all Parties.—In a motion for judgment in a first debenture-holders' action on admissions in the pleadings, one of the proposed minutes asked for an immediate sale by the receiver, under Order L.I. rule 1 (B), of the property comprised in the security, which was proved to be in jeopardy of loss. There was also in existence another series of debentures, only some of the holders of which were now before the Court:—*Held*, that the proposed minute must be varied so as to direct that a sale should take place with the approbation of the Court, as this would enable those second debenture-holders who were not now represented to come in when the contract should come before the Court for its approval. *Crigglestone Coal Co., In re; Stewart v. Crigglestone Coal Co.*, 75 L. J. Ch. 307; [1906] 1 Ch. 523; 94 L. T. 471; 54 W. R. 298; 13 Manson, 181—Swinfen Eady, J. *And see PRACTICE (SALE BY COURT).*

— **Form of Judgment.**—See *Wolverhampton District Brewery, In re*, 7 Manson, 50—Keke-wich, J.

— **Preferential Payments.**—A judgment in a debenture-holder's action, where the debentures constitute a floating charge on the assets of the company, ought to contain an enquiry as to preferential creditors. *Meaby & Co., In re*, 6 Manson, 303—Wright, J. *See now the Chancery Judges' Rules*, Ann. Pr. 1908.

Bonds—Proceeds of Sale—Capital or Income.—*See TENANT FOR LIFE.*

(m) *Receiver and Manager.*

Appointment—Floating Charge—Jeopardy of Property — Equitable Mortgagee — Judgment Creditor.—Where a company has issued debentures giving a floating charge on its present and future property, the debenture-holders are entitled to the appointment of a receiver on the sole ground of jeopardy to the security, even although nothing may be due and presently payable to the debenture-holders. The fact that the creditor has issued a writ and signed judgment, and is in a position to issue execution, may constitute jeopardy. Persons supplying such a company with goods have an expectation of being paid only when such payment would be in the ordinary course of business. This expectation is intercepted when a receiver is appointed, but even before the appointment those creditors, as between themselves and the debenture-holders, have no right to enforce payment of their debts in priority to

the latter. *London Pressed Hinge Co., In re; Campbell v. Company*, 74 L. J. Ch. 321; [1905] 1 Ch. 576; 92 L. T. 409; 53 W. R. 407; 12 Manson, 219; 21 T. L. R. 322—Buckley, J.

An execution creditor takes subject to all equities of the debenture-holders. *Standard Manufacturing Co., In re* (60 L. J. Ch. 292, 298; [1891] 1 Ch. 627, 641), followed. *Id.*

Appointment of Receiver under Power—Remuneration—Winding-up.—A condition endorsed on debentures of a company gave a power to the debenture-holders to appoint a receiver who should have power to take possession of the property charged, to carry on the business of the company, to sell the property charged, and to make any arrangements in the interest of the debenture-holders:—*Held*, that a receiver appointed under the power was the agent of the debenture-holders and not of the company, but, whether he were the agent of the debenture-holders or the company, in neither case could the liquidator apply in a winding-up of the company to have his remuneration fixed by the Court; but, the receiver having retained as remuneration a sum fixed by himself, the liquidator's proper course was by action to recover the moneys which had come to the receiver's hands as moneys of the company. *Vimpos, Limited, In re*, 69 L. J. Ch. 209; [1900] 1 Ch. 470; 82 L. T. 597; 48 W. R. 520; 8 Manson, 101—Cozens-Hardy, J.

Appointment by Court — Leaseholds Sub-demised to Trustees of Trust Deed—Possession by Receiver—Rent and Covenants—Claim by Landlord to be Paid out of Assets.—Where, in an action by mortgagees or debenture-holders to enforce their security (including leasehold property mortgaged by sub-demise), a receiver has been appointed who enters into possession of the mortgaged property, the Court will not order the receiver to pay out of the assets in his hands rent or moneys payable in respect of breaches of covenant which neither the mortgagees nor the receiver are liable at law or in equity to pay to the head landlord. The mere fact that the head landlord, owing to the appointment of a receiver, cannot re-enter or distrain without first obtaining leave from the Court is not sufficient to raise such an equity in his favour. *Hand v. Blow*, 70 L. J. Ch. 687; [1901] 2 Ch. 721; 85 L. T. 156; 50 W. R. 5; 9 Manson, 156—C.A.

Borrowing by—Advances to Receiver by Debenture-holders—First Charge upon Property Secured by Debentures — Expenses of Management — Receiver's Remuneration—Priority.—A receiver and manager appointed in a debenture-holders' action under orders of the Court borrowed, for preserving the property of the company comprised in the debentures, certain sums, which were advanced by certain of the debenture-holders. The receiver gave in respect of the sums so borrowed formal charges, which were declared to be "first charges" on the property, and provided that the receiver should not be personally liable to repay the advances out of his own moneys. The property charged was realised by the receiver, and proved insufficient to pay the receiver's expenses and remuneration

and the sums borrowed:—*Held*, that the receiver was entitled to be indemnified in respect of his expenses and remuneration out of the assets realised in priority to the lenders' claims under their charges. *Strapp v. Bull, Sons & Co.* (64 L. J. Ch. 658; [1895] 2 Ch. 1) considered and followed. *Glasgow Copper Mines, Lim., In re; English Electro-Metallurgical Co. v. Glasgow Copper Mines, Lim.*, 75 L. J. Ch. 109; [1906] 1 Ch. 365; 94 L. T. 8; 13 Manson, 41; 22 T. L. R. 100—C.A.

Order Authorising Money to be Raised to a Limited Amount—General Purposes of Carrying on Business—Debts and Liabilities in Excess of Limit—Right to Indemnity.—Where a receiver and manager appointed in a debenture-holders' action is authorised by the Court to raise by mortgage of the company's assets a sum not exceeding a certain limit for the general purposes of carrying on the business, it is his duty, if he finds the limited sum insufficient, to apply to the Court to increase it or give leave to incur further expenses or liabilities. If he incurs such expenses or liabilities without applying to the Court he is not entitled to be indemnified unless he can shew that, having regard to all the circumstances, he was justified in incurring them without leave. *British Power, Traction, and Lighting Co., In re; Halifax Joint-Stock Banking Co. v. The Company* (No. 1), 75 L. J. Ch. 248; [1906] 1 Ch. 497; 94 L. T. 479; 54 W. R. 387; 13 Manson, 74; 22 T. L. R. 268—Warrington, J.

Semble, it is not sufficient justification merely to shew that the expenses and liabilities were incurred *bona fide* and in the ordinary course of business. *Ib.*

Sanction of Court.—Where a receiver and manager, appointed in a debenture-holders' action and authorised by the Court to raise by mortgage of the company's assets a sum not exceeding a certain limit for the general purposes of carrying on the business, incurs expenses or liabilities beyond the authorised limit without applying to the Court, and shews that it was not practicable to apply to the Court, and that he had reasonable grounds for believing that he would be able to pay expenses justifiably incurred in carrying on the business, he will not lose his right to indemnity, but he cannot be indemnified for expenses incurred by way of speculation, although incurred with the object of increasing the value of the business. *British Power Traction and Lighting Co., In re; Halifax Joint-Stock Banking Co. v. The Company* (No. 2), 76 L. J. Ch. 423; [1907] 1 Ch. 528; 97 L. T. 198; 14 Manson, 149—Warrington, J.

Pledging Credit of Debenture-holders.—A receiver was appointed by debenture-holders under a power conferred by the debentures. The receiver was authorised by the terms of the debentures (*inter alia*) to take possession of the property charged by the debentures; to carry on or concur in carrying on the business of the company; and to make any arrangement or compromise which he should think expedient in the interests of the debenture-holders:—*Held*, that, for the purpose of carrying on the business of the company, the receiver might, first, create a valid charge on property comprised in the debentures to have priority over

the charge of the debenture-holders; and secondly, pledge the personal credit of the debenture-holders. *Robinson Printing Co. v. "Chic," Lim.*, 74 L. J. Ch. 399; [1905] 2 Ch. 123; 93 L. T. 262; 53 W. R. 681; 12 Manson, 314; 21 T. L. R. 446—Warrington, J.

Property Abroad.—A receiver is not put in possession of foreign property by the mere order of an English Court; the requirements of the law of the country where the property is situate must also be complied with. Until this is done, a person not a party to the action taking proceedings in the foreign country is not guilty of contempt of Court either on the ground of interfering with the receiver's possession or otherwise. *In re Maudslay, Sons & Field; Maudslay v. Maudslay, Sons & Field*, 69 L. J. Ch. 347; [1900] 1 Ch. 602—Cozens-Hardy, J.

Debenture-holders of a company having according to English law a good assignment of a French debt due to the company, but according to French law no such assignment, cannot prevail against creditors who have according to French law a good inchoate charge or assignment of the French debt. *Ib.*

Part Exercise of Borrowing Powers.—When a receiver and manager in a debenture-holder's action is authorised to borrow to a fixed amount—for example, 700*l.*—and borrows a part—for example, 500*l.*—from a bank, which he afterwards repays, such repayment does not exhaust *pro tanto* the borrowing power—that is, reduce it to 200*l.* *Milward v. Avill*, 4 Manson, 403—Wright, J.

Bankruptcy of—Trustee Funds in Court—Insufficiency of—Right to Indemnity—Order of Payment.—In the case of the bankruptcy of the receiver and manager of a company who had incurred liabilities in carrying on the business of the company, where the funds in Court in a debenture-holders' action proved to be insufficient to discharge the liabilities of the Company,—*Held*, that after taxation and payment of the costs of realisation of the property an enquiry should be directed whether any and what debts and liabilities had been properly incurred by the receiver which were still outstanding, and that the funds should be dealt with in the order stated by PEARSON, J., in *Batten v. Wedgwood Coal & Iron Co.* (54 L. J. Ch. 686; 28 Ch. 1). 317). *London United Breweries, Lim., In re; Smith v. The Company*, 76 L. J. Ch. 612; [1907] 2 Ch. 511; 97 L. T. 541; 14 Manson, 250—Neville, J.

When the Court has appointed a receiver and manager who has incurred liabilities in the proper management of the estate, the Court will see that those creditors are satisfied either by the receiver or, in case he should be bankrupt, by payments out of the fund in Court direct to the creditors. *Ib.*

Liberty to Prosecute Action—Receiver Ordered to Find Security for Costs of Appeal—Successful Appeal—Payment Out of Security.—On March 19, 1898, an action was commenced in the Queen's Bench Division by the C. Corporation, Lim., against H. & Co., Lim., when judgment

was given in favour of H. & Co., Lim. On February 24, 1899, in an action on behalf of the debenture-holders against the C. Corporation, Lim., a receiver was appointed, and on March 9, 1899, he obtained leave to prosecute an appeal in the above action against H. & Co., Lim. By order of the Court of Appeal the receiver was required to pay the sum of 200*l.* into Court as security for the costs of the appeal. On July 13, 1899, the Court of Appeal reversed the decision of the Queen's Bench Division, and ordered the 200*l.* to be paid out to the receiver. On appeal to the House of Lords the judgment of the Queen's Bench Division was restored, and the C. Corporation, Lim., ordered to pay the costs of the proceedings both in the Courts below and in the House of Lords. On an application by H. & Co., Lim. (being debenture-holders in the C. Corporation, Lim.), in the above debenture-holders' action that the receiver might be directed to pay to them the 200*l.* paid out to him by order of the Court of Appeal on account of the costs ordered to be paid to them under the above order of the House of Lords,—*Held*, that the application must be refused. *Griffiths Cycle Corporation, In re*, 85 L. T. 776—C.A.

Unexecuted Contract — Liability on.]—A limited company entered into a contract with the defendants to supply them with pit props to be delivered during the twelve months ending June 30, 1905. The company became in arrear with the deliveries, and it was agreed that the time should be extended to June 30, 1906. In November, 1905, the plaintiff was appointed by the Court receiver and manager of the Company on behalf of the debenture-holders, and notice thereof was given to the defendants. The plaintiff delivered a quantity of props at various times in pursuance of the contract, and then gave the defendants notice that he could not undertake to carry out their contract with the company. In an action by the plaintiff to recover the price of the props supplied by him,—*Held*, that, as the plaintiff delivered the props under the contract between the company and the defendants, and not under a new contract with him, he did so as assignee of the company, and he could only recover subject to the right of the defendants to set off any claim which they might have against the company arising out of the same matter; and that the defendants were therefore entitled to set off as against the plaintiff's claim the difference between the contract price and the market price of the props not delivered. *Forster v. Nixon's Navigation Co.*, 23 T. L. R. 138—Channell, J.

And as to receiver's liability for goods ordered, see PRINCIPAL AND AGENT.

Remuneration — Remuneration as Receivers and Managers and as Directors.]—Two directors of a company who had been appointed by the Court receivers and managers for the debenture-holders were allowed to prove in a voluntary winding-up for their remuneration as directors during the period for which they had acted and been paid as such receivers and managers. *South-Western of Venezuela Railway, In re*, 71 L. J. Ch. 407; [1902] 1 Ch. 701; 86 L. T. 321; 50 W. R. 300; 9 Manson, 193—Buckley, J.

(n) Foreclosure.

Dealing with Property.]—The working out of a foreclosure decree in the absence of the debenture-holders cannot be considered a dealing by the company with its property in the ordinary course of its business. *Wallace v. Evershed*, 68 L. J. Ch. 415; [1899] 1 Ch. 891; 80 L. T. 523; 6 Manson, 351—Cozens-Hardy, J.

Parties—"Floating Security."]—The holders of debentures (subsequent in date to a specific mortgage on a company's property) which constitute a "floating charge" on all the property of the company are necessary parties to an action for foreclosure of the mortgage, even although their charge has not yet crystallised. *Ib.*

(o) Compromise with Company.

"Compromise or adjustment of any claim"—"Release of property charged"—Extension of Period for Redemption—Increase of Debenture Stock—Power of Majority to Bind Minority.]—By one of the conditions as to the issue of the debenture stock of a company it was provided that a meeting of the holders might, by a resolution of three-fourths, agree to any "compromise or adjustment of any claim" by the holders against the company, or for the settlement of any question in dispute, or the "giving of time to the company for the payment of any principal or interest or the release of the property or any portion thereof charged to secure the stock"; and that such resolution should bind all the holders. Debenture stock to the extent of 75,000*l.* had been issued by the company, which was redeemable on October 1, 1901. The directors had endeavoured to raise funds to redeem the stock, but the negotiations were unsuccessful. The company therefore was not in a position to redeem on October 1, 1901, and the redemption could not be carried out without prejudicing the stockholders themselves. In these circumstances the company convened a meeting of the stockholders under the above conditions, at which two resolutions were passed by a majority present—one extending the period for redemption of the stock until July 1, 1904, and the other authorising the increase of the stock up to 100,000*l.* by the issue of 25,000*l.* further stock to rank *pari passu* with the existing stock:—*Held*, that the condition was not limited to cases where disputes had arisen within the strict meaning of that term, but was applicable to a case where difficulties had to be met; and that, therefore, under the circumstances the majority of the debenture stockholders acting honestly and *bona fide*, and with a view to the preservation and improvement of their security, had power to bind the minority under the language of the condition when passing the resolutions. *Walker v. Elmore's German Metal Co.*, 85 L. T. 767—C.A.

15. ACTIONS BY AND AGAINST.

Action Pending against Company for Damages—Repudiation of Claim by Liquidator—Adoption of Defence—Judgment for Plaintiff with Costs—

Liability of Assets for Costs in Full.]—Where the liquidator of a company in voluntary liquidation repudiates a claim for damages for which an action is pending or is brought against the company and defends the action, and the plaintiff obtains judgment with costs, the liquidator must pay the costs in full out of the assets. *Thurso New Gas Co., In re* (42 Ch. D. 486), distinguished. *Wenborn & Co., In re*, 74 L. J. Ch. 283; [1905] 1 Ch. 413; 92 L. T. 228; 53 W. R. 332; 12 Manson, 45; 21 T. L. R. 229—Buckley, J.

The liquidator's proper course would have been to apply to stay the action, when the Court, if allowing it to go on, might have done so on terms that the plaintiff should, if successful, add his costs to the damages recovered. *Id.*

Costs—Action by Company before Commencement of Winding-up—Continuance by Liquidator—Judgment Recovered against Company with Costs.]—Where prior to the commencement of winding-up a company has commenced an action, and subsequently thereto the liquidators obtain the leave of the Court to continue the action, but the defendant obtains judgment in the action against the company with costs, the principle laid down in *Boynston v. Boynston* (4 App. Cas. 733) applies, and the defendant is entitled to be paid in full out of the assets of the company, not only his costs incurred after the commencement of the winding-up, but also those incurred between the commencement of the action and the commencement of the winding-up. *London Drapery Stores, In re*, 67 L. J. Ch. 690; [1898] 2 Ch. 684; 79 L. T. 592; 47 W. R. 118; 5 Manson, 338—Wright, J.

Security for Costs — Plaintiff — “Sufficient Security.”]—The security for costs required to be given by a plaintiff company, under section 69 of the Companies Act, 1862, must, as that section provides, be “sufficient”—neither illusory nor oppressive—having regard to the probable costs likely to be incurred by the defendant. *Dominion Brewery v. Foster*, 77 L. T. 507—C.A.

— Appeal by Defendant Limited Company.]—A limited company against which an action has been brought does not by appealing become a plaintiff within the meaning of section 69 of the Companies Act, 1862, so as to be required to give security for costs. *Sinclair v. Glasgow and London Contract Corporation*, 6 F. 818—Ct. of Sess.

— On Appeal.]—In opposing an appeal from the decision in an action in which a company has succeeded, the company is not “plaintiff or pursuer” within the meaning of section 69 of the Companies Act, 1862, so as to be required to give security for costs. *Star Fire and Burglary Insurance Co. v. Davidson*, 4 F. 997—Ct. of Sess.

Garnishee Order against Company—Action on —Order XIV.]—Under Order XLII. rule 24 orders as well as judgments can be enforced by action; therefore a judgment creditor, who has obtained a garnishee order absolute directing garnishees to pay to him a debt due by

them to the judgment debtor, can, if unable to obtain payment by execution, bring an action against them for the money due. *Pritchett v. English and Colonial Syndicate*, 68 L. J. Q.B. 801; [1899] 2 Q.B. 428; 81 L. T. 206; 47 W. R. 577—C.A.

“Proceeding against the company.”]—Where a company is being wound up under the direction of the Court, an appeal to the House of Lords in which the company is respondent, brought in an action in which the company was originally plaintiff, is not a “proceeding against the company” within section 87 of the Companies Act, 1862. *Humber v. John Griffiths Cycle Co.*, 85 L. T. 141—H.L. (E.)

Service of Summons—Offence Punishable Summarily.]—Service of a summons upon a limited joint-stock company for an offence punishable summarily must be effected at their registered office in accordance with the terms of section 62 of the Companies Act, 1862. *Pearks v. Richardson*, 71 L. J. K.B. 18; [1902] 1 K.B. 91; 85 L. T. 616; 50 W. R. 286; 66 J. P. 119; 20 Cox C.C. 96—D.

Action by Shareholder against Railway Company and Third Party for Undue Preference.]—See *Anderson v. Midland Railway, ante*, CARRIERS.

Debenture-holders' Actions.]—See col. 433.

Petition in Bankruptcy—Officer.]—See BANKRUPTCY.

16. STRIKING NAME OFF REGISTER.

Defunct Company—Neglect to Make Returns —Striking Name off Register—Application to Court to Restore Name.]—Where a company neglects to send to the Registrar of Joint-Stock Companies the annual return required by section 26 of the Companies Act, 1862, as amended by section 19 of the Companies Act, 1900, and the Registrar strikes the name of the company off the register under section 7, sub-section 4 of the Companies Act, 1880, as a defunct company, the Court, upon an application under section 7, sub-section 5 of the Act of 1880 to restore the name to the register, has no power to impose a penalty as a condition of restoring the name. By section 7, sub-section 4 of the Act of 1880 the effect of striking the name of a company off the register is to dissolve the company, but the personal liability of its officers for the engagements made as its agents is preserved, and the mere restoring of the name to the register does not relieve them from that liability. To relieve them from liability the Court must make an order under section 7, sub-section 5. *Brown, Bayley's Steel Works, In re*, 21 T. L. R. 374—Buckley, J.

Restoration of Name of Company to Register.]—In September, 1900, a limited company was struck off the Register of Joint-Stock Companies on the ground that it had not filed the proper returns with the registrar. At this date the company held an asset of the value of 2,000*l.* which it was about to sell, but in consequence of being struck off the register it was

unable to do so. In December, 1901, a contributory and director of the company presented a petition to the Court under section 7, sub-section 5 of the Companies Act, 1880, as amended by section 26, sub-section 2, of the Companies Act, 1900, for an order for the restoration of the company's name to the register on the ground that it would be just to do so, as otherwise the company's assets would fall to the Crown as *bona vacantia*. The Court granted the prayer of the petition, but ordained the returns to be transmitted to and received by the Registrar—the costs in the proceedings incurred by the Registrar of Joint-Stock Companies to form a first charge on the assets of the company. *Healy, Petitioner*, 5 F. 644—Ct. of Sess.

17. RECONSTRUCTION.

Premium Payable on Shares on "winding-up for the purpose of reconstruction or amalgamation."—*"Reconstruction"* is a commercial, not a legal term. It means carrying on the same business by substantially the same persons, but in an altered form. A mere sale is not a reconstruction. *"Amalgamation"* means a blending of two undertakings—for instance, by a transference of the undertakings of two companies to a third company, or by one company admitting as shareholders the shareholders of another company. *South African Supply and Cold Storage Co., In re; Wild v. South African Supply and Cold Storage Co.*, 73 L. J. Ch. 657; [1904] 2 Ch. 268; 91 L. T. 447; 52 W. R. 649; 12 Manson, 76—Buckley, J.

The preference shareholders and debenture-stockholders of the A company were to be respectively entitled under the company's articles and a debenture deed to a premium in the event of the company being voluntarily wound up "for the purpose of reconstruction or amalgamation." The preference shareholders and debenture-stockholders of the B company were similarly entitled. The A and B companies were voluntarily wound up after a series of complicated transactions had taken place between them, and two other companies, the C and D companies, which continued their business:—*Held*, as a result of these transactions, that the A and B companies had been wound up "for the purpose of reconstruction or amalgamation," and that the preference shareholders and debenture-stockholders of each company were entitled to the premium reserved under the articles and trust deeds of the two companies. *Ib.*

"Amalgamation"—Sale—Consideration—Distribution—Severable Contract.—There is no very precise meaning in law to be given to the word "amalgamate" in the memorandum of association of a company, but *semble* the sale by one company to another, in consideration of shares in the purchasing company, of all the vendor company's assets, except certain shares in the purchasing company held by the vendor company, is authorised by a clause in the memorandum of association of the vendor company allowing the company to "amalgamate" with another company. In an agreement for such a sale a provision for distributing the shares received as consideration amongst the

members of the vendor company can upon a question of legality be severed from the agreement for sale. *Wall v. London and Northern Assets Corporation* (No. 1), 67 L. J. Ch. 596; [1898] 2 Ch. 469; 79 L. T. 249; 47 W. R. 219—C.A.

New Company not in Existence.—The Court can sanction a scheme of reconstruction and arrangement providing for the transfer to an intended new company of the assets of the old company before the new company is actually incorporated, as well under section 161 of the Companies Act, 1862, as under section 2 of the Joint-Stock Companies Arrangement Act, 1870. *Canning Jarrah Timber Co., In re*, 69 L. J. Ch. 416; [1900] 1 Ch. 708; 82 L. T. 409; 7 Manson, 439—C.A.

Underwriting Agreement—Dissentient Shareholders.—The Court will be very slow to sanction in a scheme of reconstruction an arrangement which involves the payment of a commission for underwriting the shares in the new company out of the assets of the old company. *Ib.*

The Court will not sanction a scheme of reconstruction and arrangement which deprives dissentient shareholders in the old company of the right to have their shares valued by arbitration conferred by section 161 of the Companies Act, 1862. *Ib.*

(a) SALE UNDER MEMORANDUM OF ASSOCIATION.

Ultra Vires.—It is competent to a company by its memorandum of association to exclude the operation of section 161 of the Companies Act, 1862, in the event of a sale by the company of its undertaking to another company, part of the consideration for such sale being shares in the purchasing company, notwithstanding that the resolutions for sale and voluntary winding-up are contemporaneous and that stipulations in the agreement for sale can only be thoroughly carried out in the winding-up. *Cotton v. Imperial &c. Agency Corporation* (61 L. J. Ch. 684; [1892] 3 Ch. 454) followed and extended. *Doughty v. Lomagunda Reefs, Lim.*, 71 L. J. Ch. 888; [1902] 2 Ch. 837—Buckley, J. Decision of BUCKLEY, J. (71 L. J. Ch. 888; [1902] 2 Ch. 837), affirmed on the ground of non-joinder of parties, 72 L. J. Ch. 331; [1903] 1 Ch. 673—C.A. Disapproved, *Bisgood v. Henderson's Transvaal Estates, Lim.*, 43 L. J. N.C. 225.

Sale for Partly Paid Shares.—Under a clause in a memorandum of association stating one of the objects of the company to be "to sell the undertaking of the company . . . for a consideration consisting in whole or in part of . . . shares . . . of any other company . . ."—*Held*, that the company could sell for partly paid shares. *City and County Investment Co., In re* (49 L. J. Ch. 195; 13 Ch. D. 475) applied. *Mason v. Motor Traction Co.*, 74 L. J. Ch. 273; [1905] 1 Ch. 419; 92 L. T. 234; 12 Manson, 31; 21 T. L. R. 238—Buckley, J.

A sale as above was part of a scheme of reconstruction under which it was proposed to distribute the partly paid shares among the (fully paid) shareholders of the selling company.

Quære, whether the distribution would be *ultra vires*. *Ib.*

Provision for Distribution of Assets and Sale of Shares of Dissident Members.—A company which had power under its memorandum of association to sell its undertaking and to accept in payment for the same shares of any other company, whether wholly or partly paid up, entered into an agreement for a sale of its undertaking to a new company, part of the consideration being shares in the new company of 5s. with 4s. credited as paid up. A clause of the agreement provided that if the selling company should go into liquidation and distribute the shares forming part of the consideration amongst its members, all shares not accepted by members within twenty-one days should be sold and applied in payment of debts and liabilities of the selling company in relief of the obligation of the new company under the agreement:—*Held*, that the agreement was not justified by the memorandum of association and was *ultra vires*, for the selling company had no power to contract that upon a liquidation the assets should be divided amongst its shareholders, or that if a shareholder did not choose to undertake the liability under the shares in the new company his shares should be forfeited. *Manners v. St. David's Gold and Copper Mines*, 73 L. J. Ch. 764; [1904] 2 Ch. 593; 91 L. T. 277; 11 Manson, 425; 20 T. L. R. 729—C.A.

Unclaimed Shares to be Sold and Proceeds Distributed—Shares of Dissident Shareholders—Return of—Rateable Proportion of Proceeds of Sale.—A company which had power under its memorandum of association to sell its undertaking for shares of any other company having objects altogether or in part similar, before going into liquidation, passed a resolution approving a draft agreement for a sale of its undertaking to a new company for the same number of shares as those issued in the old company, but subject to a liability per share. A clause of the agreement provided that within a fixed time after the winding-up the liquidator should require members to claim for allotment in the new company within a specified time, and as regards such shares as were not claimed accordingly should "use his best endeavours to sell the same for what they would fetch," the proceeds of sale, after paying expenses, to be "distributed rateably among the members who, if they had claimed, would have been entitled to such shares in accordance with their rights and interests":—*Held*, that the proposed scheme was not justified by the memorandum of association, and was *ultra vires*, as it constituted such a forfeiture of the shares of dissentient members in a going concern as was not contemplated in their contract with the company, and none the less because there was a provision for a rateable distribution of the proceeds of sale by the liquidator. *Manners v. St. David's Gold and Copper Mines* (73 L. J. Ch. 764; [1904] 2 Ch. 593) followed. *Bisgood v. Nile Valley Co.*, 75 L. J. Ch. 379; [1906] 1 Ch. 747; 94 L. T. 304; 54 W. R. 397; 13 Manson, 126; 22 T. L. R. 317—Kekewich, J.

—Shares not Accepted to be Sold and Proceeds Distributed.—A company was incorporated with a capital of 140,000*l.* in 1*l.* shares, which were issued and fully paid. The memorandum of association provided that the objects of the

company were, *inter alia*, "to sell . . . the undertaking . . . of the company . . . for such consideration as the company may think fit, and in particular for any shares, fully or partly paid up . . . of any other company, and to divide such part or parts, as may be determined by the company, of the purchase money, whether in cash, shares, or other equivalent . . . amongst the members of the company, by way of dividend or bonus in proportion to their shares . . . and the powers contained in this . . . sub-section shall be exercisable, whether in view of a winding-up of the company or not"; and "to distribute any of the assets of the company amongst the members in specie, or otherwise. . . ." The company agreed to sell their undertaking to another company in consideration—first, of payment of debts and liabilities; secondly, of payment of costs of winding-up if resolved upon within six months; and thirdly, of 140,000 shares of 5s. each of the purchasing company credited with 3s. 6*d.* paid up, the vendor company or its nominees within a limited time to apply for and accept an allotment of the shares, and, in default, the shares unapplied for to be at the disposal of the purchasing company. Subsequently resolutions were passed for voluntarily winding up the vendor company and authorising the liquidator to offer the shares of the new company receivable under the agreement for distribution amongst the members of the old company at the rate of one new share for each old share, and in the event of any members not accepting their due proportion of shares within a limited time the liquidator was to use his best endeavours to sell the shares not accepted upon the best terms obtainable, and to hold the proceeds upon trust for distribution among the non-accepting members:—*Held*, that the agreement and proposed distribution of shares were not *ultra vires*. *Burdett-Coutts v. True Blue (Hannan's) Gold Mine, Lim.* (68 L. J. Ch. 692; [1899] 2 Ch. 616), followed. *Manners v. St. David's Gold and Copper Mines, Lim.* (73 L. J. Ch. 764; [1904] 2 Ch. 593), and *Bisgood v. Nile Valley Co.* (75 L. J. Ch. 379; [1906] 1 Ch. 747) distinguished. *Fuller v. White Feather Reward, Lim.*, 75 L. J. Ch. 393; [1906] 1 Ch. 823; 95 L. T. 404; 13 Manson, 136; 22 T. L. R. 400—Warrington J.

(b) SALE AND TRANSFER OF ASSETS UNDER SECTION 161.

Article Excluding Arbitration.—Where a company has adopted a scheme of reconstruction and sale under section 161 of the Companies Act, 1862, the right of a dissentient shareholder to have the price to be paid for the purchase of his interest determined by arbitration under section 162 will not be ousted by an article of association of the company providing some other means of fixing the price for the purchase of his interest. An article of association is not such an agreement as is referred to in section 162, which must be an agreement between the company or its liquidator on one side and the dissentient shareholder on the other. *Baring-Gould and Sharphington Combined Pick and Shovel Syndicate, In re*, 68 L. J. Ch. 429; [1899] 2 Ch. 80; 80 L. T. 739; 47 W. R. 564—C.A.

Application for New Shares by Old Share-

holders—Limited Time—Surplus Shares to be at Disposal of New Company—Shareholders Claiming out of Time.—A scheme of reconstruction under section 161 of the Companies Act, 1862, which as part of the consideration for the transfer of the assets of an old company in liquidation to a new purchasing company gives to the shareholders of the old company a right to apply for shares in the new company within a limited time, is not *ultra vires* because it provides that shares which dissentient members of the old company would have been entitled to claim but for their dissent, and shares which other members of the old company would have been entitled to claim if they had sent in their applications within the time limited, shall in effect be at the disposal of the new company. Observations of LORD ESHER, M.R., in *Nicholl v. Eberhardt Mining Co.* (59 L. J. Ch. 103), dissented from. *Burdett-Coutts v. True Blue (Hannam's) Gold Mine*, 68 L. J. Ch. 692; [1899] 2 Ch. 616; 81 L. T. 29; 48 W. R. 1; 7 Manson, 85—C.A.

(c) JOINT-STOCK COMPANIES ARRANGEMENT ACT, 1870, UNDER.

Scheme of Arrangement—Approval by Creditors—Dissentient Shareholders.—A scheme of arrangement for the reconstruction of a company, after providing for the claims of the debenture-holders and other creditors of the company, gave options to holders of preference and ordinary shares respectively to take shares in the new company credited as partly paid up in proportion to their holdings in the old company. There was evidence to the effect that if the assets were immediately realised there would be no balance available for meeting the claims of ordinary shareholders. At separate meetings of debenture-holders, creditors, and preference shareholders, three-fourths majorities in favour of the scheme had been obtained, but at the meeting of ordinary shareholders such a majority was not obtained:—*Held*, that, notwithstanding that the scheme had not the approval of a three-fourths majority of the ordinary shareholders, the Court had power to sanction it as regards the creditors by virtue of the Joint-Stock Companies Arrangement Act, 1870, s. 2; and as regards the preference shareholders by virtue of the Companies Act, 1900, s. 24. *Tea Corporation, In re; Sorsbie v. Tea Corporation*, 73 L. J. Ch. 57; [1904] 1 Ch. 12; 89 L. T. 516; 52 W. R. 177; 11 Manson, 34; 20 T. L. R. 57—C.A.

Company Registered in England but Carrying on Business in a Colony—Colonial Creditor.

—Neither the Joint-Stock Companies Arrangement Act of 1870, nor the other Companies Acts together with which it must be read and construed, extend to the colonies, or are intended to bind the colonial Courts. Proceedings in an English Court under those Acts cannot therefore be pleaded in a colony as a defence to an action by a colonial creditor. *New Zealand Loan and Mercantile Agency Co. v. Morrison*, 67 L. J. P.C. 10; [1898] A.C. 349; 77 L. T. 603; 46 W. R. 239; 5 Manson, 171—P.C.

Amalgamation Agreement—Ultra Vires.

—An agreement between the Greenwich Pier Co. and a waterman's society which owned a floating pier at Greenwich, by which the pier

company agreed to compensate the waterman's society for the abandonment of their pier by paying to them a part of the net profits of the company's pier, was held *ultra vires* of the pier company. *Greenwich Pier Co. v. Thames Conservators*, 21 T. L. R. 669—Buckley, J.

Underwriters—Commission—Payment of Cash in Consideration of Underwriters Agreeing to Accept Allotment of Shares—“Ultra Vires”—Injunction.

—In October, 1898, the N. A. Company was incorporated under the Companies Acts with a nominal capital of 250,000l. divided into 250,000 shares of 1l. each, of which 205,014 had been issued. By an agreement dated in July, 1902, and made between the N. A. Co. and certain guarantors, it was provided that a sale of the undertaking, business, and assets of the N. A. Co. should be made to the guarantors. The guarantors undertook to form a new company, to repurchase the subject-matter of the sale on the terms provided in a draft agreement scheduled to the first agreement. As part of the consideration for the sale the guarantors undertook to procure that the new company would allot such number of its shares, to be of the value of 1l. credited with the sum of 12s. per share as paid up thereon, but not exceeding on the whole 205,014 shares, as the N. A. Co. should require, to satisfy all liabilities of that company, including costs of a proposed liquidation. The shareholders of the N. A. Co. were to have an option of taking a 1l. share in the new company, with a liability on it of 8s. for every share in the N. A. Co. The scheduled agreement fixed the price to be paid by the new company to the guarantors at 205,014 1l. shares, with 12s. paid up, out of a total of 250,000 of such shares, and a payment of 12,300l. in cash. The guarantors agreed to accept an allotment of such number of the 205,014 shares credited with 12s. per share paid up thereon, as should not be required to satisfy the requirements of the N. A. Co. or the liquidator thereof. Subsequently the new company was duly incorporated as provided by the agreement. The plaintiff was the registered holder of 1,000 shares, each fully paid, in the N. A. Co. He contended that the provision for the cash payment of 12,300l. was, in effect, a provision for payment of commission by the new company, and was contrary to the enactment contained in section 8 of the Companies Act, 1900; and that it invalidated the whole agreement of July, 1902:—*Held*, that the payment of the 12,300l. came within section 8, sub-section 2 of the Act of 1900, and did not fall within sub-section 1, it being a payment by way of commission for underwriting to the guarantors in consideration of their agreeing to take up as many of the shares allotted, to the liquidator of the N. A. Co. as the members thereof declined to accept; and that this was not a profit on a re-sale, the transaction not really being in the nature of a re-sale. *Held*, therefore, that there must be a declaration that the proposed payment was prohibited by sub-section 2, but without prejudice to such right (if any) as the new company might have to claim the benefit of sub-section 1, and a perpetual injunction upon the footing of that declaration, but so as not to prevent any payment if and so far as it could be made under sub-section 1. *Booth v. New Afrikander Gold-Mining Co.*, 87 L. T. 509—C.A.

Reconstruction—Exchange of Shares—Sanction of Court.]—*See* EXECUTOR AND ADMINISTRATOR; TRUST AND TRUSTEE.

18. WINDING-UP.

Jurisdiction—Friendly Society—Unregistered Company.]—The Court has jurisdiction under section 199 of the Companies Act, 1862, to wind up compulsorily, as an unregistered company, a society registered under the Friendly Societies Acts but not registered under the Companies Act, 1862. The fact that such a society has passed a resolution to dissolve, and is actually in process of dissolution, does not prevent a creditor from obtaining an order for winding up the society. *Irish Mercantile Loan Society, In re*, [1907] 1 Ir. R. 98—M.R.

—Unregistered Company—Company Incorporated Abroad, but having Office in England.]—A foreign company, which is incorporated under the laws of a foreign State, but which has an office and assets in England, can be wound up in this country under section 199 of the Companies Act, 1862. *Syria Ottoman Railway Co., In re*, 20 T. L. R. 217—Byrne, J.

—Company Incorporated under Special Act.]—The Court has jurisdiction, upon the petition of a judgment creditor, to make a winding-up order against a company incorporated under a special Act for supplying water to a district. *Barton-upon-Humber and District Water Co., In re* (58 L. J. Ch. 613; 42 Ch. D. 585), and *Portsmouth &c. Tramways Co., In re* (61 L. J. Ch. 462; [1892] 2 Ch. 362), followed. *St. Neots Water Co., In re* (No. 2), 22 T. L. R. 478—Buckley, J.

—Building Society Formed in Pursuance of Statute Subsequently Repealed.]—In a petition by a creditor for the winding up, under section 199 of the Companies Act, 1862, of a building society (unincorporated and not registered under the Act) consisting of more than twenty persons, and established and certified in 1873 under the Building Societies Act, 1836, the Court made a winding-up order, holding that the society, having been in 1873 formed in pursuance of the Building Societies Act, 1836, did not fall within the class of companies forbidden by section 4 of the Companies Act, 1862, and that in virtue of section 38 of the Interpretation Act, 1889, the repeal of the Act of 1836 by the Building Societies Act, 1894, did not affect rights or liabilities acquired or incurred by the society under the repealed Act. *Smith's Trustees v. Irvine and Fullarton Building Society*, 6 F. 99—Ct. of Sess.

—Building Society Certified after 1862 and not Registered after 1874—Unauthorised Association—Costs.]—A building society was established in 1868 under the Building Societies Act, 1836, but had never been incorporated under any subsequent Act. In 1900 the society was found to be insolvent, and a petition was presented by two creditors to wind it up, and the present petitioner had knowledge of it, but that petition was subsequently withdrawn. All the undisputed creditors except the present petitioner and three others had accepted a composition of 12s. 6d. in the pound, and the whole of

the assets had been sold by the directors, who had contributed out of their own pockets to provide the composition. A petition was now presented by a creditor to wind up the society. The directors had expressed their willingness to pay him a composition of 12s. 6d. in the pound on his debt, and had retained sufficient funds in their hands for this purpose:—*Held*, upon the merits, that no order ought to be made upon the petition. *Ilfracombe Permanent Mutual Benefit Building Society, In re*, 70 L. J. Ch. 66; [1901] 1 Ch. 102; 84 L. T. 146—Wright, J.

Semble, that although in a literal sense the society was, in the words of section 4 of the Companies Act, 1862, "formed in pursuance of some other Act of Parliament"—that is, the repealed Building Societies Act, 1836—the word "formed" in that section means formed and having its existence recognised under the provisions "of some other Act," and therefore that the society, not having been incorporated under the Building Societies Act, 1874, was an illegal society, and consequently the Court had no jurisdiction to make a winding-up order:—*Held*, therefore, that the petition must be dismissed, but that the society, having pleaded its own illegality as a defence, was not entitled to costs. *Id.*

County Court Jurisdiction—Committal.]—By sub-sections 1 and 4 of the Companies (Winding-up) Act, 1890, jurisdiction is given to County Courts to wind up companies in certain cases; and by sub-section 6 every Court having jurisdiction under the Act to wind up a company shall for the purposes of that jurisdiction have all the powers of the High Court. In the course of winding up a company a County Court Judge made an order committing a person who had been a director of the company to prison for disobedience to a previous order of the Court:—*Held*, on appeal from an order for prohibition made by a Judge at chambers, that inasmuch as a County Court has for the purposes of its jurisdiction to wind up a company under the Companies (Winding-up) Act, 1890, all the powers of the High Court, prohibition would not lie. *New Par Consols, In re* (No. 2), 67 L. J. Q.B. 598; [1898] 1 Q.B. 669; 78 L. T. 312; 46 W. R. 369; 5 Manson, 277—C.A.

(a) PETITION.

Equitable Assignee.]—The equitable assignee of a debt can present a winding-up petition as a creditor under section 82 of the Companies Act, 1862. *Cooper, Ex parte; Baillie, In re* (44 L. J. Bk. 125; L. R. 20 Eq. 762), applied. *Dictum of Cotton, L.J., in Combined Weighing and Advertising Machine Co., In re* (59 L. J. Ch. 26, 27; 43 Ch. D. 99, 104), followed. *Montgomery Moore Ship Collision Doors Syndicate, Lim., In re*, 72 L. J. Ch. 624; 89 L. T. 126; 10 Manson, 327—Byrne, J.

Judgment Creditors—Debenture-holders' Action—Business Carried on by Receiver on behalf of Debenture-holders—No Allegation of Surplus Assets.]—On a petition for a compulsory winding-up order by judgment creditors, it was shewn that the debenture-holders of the company had appointed a receiver of all the assets of the company. The receiver carried on the

business and incurred further liabilities. The assets were more than covered by the debentures, and it appeared that there would be no surplus assets, so that the petitioners would derive no advantage from the winding-up:—*Held*, that it was "just and equitable," under section 79, sub-section 5 of the Companies Act, 1862, that a winding-up order should be made. "*Chic*," *Lim.*, *In re*, 74 L. J. Ch. 597; [1905] 2 Ch. 345; 93 L. T. 301; 53 W. R. 659; 12 Manson, 342—Warrington, J.

Debenture-holder—Default in Payment of Interest on Debentures—Waiver of Default—Creditor—Future Debt.—A debenture stockholder of a company to whom nothing is due for principal or interest has no *locus standi* to present a petition to wind up the company. *Melbourne Brewery and Distillery, Lim.*, *In re*, 70 L. J. Ch. 198; [1901] 1 Ch. 453; 84 L. T. 228; 49 W. R. 250; 8 Manson, 403—Wright, J.

In 1895 a company issued debenture stock which was secured by a debenture trust deed. The deed provided that the security should become enforceable (*inter alia*) in the event of default by the company in the payment of interest on the stock for a period of three months after such interest ought to have been paid. In 1896 the company made default in payment of the interest on the debentures. Thereupon a petition was presented by a debenture stockholder to wind up the company, but was withdrawn by him on certain terms which included the payment to him of the interest due on his debentures. A petition was now presented by the same debenture stockholder, who had received payment of all interest due on his debentures, to wind up the company, alleging that the company was only able to pay the interest on the debenture stock by borrowing the amount required; that default had been made in payment of the interest on the debentures; and that the principal of his debenture stock had thereupon become due and was payable to him: *Held*, that the petitioner, by receiving the interest on his debentures, had waived the default by the company in 1896, and could not now take advantage of it, and that, as no interest was due to him and the debentures were not repayable until 1994, there was no debt presently due to him in respect of which he could petition, and that the petition must therefore be dismissed. *Australian Joint-Stock Bank, In re* (32 L. J. N.C. 264; W. N. (1897), 48), distinguished. *Ib.*

Statutory Affidavit—Affidavit by Petitioner's Manager—Sufficiency.—Where an affidavit verifying a winding-up petition presented by an individual and not by a company is made by the petitioner's manager acting under a power of attorney and not by the petitioner himself, as required by rule 36 of the Companies (Winding-up) Rules, 1890, the case is not within rule 177 (1) of those rules, and the Court cannot accept the affidavit as sufficient evidence. *Charterland Stores and Trading Co., In re*, 69 L. J. Ch. 861; [1900] 2 Ch. 870; 83 L. T. 674; 49 W. R. 75; 8 Manson, 94—Wright, J.

Supplemental Affidavits—Notice of Filing.—It is not necessary to give notice of the statutory affidavit in support of a winding-up petition, but such notice should be given in

respect of the filing of additional or supplemental affidavits to avoid unnecessary adjournments being made in order to answer such affidavits. *British Cycle Manufacturing Co., In re*, 77 L. T. 683; 4 Manson, 383—Wright, J.

Affidavit by Agent of Petitioner—Sufficiency of Affidavit.—Notwithstanding that rule 29 of the Companies (Winding-up) Rules, 1903, requires a petition for the winding-up of a company to be verified by an affidavit "made by the petitioner," the Court will in a proper case accept as sufficient an affidavit other than that of the petitioner. Thus, where the petitioner was resident in South Africa, the Court accepted the affidavit of his attorney and agent, who knew the facts on which the petition was based, whereas the petitioner did not. *Charterland Stores and Trading Co., In re* (69 L. J. Ch. 861; [1900] 2 Ch. 870), not followed. *African Farms, Lim., In re*, 75 L. J. Ch. 378; [1906] 1 Ch. 640; 95 L. T. 403; 54 W. R. 490; 13 Manson, 123—Warrington, J.

Voluntary Winding-up Resolution—Contempt of Court—Committal.—It is a contempt of Court, while a petition for a compulsory winding-up is pending, to obtain by improper means the passing of a resolution for a voluntary winding-up, with a view to mislead the Court as to the real views of the shareholders and thereby induce the Court to abstain from making a compulsory order. *Parsonage & Co., In re*, 70 L. J. Ch. 706; [1901] 2 Ch. 424; 84 L. T. 866; 49 W. R. 700—Wright, J.

Irregularity—Creditor's Petition.—Notice was given of an extraordinary meeting of shareholders in a company for the purpose of considering, and, if thought fit, passing resolutions for a voluntary winding-up, with the appointment of a liquidator at a fixed remuneration, for the purpose of reconstruction in accordance with the terms of a draft agreement. At the meeting the only resolution put was for the voluntary winding-up of the company, with the appointment of a liquidator:—*Held*, on the petition of a creditor for either a compulsory or supervision order, that a compulsory order must be made, on the ground that the resolution put to the meeting was not in accordance with the resolutions of which notice had been given, and therefore no valid resolutions for a voluntary winding-up had ever been passed. *Teede & Bishop, Lim., In re*, 70 L. J. Ch. 409; 84 L. T. 561; 8 Manson, 217—Cozens-Hardy, J.

Prejudice to Creditor by Voluntary Winding-up—Support of Creditors.—Section 145 of the Companies Act, 1862, does not mean that the voluntary winding-up of a company shall be an absolute bar to the right of creditors to have the same wound up by the Court unless the Court is of opinion that the rights of the petitioning creditor will be prejudiced by the voluntary winding-up. It does not override sections 91 and 149, but the three sections must be read together. A creditor's *prima facie* right, as between himself and the company, to a compulsory order *ex debito justitiae* is undoubtedly restricted by section 145, but the right of the general body of creditors to have effect given to their wishes under sections 91 and 149 is untouched by section 145. Accordingly, the Court has jurisdiction to make a compulsory

order on the petition of a creditor who has the support of the general body of the creditors, although a voluntary winding-up is in existence and the petitioner does not allege that he will be prejudiced by the voluntary winding-up. *Bishop & Sons, Lim., In re*, 69 L. J. Ch. 513; [1900] 2 Ch. 254; 82 L. T. 756; 7 Manson, 342—Farwell, J.

— **Investigation Required.**—The Court, upon the authority of *Bishop & Sons, In re*, (69 L. J. Ch. 513; [1900] 2 Ch. 254), made a compulsory winding-up order, there being already a voluntary winding-up, the petitioning creditor not shewing that he would be prejudiced by a voluntary winding-up, but shewing a case for enquiry. *Lichtenstein, In re*, 23 T. L. R. 424—Parker, J.

— The existence of a voluntary winding-up of a company is not a bar to a compulsory order being subsequently made on a petition of a fully paid-up shareholder, if the Court is satisfied that the voluntary liquidation is existing under such circumstances as are likely to prejudice the shareholders. The jurisdiction to make a compulsory order notwithstanding a voluntary winding-up is not confined to cases where it is shewn that the resolution for voluntary winding-up was passed fraudulently and not *bona fide*, or where the petition is supported by creditors. The Court, however, will not make such an order unless it is satisfied that the shareholders will obtain some benefit by it. *Gold Co., In re* (48 L. J. Ch. 281; 11 Ch. D. 701), explained. *Haycraft Gold Reduction &c. Co., In re* (69 L. J. Ch. 497; [1900] 2 Ch. 280), and *Gutta-Percha Corporation, In re* (69 L. J. Ch. 769; [1900] 2 Ch. 665), approved. *National Company for Distribution of Electricity, In re*, 71 L. J. Ch. 702; [1902] 2 Ch. 34; 87 L. T. 6; 9 Manson, 314—C.A.

— **Investigation Required.**—The rule that a voluntary winding-up is *prima facie* a bar to a shareholder obtaining a compulsory order does not apply where the resolution for voluntary winding-up has been passed by the shareholders with a view to a reconstruction scheme which has subsequently proved abortive and there are circumstances in connection with the company which require investigation. *Gutta-Percha Corporation In re*, 69 L. J. Ch. 769; [1900] 2 Ch. 665; 83 L. T. 401—Cozens-Hardy, J.

The existence of a voluntary winding-up is not a bar to a compulsory order being made, even on the petition of a fully paid-up shareholder unsupported by creditors, if the circumstances are such as require the investigation of the Court. *Fire Annihilator Co., In re* (32 Beav. 561), and *Gold Co., In re* (48 L. J. Ch. 281; 11 Ch. D. 701), followed. *Haycraft Gold Reduction Co., In re*, *supra*.

Voluntary or Under Supervision—Winding-up by the Court.—Section 14 of the Companies (Winding-up) Act, 1890—which enacts that, where a company is being wound up voluntarily or subject to supervision, the Court may, if satisfied that such winding-up cannot be continued with due regard to the interests of the creditors or contributories, order that the company be wound up by the Court—ought to have

a reasonably wide construction given to it, in accordance with its language without straining it; and, so construed, it includes all cases where the powers of the liquidator in a voluntary winding-up, or winding-up under supervision, prove insufficient for the purposes of the winding-up so far as they affect the interests of the creditors or contributories; and if the official receiver under a compulsory order would possess powers which the liquidator in a voluntary winding-up or winding-up under supervision would not, and which in the opinion of the Court are necessary for an efficient winding-up, then the section applies; but an order under the section will not be made as a matter of course, and a strong case should be made to show that it is required. *Jubilee Sites Syndicate, In re*, 68 L. J. Ch. 427; [1899] 2 Ch. 204; 80 L. T. 869; 47 W. R. 606; 6 Manson, 331—Wright, J.

Assets of Company Exhausted by Debentures—Debenture-holders carrying on Business—Unsecured Creditor.—The Court is not bound to exercise its discretion by refusing, at the instance of the company, to make a winding-up order merely on the ground that the order will produce nothing for the unsecured creditors. *Melton & Co., In re*, 75 L. J. Ch. 509; [1906] 1 Ch. 841; 94 L. T. 641; 54 W. R. 468; 13 Manson, 190; 22 T. L. R. 500—Buckley, J.

A company had a paid-up capital of 2,507l., and a debenture debt of over 6,000l. The debentures were held by three individuals. It was doubtful whether there would be assets for the payment of anything to unsecured creditors on a winding-up. A judgment creditor presented a petition for the compulsory winding-up of the company, which was opposed by the company, and neither supported nor opposed by other unsecured creditors:—*Held*, that since the debenture-holders were in substance carrying on the business, using the company's name, the company ought, under the "just and equitable" clause of section 79 of the Companies Act, 1862, to be wound up, even if the order would produce nothing for the unsecured creditors. *Ib.*

— **Unsecured Creditor—Possibility of Benefit—Right to Winding-up Order.**—An unpaid creditor of a company who shews the company to be insolvent is entitled *ex debito justitiae* to a winding-up order, subject to the right of the majority of creditors of the class to which he belongs to oppose the petition. It is no defence to the petition on the part of the company that there are no assets to wind up; if the order will be useful, though not necessarily fruitful, there is jurisdiction to make it. *Criggstone Coal Co., In re*, 75 L. J. Ch. 362; [1906] 2 Ch. 327; 95 L. T. 510; 13 Manson, 233; 22 T. L. R. 585—C.A.

Per COLLINS, M.R.—The onus of proving that in no possible case could the petitioner gain any benefit from a winding-up order is upon the company and the debenture-holders claiming through it. *Ib.* And see now Companies Act, 1907, s. 29.

Substratum of Company Gone—Deadlock—Management.—If the real substratum of a company has gone, or if the company has come to a deadlock, the Court will consider itself justified in acting under section 79, sub-section 5

of the Companies Act, 1862, and ordering the company to be wound up. But the Court will not allow the aid of that sub-section where all that has happened is merely what may be called a domestic quarrel between two sets of shareholders, inasmuch as the company itself is the proper forum for the settlement of domestic differences, according to the powers of the majority under the constitution of the company. *Symington v. Symington's Quarries, Lim.*, 8 F. 121—Ct. of Sess.

— Shipping Companies — Only Vessel Lost.—A majority in number and value of the shareholders of a company formed (a) to purchase, charter, hire, or otherwise acquire steam or other ships, and to work, hire, or employ them, and (b) to carry on the business of ship-owners, which had lost the only vessel it possessed, and whose only remaining asset was a balance of 863*l.* in the bank, presented a petition to have the company wound up by the Court. A minority of the shareholders desired to carry on the business as charterers, and a resolution to wind up voluntarily failed to obtain the necessary three-fourths majority:—*Held*, that in the circumstances it was just and equitable that the company should be wound up, and a winding-up order granted. *Pirie v. Stewart*, 6 F. 847—Ct. of Sess.

Petition for Winding-up of Company within Six Months of Incorporation—"Just and equitable."—*Per* LORD STORMONTH DARLING.—Where a petition is presented under sub-section 5 of section 79 of the Companies Act, 1862, for the winding-up of a company on the ground that it is just and equitable that this should be done, it requires a very strong case on the part of the petitioner to induce the Court to grant the petition when the case contemplated in sub-section 2 of section 79 has not arisen. *Scobie v. Atlas Steel Works*, 8 F. 1052—Ct. of Sess.

Dismissal of Petition—No Benefit to Creditors Generally.—The Court can in its discretion dismiss the petition of a creditor for an order to compulsorily wind up a company already in voluntary liquidation, where the order when made will not benefit the creditors generally, but only the particular creditor presenting the petition. *Greenwood & Co.*, *In re*, 69 L. J. Q.B. 751; [1900] 2 Q.B. 306; 82 L. T. 843; 48 W. R. 607; 7 Manson, 456—D.

Notice of Appeal—Costs—Unsuccessful Appeal—Two Sets of Contributories Opposing Petition.—On an appeal against an order made by a Judge on a winding-up petition in which, according to the established practice, one set of costs has been allowed between the creditors and contributories respectively who supported the winning side, if the appellant does not wish to run the risk of incurring additional costs by asking for the discharge or modification of the order so far as it gave those costs, he must make it clear by his notice of appeal that he does not ask for that; and if the notice of appeal goes to the whole order of the Court below, he must write to the creditors or contributories, as the case may be, or to their solicitors, and inform them that he does not propose to ask for an order which would affect the part of the order of the Court below under

which they got their costs. If the creditors or contributories choose to appear on the appeal after receiving this notice and the order of the Court below is affirmed, the rule as to allowing one set of costs only between them respectively will be applied in the Court of Appeal. *New Gas Co.*, *In re* (5 Ch. D. 703), explained. *Ibo Investment Trust, Lim.*, *In re*, 72 L. J. Ch. 661; [1903] 2 Ch. 373; 88 L. T. 752; 51 W. R. 593; 10 Manson, 309—C.A.

Withdrawal of Petition—Costs of Persons Supporting and Opposing—Amount.—Where, on a petition to wind up a company being called on, the petitioner elects to withdraw the petition, he will be ordered to pay the costs of those persons who appear and who have given notice within the time limited by rule 20 of the Companies Winding-up Rules (April), 1892, of their intention to do so—one set of costs to those supporting, and one set of costs to those opposing. *Patent Cocoa Fibre Co.*, *In re* (45 L. J. Ch. 207; 1 Ch. D. 617), followed. *British Electric Street Tramways*, *In re*, 72 L. J. Ch. 386; [1903] 1 Ch. 725; 10 Manson, 195—Buckley, J.

Petition Standing Over—Undertaking "not to wind up voluntarily."—Where a petition to wind up a company is ordered to stand over by consent on the terms of what is known as "St. Thomas's Dock Order," the undertaking by the company should not be that it will not consent to an order on another petition and will not wind up voluntarily, but should follow the wording of the judgment of Jessel, M.R., in *St. Thomas's Dock*, *In re* (45 L. J. Ch. 304; 2 Ch. D. 116), and be an undertaking that the company will not consent to a winding-up order on the petition of another person, or to a voluntary winding-up. *Semble*, that a corporation cannot validly undertake not to wind up voluntarily. *St. Neots Water Co.*, *In re* (No. 1), 93 L. T. 788—Buckley, J.

Costs—Compulsory Order—Petitioning Creditor's Debt under 50*l.*—Where a compulsory winding-up order is made on the petition of a creditor whose debt is under 50*l.*, he may, if supported by creditors for a larger amount, be allowed his costs. *Leyton and Walthamstow Cycle Co.*, *In re*, 50 W. R. 98—Wright, J.

Dismissal of Petition with Costs—Contributories Opposing Petition—Taxation of Costs—Allowances in Respect of Copies of Evidence.—Where the common order is made dismissing a winding-up petition with costs, and the contributories are in the ordinary way allowed one set of costs between them, they will not upon taxation be allowed the usual charges consequent upon taking copies of the evidence filed by the petitioner and the company respectively. If any such allowances are desired, application must be made to the Court at the hearing of the winding-up petition. *Ibo Investment Trust, Lim.*, *In re*, 73 L. J. Ch. 71; [1904] 1 Ch. 26; 90 L. T. 373; 11 Manson, 105—Byrne, J.

— Taxation — Petition — Direction to Try Question—Fee for Instructions for Brief.—On a petition for a compulsory or supervision order against a company which has been wound up voluntarily, the Court made no order, but directed a question whether the company was

indebted to the petitioner on a guarantee to be tried as if a summons had been taken out by the liquidator under section 138 of the Companies Act, 1862:—*Held*, for purposes of taxation, that such trial was the trial of an issue of fact within the meaning of the Rules of the Supreme Court, 1883, Appendix N (Costs), No. 81. *Consolidated Exploration and Finance Co., In re*, 68 L. J. Ch. 752; [1899] 2 Ch. 599; 81 L. T. 522; 7 Manson, 45—Wright, J.

Building Society after Registry Cancelled.]—
See BUILDING SOCIETY.

Friendly Society — Jurisdiction to Order Winding-up of.]—See *supra*, and FRIENDLY SOCIETY.

Industrial Society, of.]—See INDUSTRIAL SOCIETY.

Life Insurance Society, of.]—See INSURANCE (LIFE).

(b) STAY OF ACTIONS AND EXECUTIONS.

Attachment against Company in Course of Liquidation—Leave to Proceed against Company.]—*Semble*, per LORD TRAYNER, that the terms of section 163 of the Companies Act, 1862, which invalidates all proceedings by way of attachment put in force against a company which is being wound up by or under the supervision of the Court, after the commencement of the winding-up, are absolute, and are not modified or restricted by the terms of section 87, which enables the Court to allow proceedings to be taken or proceeded with against the company after the order for winding up has been made. *Radford & Bright, Lim. v. Stevenson*, 6 F. 429—Ct. of Sess.

(c) PROCEEDINGS UNDER WINDING-UP ORDER.

Statement of Affairs—Person Acting as Director.]—Although a person has not legally been a director of a company within one year before an order for winding up the company, if he has in fact acted as a director within that period, he is a director who is liable to furnish a statement as to the affairs of the company within the meaning of section 7 of the Companies (Winding-up) Act, 1890. *New Par Consols, In re* (No. 1), 67 L. J. Q.B. 595; [1898] 1 Q.B. 573; 5 Manson, 273—D.

— Jurisdiction of County Court to Order.]—Notwithstanding the provision for a penalty for default in complying with the requirements of the section contained in sub-section 5 thereof the inherent power of the Courts to make such orders as are necessary to carry out the objects with which they have to deal is not taken away, and a County Court has therefore jurisdiction to make an order that a director make out and furnish the statement of affairs required by the section. *Ib.*

Winding-up Order—Stay of Proceedings—Discretion of Court—Consent of Creditors—Practice in Bankruptcy.]—When a company has been ordered to be wound up and an application is

made under section 89 of the Companies Act, 1862, to stay proceedings under the order, it is not a sufficient ground for directing a stay that all the creditors of the company assent. The Court has a discretion under the section, and, in exercising it, will be guided by the same principles as those upon which the Court of Bankruptcy acts in the analogous case of rescinding a receiving order—that is, it will consider the interests of commercial morality as well as the wishes of creditors, and if the circumstances shew that an investigation is required by reason, for example, of the directors having neglected after notice to file the statutory statement of affairs or to attend the official receiver, or having accepted a secret gift from the promoter or otherwise abused their fiduciary position, the Court will refuse to grant a stay. *Telescriptor Syndicate, In re*, 72 L. J. Ch. 480; [1903] 2 Ch. 174; 88 L. T. 389; 51 W. R. 409; 10 Manson, 213—Buckley, J.

Appeal—Order made by Registrar—Application to Judge.]—When a matter in the winding-up of a company has been heard by the Registrar, and he has made an order either granting or refusing the application, the proper course for those who wish to reverse his decision is to move before the Judge, and not to appeal direct to the Court of Appeal. *Pretoria Pietersburg Railway Co., In re* (No. 1), 73 L. J. Ch. 551; [1904] 2 Ch. 170; 91 L. T. 274; 53 W. R. 41; 11 Manson, 318; 20 T. L. R. 591—C.A.

(d) COMMITTEE OF INSPECTION.

Constitution—Power of Court to Alter—Fresh Meeting.]—A company having been ordered to be wound up, first meetings of the creditors and contributories were held, at which a liquidator and committee of inspection were appointed, and an order was subsequently made giving effect to such appointments. The debts of the creditors represented at the meeting of creditors amounted to 43,000*l.* Shortly after the meetings a foreign company recovered judgment against the company, and its proof was admitted for 45,000*l.* On an application by the foreign company that the liquidator might be ordered to summon a general meeting of the company for the purpose of ascertaining their wishes as to whether or not a representative of the foreign company should be appointed a member of the committee of inspection, or, in the alternative, that directions might be given for summoning a fresh first meeting of creditors,—*Held*, that the Court had jurisdiction under section 23 of the Companies (Winding-up) Act, 1890, and section 91 of the Companies Act, 1862, to order the liquidator to summon a meeting of the creditors to consider whether one or more members of the committee of inspection should be removed, and some other person or persons appointed in their place, and that such order ought to be made in the present case. *Semble* also, that the Court had jurisdiction to order fresh first meetings of creditors and contributories to be summoned for the purposes of section 6 of the Act of 1890. *Radford & Bright, Lim., In re* (No. 1), 70 L. J. Ch. 78; [1901] 1 Ch. 272; 84 L. T. 150; 49 W. R. 270; 9 Manson, 98—Wright, J.

Unrepresented Creditors on Committee—Power

of Court to Re-summon First Meeting.—The Court has power, under section 91 of the Companies Act, 1862, to re-summon first meetings of creditors and contributories to consider whether an additional member shall be added to an already appointed committee of inspection, in order to give representation to substantial creditors who had not yet proved their debt and were not accordingly able to vote at the time of the appointment of the already existing committee of inspection. *Radford & Bright, Lim., In re* (No. 2), 70 L. J. Ch. 352; [1901] 1 Ch. 735; 84 L. T. 150; 9 Manson, 189—Wright, J.

(e) LIQUIDATOR.

(i.) *Appointment.*

Invalidity of—Services Rendered—Right of Liquidator to Remuneration—Quantum Meruit.—Where resolutions of a company for voluntary winding-up and the appointment of a liquidator have been set aside by the Court, the person who was appointed liquidator cannot in the subsequent compulsory winding-up of the company prove in respect of remuneration for having acted as liquidator, either on the ground that his appointment and acts must be deemed to have been valid under section 67 of the Companies Act, 1862, or under an implied contract to employ him as liquidator; but so far as his work has been beneficial to the company and accepted by them for business purposes unconnected with liquidation he is entitled to claim remuneration on the basis of a *quantum meruit*. *Allison, Johnson & Foster, Lim., In re; Carlill, Burkinshaw & Ferguson, ex parte*, 73 L. J. K.B. 763; [1904] 2 K.B. 327; 91 L. T. 66; 53 W. R. 285; 20 T. L. R. 493—D.

Permanent Liquidator — Official Receiver — Jurisdiction of Court.—In making an order upon a creditor's petition for the compulsory winding-up of a company, the Court cannot there and then appoint any person other than the official receiver as permanent liquidator; for at that stage of the proceedings the creditors have not in fact been consulted in the manner contemplated by the Companies (Winding-up) Act, 1890. *Reid & Sons, In re*, 69 L. J. Q.B. 736; [1900] 2 Q.B. 634; 83 L. T. 196; 49 W. R. 15; 7 Manson, 475—D.

(ii.) *Powers and Duties.*

Debts — Statutory Duty to Pay — Dissolution — Negligence — Unpaid Creditor.—It is the duty of a liquidator before distributing the assets of a company, not only to advertise for creditors, but also to write to those creditors of whose existence he knows and who have not sent in claims, and ask them if they have any claims against the company. *Pulsford v. Devenish*, 73 L. J. Ch. 35; [1903] 2 Ch. 625; 52 W. R. 73; 11 Manson, 393—Farwell, J.

The duty imposed on a liquidator of paying the debts of the company is an absolute statutory duty without limit in point of time, and with no provisions for the release of the voluntary liquidator. So long as the company remains in existence the creditors and contributories have

a remedy and can apply to the Court in the winding-up to assert their rights; but when the company has been dissolved, and the statutory remedy is therefore gone, the statutory duty still remains, and the liquidator is personally liable at law for a breach of that duty. *Knowles v. Scott* (60 L. J. Ch. 284; [1891] 1 Ch. 717) distinguished. *Id.*

Misfeasance — Distributing Assets without Providing for Income Tax.—The liquidator of a company, which was being wound up for the purpose of the sale of its undertaking to a new company, distributed the assets of the old company without providing for income tax due to the Crown. *Held*, that he had been guilty of misfeasance within section 10 of the Companies (Winding-up) Act, 1890, and must pay the amount due to the Crown. *New Zealand Joint-Stock and General Corporation, In re*, 23 T. L. R. 238—Parker, J.

Compromise of Action — Sanction of Extraordinary Resolution not Obtained.—A compromise by the voluntary liquidator of a company of a claim by the company against a third party is binding on the company, notwithstanding that it has not been sanctioned by an extraordinary resolution under section 160 of the Companies Act, 1862. *Cycle Makers' Co-operative Supply Co. v. Sims*, 72 L. J. K.B. 160; [1903] 1 K.B. 477; 88 L. T. 360—D.

Contracts—Two Separate Contracts with Same Party Subsisting at Date of Liquidation—Power of Liquidator to Adopt one and Reject the other.—The liquidator of a company, which at the date of the liquidation was bound under two separate executory contracts with the same party, was *held* entitled to adopt one of them and not the other. *Held*, further, that the company by not performing both contracts was not barred from recovering payment for work done under the contract which had been adopted. *Asphaltic Limestone Concrete Co. v. Glasgow Corporation*, [1907] S.C. 463—Ct. of Sess.

Shares Issued for Consideration other than Cash—Duty to Stamp and File Contract.—It is the duty of the liquidator of a company which is being wound up voluntarily to stamp and file any unfilled contract constituting the title of an allottee to any shares which were allotted for a consideration other than cash, and to pay for such stamping and filing out of the assets of the company. *X Company, Lim., In re*, 76 L. J. Ch. 529; [1907] 2 Ch. 92; 97 L. T. 50; 14 Manson, 227—Parker, J.

Documents containing Information obtained by Official Receiver—"Property of the company"—Subsequent Appointment of Liquidator—Right to Documents.—Where, in the case of a company ordered to be wound up by the Court, the official receiver has, under rule 53 of the Companies (Winding-up) Rules, 1903, obtained information from officers of the company, the notes, memoranda, or other documents containing such information are not the "property of the company" within rule 144 (1) which the official receiver is bound to put into the possession of a liquidator subsequently

appointed, and the information so obtained cannot in the absence of evidence be said to be "information respecting the estate and affairs of the company . . . necessary or conducive to the due discharge of the duties of the liquidator," within rule 144 (3), which it is the duty of the official receiver, if so requested by the liquidator, to communicate to such liquidator. *Lake George Mines, Lim., In re*, 73 L. J. Ch. 333; [1904] 1 Ch. 803; 11 Manson, 214—Byrne, J.

Seemle,—The Court may in its discretion, upon an application supported by sufficient evidence, direct the official receiver as its officer to produce or hand over to the liquidator the documents containing such information. *Ib.*

(iii.) Sale by.

Sale by Liquidator to Himself—Breach of Trust—Liability of Liquidator for Interest on Rents and Profits.—Where the sale of an undertaking of a company effected by its liquidator, nominally to another company, but really to himself, had been set aside on the ground of fraud, and the re-transfer of the undertaking to the original company had been ordered,—*Held*, that the liquidator, being in a fiduciary capacity, should repay the rents and profits which had accrued, but that he was not to be charged with interest on the same. *Silkstone and Haigh Moor Coal Co. v. Edey*, 69 L. J. Ch. 73; [1900] 1 Ch. 167; 48 W. R. 137—Stirling, J.

Vesting of Real Estate—Title—Legal Estate—Private Partnership—“Company duly constituted by law”—Registration—Statute of Limitations—Trustees—Possession.—In 1887 C. and seven other persons formed a private partnership, and immediately afterwards C. conveyed to the eight partners certain real estate to hold unto and to the use of the grantees as part of the joint-stock assets of the partnership. Shortly afterwards the business was converted into a limited liability company, and the Registrar of Joint-Stock Companies gave a certificate of incorporation as of the date of the formation of the partnership. There was no deed of conveyance of the property to the incorporated company, but in 1891 the company conveyed it by deed to a new company, which in 1902 agreed to sell it to a purchaser. Upon the purchaser's contention that the legal estate was outstanding in the eight grantees,—*Held*, that the partnership was not a “company duly constituted by law” within the meaning of section 180 of the Companies Act, 1862, so as by section 193 of that Act to vest the legal estate in the incorporated company; and that the legal estate was therefore left in the grantees or the survivor of them in trust for the company. But *held*, that the legal estate in the grantees as such trustees was, in view of the undisturbed possession of the new company since 1891, barred and extinguished by operation of the Real Property Limitation Acts, 1833 and 1874, and that the vendors had therefore shewn a good title. *Kibble v. Fairthorne* (64 L. J. Ch. 184; [1895] 1 Ch. 219), applied. *Cussons, Lim.,*

In re, 73 L. J. Ch. 296; 11 Manson, 192—Kekewich, J.

(iv.) Costs.

Misfeasance Summons—Security for Costs by Liquidator.—The practice of the Court is not to order a liquidator of a company in winding-up to give security for costs on a summons by him under section 10 of the Companies (Winding-up) Act, 1890. It will, however, in a proper case make an order against him personally for the costs of such an application. The principle of *Cowell v. Taylor* (55 L. J. Ch. 92; 31 Ch. D. 34) applied. *Strand Wood Co., In re*, 73 L. J. Ch. 550; [1904] 2 Ch. 1; 90 L. T. 800; 53 W. R. 69; 11 Manson, 291—C.A.

Liquidator Ordered to Pay Costs Personally—County Court—Appeal.—An appeal will lie to the Divisional Court from an order of the County Court directing a liquidator to pay costs personally. *Raynes Park Golf Club, In re; Official Receiver, ex parte*, 68 L. J. Q.B. 529; [1899] 1 Q. B. 961; 80 L. T. 388; 47 W. R. 496; 6 Manson, 316—D.

(f) ASSETS.

Mortgage of Uncalled Capital—Winding-up Order—Sub-mortgage of Mortgage Fraudulent against Contributors—Notice of Winding-up—No Notice of Fraud.—A mortgage of the uncalled capital of a company was given by the directors to the promoter's wife (whose name was used in the deed at his request and for his convenience) to secure 3,400*l.*, alleged to have been advanced for the company. The circumstances under which the mortgage was executed were such that the Court decided that it was as to 1,350*l.* (portion of the principal thereby secured) fraudulent as against the shareholders. The promoter's wife obtained an advance of 2,750*l.* by executing a sub-mortgage to W., who had no notice of the fraud affecting the transaction, though he was aware that the company had been ordered to be wound up in hostile proceedings:—*Held*, that as soon as the winding-up order was made, all the then uncalled capital, so far as not validly otherwise appropriated, became devoted to the payment of the general creditors, and that W., claiming under the sub-mortgage with notice of the statutory appropriation of all the uncalled capital, could not obtain against the company a title higher than that of the mortgagee under whom he derived. *Guelo (Matabeleland) Exploration and Development Co., In re; Williamson's Claim*, [1901] 1 Ir. R. 38—C.A.

Lease—Forfeiture of on Compulsory or Voluntary Liquidation—Voluntary Winding-up for Reconstruction.—Where a registered company is a lessee under a lease, which contains a proviso for re-entry upon the company entering into liquidation whether compulsory or voluntary, the voluntary winding-up of the company for the mere purpose of reconstruction and increasing its capital works a forfeiture, and a right of re-entry under the proviso accrues to the lessor. *Horsley Estate v. Steiger*, 67 L. J. Q.B. 747; [1898] 2 Q.B. 259; 79 L. T. 116—Hawkins, J.

Discovery of.—See col. 470.

(g) CONTRIBUTORIES.

Misrepresentation—Rescission of Contract—Proceeding for Removal of Name from Register—Action for Calls—Affidavit in Answer to Application under Order XIV.—Where, in an action by a company against one of its shareholders for calls, the shareholder, in opposition to an application by the company for leave to sign final judgment under the Rules of the Supreme Court, 1883, Order XIV., files an affidavit stating that he intends to counter-claim for rescission of his contract to take the shares, on the ground of the misrepresentation of the company, and he obtains leave to defend on that footing, that is equivalent to taking proceedings to have his name removed from the register; and he will be allowed to proceed with his claim for rescission, although a petition to wind up the company, on which an order is subsequently made, is presented between the obtaining leave to defend and the delivery of the counterclaim. *Cleveland Iron Co., In re; Stevenson, ex parte* (16 W. R. 95), distinguished. *General Railway Syndicate, In re; Whiteley's Case*, 69 L. J. Ch. 250; [1900] 1 Ch. 365; 82 L. T. 184; 48 W. R. 440—C.A.

Striking off List—Fraudulent Prospectus—Conditional Application—Waiver—Appearance on and Opposition to Petition to Wind up.—A shareholder took shares in a company under circumstances which entitled him to repudiate his contract, and subsequently served a notice of motion on the company to have his contract rescinded and his name removed from the register. Before the motion could be heard a petition was presented to wind up the company, and on the hearing the shareholder appeared as a contributory and opposed the making of a winding-up order. On a motion by the shareholder in the winding-up to have his name removed from the list of contributories,—*Held*, that the shareholder had not by his conduct waived his right to rescind his contract, and that he was entitled to have his name removed from the list of contributories. *Foulkes v. Quartz Hill Consolidated Gold-Mining Co.* (1 Cab. & E. 156) commented upon. *Brinsmead & Sons, Lim., In re; Tomlin's Case*, 67 L. J. Ch. 11; [1898] 1 Ch. 104; 77 L. T. 521; 46 W. R. 171; 4 Manson, 384—Wright, J.

Cross-examination of Applicant—Presence at Hearing of Application.—On an application either for removal from the list of contributories or for relief under the Companies Act, 1898, the applicant should as a rule in winding-up cases be present on the hearing, and be prepared to submit himself for cross-examination on his affidavit, unless it is quite clear that his attendance will not be required for that purpose. *Roxburghe Press, In re; Spiers and Bevan's Case*, 68 L. J. Ch. 111; [1899] 1 Ch. 210; 80 L. T. 280; 47 W. R. 281; 6 Manson, 57—Wright, J.

Costs of Abandoned Action—Action by Company for Calls—Discontinuance by Liquidator—Summons by Liquidator to Enforce Calls—Stay of Proceedings.—A company brought an action against Y. for calls. Before the trial the company went into liquidation. The liquidator put Y. on the list of contributories in

respect of the calls, and after notice discontinued the action, and took out an originating summons in the winding-up against Y. for a balance order. Y. applied for a stay of proceedings until his taxed costs of the discontinued action had been paid.—*Held*, that the stay must be refused, but that the costs should be deducted from any sum recovered by the liquidator on the originating summons. *United Service Association, In re; Young, ex parte*, 70 L. J. Ch. 15; [1901] 1 Ch. 97; 84 L. T. 145; 49 W. R. 216; 8 Manson, 97—Wright, J.

Summons by Liquidator for Call on Shares—Action for Amount of Call—Unconditional Leave to Defend—Set-off—Resolution for Winding up.—A limited company commenced an action by specially indorsed writ against a shareholder for a call. The defendant obtained unconditional leave to defend, under Order XIV., on affidavit evidence setting up a debt against the company, which he claimed to set-off. The company went into voluntary liquidation. The defendant put in his defence claiming set-off, but the action had not come on for trial. The liquidator took out a summons for the amount of the call:—*Held*, that the shareholder could not set off his debt against the liquidator's claim. *Hiram Maxim Lamp Co., In re*, 72 L. J. Ch. 18; [1903] 1 Ch. 70; 87 L. T. 729; 51 W. R. 74; 10 Manson, 329—Byrne, J.

Past Member—Claim for Calls Accrued Due—Forfeiture.—Where the articles of association of a joint-stock company, formed under the Companies Acts, provide that a member whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing upon such shares at the time of the forfeiture, it is no answer to an action for such calls that the company is being wound up, and that the forfeiture took place more than one year prior to the commencement of the winding-up. *Ladies' Dress Association v. Pulbrook*, 69 L. J. Q.B. 705; [1900] 2 Q.B. 376; 49 W. R. 6; 7 Manson, 465—C.A.

Bankrupt Shareholder—Proof by Company for Amount Uncalled on Shares—Dividend—Liquidation of Company—Distribution of Surplus Assets—Claim by Trustee to Rank as Fully Paid Shareholder.—Where the holder of partly paid shares in a limited company, incorporated under the Companies Acts, becomes bankrupt, and the company proves in the bankruptcy for the amount remaining unpaid or uncalled on his shares, and receives a dividend of less than 20s. in the pound, the trustee in bankruptcy is not entitled to rank as a holder of fully paid shares in the distribution of the surplus assets of the company in a subsequent liquidation. Proof does not amount to payment for this purpose. *West Coast Gold Fields, In re; Salaman, ex parte*, 75 L. J. Ch. 23; [1906] 1 Ch. 1; 93 L. T. 609; 54 W. R. 116; 12 Manson, 414; 22 T. L. R. 39—C.A.

Semble, that if after proof by the company the trustee in bankruptcy were to sell the shares to a purchaser, the liability of the purchaser would be the amount remaining unpaid on the shares with the benefit of any further dividends under the proof, and the right to that benefit would properly be recognised by the company in the certificate given to the purchaser. *Id.*

Transfers to Infants—Real Purchasers of Shares—Application by Liquidator to Place on List—No Contractual Relation with Company—Laches—Delay.]—A company was wound up voluntarily in 1893. In April, 1894, fifty shares were transferred by M. S. to L., and in May, 1894, twenty of these shares were transferred by L. to D., the liquidator sanctioning both transfers. Both L. and D. were infants at the time of the transfers. L. was in the employment of M. & G., stockbrokers, and merely signed the transfers as their nominee, they being the real purchasers of the shares from M. S. In or before 1896 the liquidator became aware of D.'s infancy, and placed L. on a list of transferors to infants. The liquidator made no application to L. till 1905, when he applied to him for calls, and was informed by him of his infancy in 1894. The liquidator now applied that M. & G. might be placed on the list of contributories in respect of the twenty shares transferred by L. to D.:—*Held*, that, in view of the laches and delay on the part of the liquidator, he had no equity against L., and that as regarded M. & G. the case was indistinguishable from *Great Wheal Busy Mining Co., In re; King's Case* (40 L. J. Ch. 361; L. R. 6 Ch. 196), and that they ought not to be placed on the list of contributories, since there was no contractual relation between them and the company. *National Bank of Wales, In re; Massey & Giffin's Case*, 76 L. J. Ch. 290; [1907] 1 Ch. 582; 96 L. T. 493; 14 Manson, 66—Parker, J.

Hercules Insurance Co., In re; Pugh's Case and Sharman's Case (41 L. J. Ch. 580; L. R. 13 Eq. 566), and *Imperial Mercantile Credit Association, In re; Richardson's Case* (44 L. J. Ch. 252; L. R. 19 Eq. 588), distinguished. *Ib.*

Company Limited by Guarantee—Member's Liability beyond Amount Prescribed by Memorandum.]—A member of a company limited by guarantee, under the Companies Act, 1862, is not liable to be placed on the list of contributories, in the event of a winding-up, for an amount beyond that prescribed by the memorandum of association as the extent of his guarantee. *Maria Anna and Steinbank Coal Co., In re; Maxwell's Case* (L. R. 20 Eq. 585), and *Maria Anna and Steinbank Coal Co., In re; McKewan's Case* (46 L. J. Ch. 819; 6 Ch. D. 447), distinguished, as turning on the Companies Act, 1856, and relating to companies limited by shares. *Bangor and North Wales Mutual Marine Protection Association, In re; Baird's Case*, 68 L. J. Ch. 521; [1899] 2 Ch. 593; 80 L. T. 870; 47 W. R. 695—Wright, J.

Whether these cases are authorities on the construction of the Companies Act, 1862, even as to companies limited by shares, *quære. Ib.*, and see **SHARES, CONTRACT TO TAKE**, col. 366.

Liability of Fully Paid Shareholder—Foreign Contract.]—See **INTERNATIONAL LAW**.

(h) CREDITORS.

(a) *Preferential.*

Statute whether Retrospective.]—The Preferential Payments in Bankruptcy Amendment Act, 1897, which gives workmen's wages and

other debts of a company priority over debenture-holders with a floating charge on whose behalf a receiver has been appointed, is not retrospective in its operation, and does not therefore apply in a case where the receiver has been appointed before July 15, 1897, the date of the passing of the Act. *Waverley Typewriter, Lim., In re; D'Esterre v. Waverley Typewriter, Lim.*, 67 L. J. Ch. 360; [1898] 1 Ch. 699; 78 L. T. 593; 46 W. R. 685; 5 Manson, 269—Wright, J.

Managing Director—"Clerk" or "Servant."]—The managing director of a company is not entitled by virtue of the Preferential Payments in Bankruptcy Act, 1888, and the Preferential Payments in Bankruptcy Amendment Act, 1897, to any payment of salary or wages in priority to the debenture-holders of the company. He is not, within the meaning of the statute, either a "clerk" or "servant" of the company. *Newspaper Proprietary Syndicate, In re; Hopkinson v. Newspaper Proprietary Syndicate*, 69 L. J. Ch. 578; [1900] 2 Ch. 349; 83 L. T. 841; 8 Manson, 65—Cozens-Hardy, J.

Receiver in Possession—Poor Rate—District Rate—Rate for Water Supplied by Meter—Apportionment.]—A poor rate and district and water rates were made respectively on October 15, 1898, and October 4, 1898, and were payable by the defendant company. A receiver was appointed on behalf of debenture-holders on November 9, 1898, who went into possession on the same day; and on December 1, 1898, the company went into voluntary liquidation. The receiver paid the rates in full in January, 1899, and claimed to be recouped by the liquidators of the company out of the assets available for payment of the general creditors:—*Held*, that the poor and district rates were preferential payments within the Preferential Payments in Bankruptcy Act, 1888, and the amending Act of 1897, and that the receiver must be recouped by the liquidators the whole of the amount, and not merely an apportioned part down to the date of his going into possession. But the water being supplied and paid for by meter, the water rate must be apportioned, and only that part of the rate which represented the quantity consumed down to the date of the receiver going into possession was a preferential payment. *Mannesman Tube Co., In re; Von Siemens v. Mannesman Tube Co.*, 70 L. J. Ch. 565; [1901] 2 Ch. 93; 84 L. T. 579; 65 J. P. 377; 8 Manson, 300—Kekewich, J.

(b) *Unsecured.*

Judgment Creditor.]—In the compulsory winding up of an insolvent company in the Court of Chancery under the Companies Acts, 1862 and 1867, the effect of section 28, sub-section 1 of the Irish Judicature Act, 1877 (corresponding to section 10 of the English Judicature Act, 1875), is that the rules of bankruptcy as to secured and unsecured creditors shall prevail, and consequently judgment creditors of a company in liquidation who had taken no active steps to enforce their securities are not entitled to be paid in priority to the ordinary creditors of the company. *Leinster Contract Corporation, In re*, [1903] 1 Ir. R. 517—M.R.

— **Debt Due to Company—Attachment—**

Service of Garnishee Order Nisi—Secured Creditor—Right of Liquidator.]—Section 45 of the Bankruptcy Act, 1883, is not attracted to the winding-up of companies by section 10 of the Judicature Act, 1875, so as to render receipt by the creditor necessary to effectually complete the attachment of a debt. The attachment of a debt due to a company by the service of a garnishee order *nisi* before the filing of a petition to wind up the company constitutes the garnisher a secured creditor and gives him priority over the liquidator. *National United Investment Corporation, In re*, 70 L. J. Ch. 461; [1901] 1 Ch. 950; 84 L. T. 766; 8 Manson, 399—Wright, J.

Proof—Distress—Dishonoured Bill of Exchange for Rent—Assets Overcharged by Debentures—Receiver.]—Where a landlord has accepted from a company, who are not assignees of the lease but are in occupation of the demised premises, a bill of exchange in payment of overdue rent and the bill is dishonoured, and subsequently the company goes into voluntary liquidation, the landlord having a right of proof in the liquidation is thereby disentitled to distrain. *Carriage Co-operative Supply Association, In re; Clemence, ex parte* (52 L. J. Ch. 472; 23 Ch. D. 154), not followed. *Harpur's Cycle Fittings Co., In re*, 69 L. J. Ch. 841; [1900] 2 Ch. 731; 83 L. T. 407; 8 Manson, 90—Wright, J.

But if the goods sought to be distrained on are charged in favour of debenture-holders to an amount exceeding their value, the Court will not at the instance of the liquidator restrain the distress, the company having no interest in the goods; and it makes no difference that the debenture-holders have not obtained the appointment of a receiver. *New City Constitutional Club Co., In re; Purcell, ex parte* (56 L. J. Ch. 332; 34 Ch. D. 647), followed. *Ib.*

Amount—Period of Ascertainment.]—Where a creditor proves for a debt against a company which is being wound up under the Companies Act, 1862, the amount of the proof on which dividends are to be paid is to be ascertained when the claim is filed, and without regard to payments made by third parties after the sending in of the claim and before adjudication thereon. *Ligoniel Spinning Co., In re; Bank of Ireland, ex parte*, [1900] 1 Ir. R. 324—V.C.

Compensation for Breach of Contract.]—The Bradford Tramways Co., who leased the tramways from the corporation, granted a licence to a person of the exclusive right to advertise in their cars for a number of years. Under a private Act the corporation took over the tramways, subject to paying compensation to the company under certain clauses in the Act which were inserted at the instance of the company:—*Held*, that the licensee was entitled in the winding-up of the company to prove in respect of the damages sustained by him through the breach by the company of their contract with him. *Bradford Tramways and Omnibus Co., In re*, 68 J. P. 362—Buckley, J.

Shares Purported to be Issued as Fully Paid in Exchange for Debentures—Shares not Fully Paid-up—Proof in Respect of Balance of

Original Debt—Assignee of Original Creditor.]—A shareholder in a limited company is not precluded under section 38, sub-section 7 of the Companies Act, 1862, from proving in the winding-up of the company as a creditor for a debt not due to him in his own right as a member of the company, but in a different capacity, as, for instance, the assignee of the claim of a holder of debentures of the company. *Railway Time-Tables Publishing Co., In re; Welton's Claim*, 68 L. J. Ch. 50; [1899] 1 Ch. 108; 79 L. T. 679; 47 W. R. 133; 5 Manson, 367—C.A.

Interest on Debts—Stockbroker's Customers—Deposit on Wagering Transactions—Accord and Satisfaction—Compromise.]—On the winding-up of a company, creditors from whose course of dealing with it there can be implied a contract to pay interest are entitled to interest on admitted debts to the date of paying a final dividend, provided there be surplus assets. *Duncan & Co., In re*, 74 L. J. Ch. 188; [1905] 1 Ch. 307; 92 L. T. 108; 53 W. R. 299; 12 Manson, 38—Buckley, J.

This is so notwithstanding the debt is for money deposited to secure a wagering contract. *Universal Stock Exchange v. Strachan* (64 L. J. Q.B. 723; 65 ib. 429; [1895] 2 Q.B. 329; [1896] A.C. 166) followed. *Ib.*

The duty of a liquidator is to distribute the assets according to the rights of the parties; therefore a receipt for final dividend expressed to be in full discharge of all claims is no release of a claim for interest if the liquidator knew the question was to be raised. *Ib.*

The amount of a debt admitted to proof is the amount at the date of winding-up; therefore, if the amount has been settled by compromise under order of the Court, this does not negative a right to subsequent interest. *Ib.*

Lien on Documents—Proof of Debt—Omission to Mention Lien—Amendment of Proof—"Inadvertence."]—Where a solicitor, who is a creditor for costs against a company in liquidation, claims a lien on documents of the company in his possession, but omits to mention the lien in his proof of the debt due to him and subsequently acts as an unsecured creditor, he will not be allowed as a matter of right under the Companies Act, 1890, Schedule I. clause 8, to withdraw or amend his proof so as to claim his lien. Leave to amend will not be given unless the Court is satisfied that the omission was due to inadvertence on his part, and that the position of the liquidator has not been altered since the proof was carried in in a manner which is inconsistent with the lien claimed. *Safety Explosives, Lim., In re*, 73 L. J. Ch. 184; [1904] 1 Ch. 226; 90 L. T. 331; 52 W. R. 470; 11 Manson, 76—C.A.

Society for Providing Entertainments—Obligation to Keep Building Open—Sale of Building—Right of Fellows and Life Members to Prove.]—One of the articles of a society formed for the purpose of holding entertainments provided that all fellows should have the privilege of free entrance "on all occasions on which the building is open, and also the right of admittance themselves and orders for two persons on Sundays." The building having been sold and the

society having gone into liquidation, the fellows and life members sought to prove for damages in the winding-up:—*Held*, that the society merely agreed that so long as it carried on its business the claimants should be entitled to be entertained, but that there was no obligation on the part of the society to continue its business, and therefore that the claims for damages failed. *Royal Aquarium and Summer and Winter Garden Society, In re*, 20 T. L. R. 35—Buckley, J.

Set-off—Insolvent Company—Money Lent—Bills Due.—Section 10 of the Judicature Act, 1875, has not introduced into the law of the winding up of companies the bankruptcy rules as to set-off, so as to allow an insolvent liquidating company which is a shareholder in another insolvent liquidating company with limited liability to set off against calls due from it a debt due to it from the company whose shareholder it is. *General Works Co., In re; Gill's Case* (48 L. J. Ch. 774; 12 Ch. D. 755), followed. *Auriferous Properties, Lim., In re* (No. 1), 67 L. J. Ch. 367; [1898] 1 Ch. 691; 79 L. T. 71; 47 W. R. 75; 5 Manson, 260—Wright, J.

The A and B companies were both insolvent and in liquidation. The A company held shares in the B company, on which calls had been made prior to either company going into liquidation. The B company was indebted to the A company for money lent:—*Held*, that in the winding-up of the B company the liquidator of the A company was not entitled to take any dividend upon its debt owing from the B company until the A company had paid up all calls in the winding-up of the B company on the shares held by it in the B company. *Overend, Gurney & Co., In re; Grissell's Case* (35 L. J. Ch. 752; L. R. 1 Ch. 528), followed. *Auriferous Properties, Lim. (No. 2), In re*, 67 L. J. Ch. 574; [1898] 2 Ch. 428; 79 L. T. 71; 47 W. R. 75; 5 Manson, 260—Wright, J.

Two Companies in Liquidation—Mutual Debts—Mode of Dealing with Assets.—The T. and F. Companies were both in liquidation. The T. Company owed the F. Company 5,000*l.*, and the F. Company owed the T. Company 12,000*l.* In the course of the liquidation the F. Company had paid all its creditors in full with the exception of the T. Company, and had in its hands undistributed assets amounting to 7,677*l.* By an order made in the winding-up of the F. Company this sum was ordered to be paid by the F. Company to the T. Company without prejudice to the right of the former to prove against the latter. Subsequently other creditors came forward and established debts against the F. Company for 5,490*l.* The liquidator of the T. Company had assets in his hands subject to a liability of 5,100*l.* to the F. Company and 4,685*l.* to other creditors. On an application in the winding-up of the T. Company by the F. Company as to how the assets were to be dealt with,—*Held*, that the proper course was notionally to treat the F. Company as having paid the 4,323*l.* (balance of its debt of 12,000*l.*) to the T. Company, and to take that sum, together with the assets already in hand, and apply it in payment of a dividend upon all the debts of the T. Company—that is, the 5,100*l.* due to the F. Company and the 4,685*l.* due to other creditors. If the dividend found attribut-

table to the F. Company exceeded in amount the 4,323*l.* which it owed, it would receive the difference; if, however, it was less or equal to that sum it would receive nothing. *Leeds and Hanley Theatres of Varieties, In re; Consolidated Exploration and Finance Co., ex parte*, 73 L. J. Ch. 553; [1904] 2 Ch. 45; 52 W. R. 506; 12 Manson, 191—Buckley, J.

Guarantor—Creditor.—See BANKRUPTCY.

Limited Company—Lessee of Premises—Power of Re-entry in Event of Liquidation.—See *Horsey Estate v. Steiger, post*, LANDLORD AND TENANT.

(i) DISCOVERY OF ASSETS.

(Companies Act, 1862, s. 115.)

Examination of Witness under Section 115 of Companies Act, 1862—Costs of being Represented by Solicitors and Counsel.—“Proceeding in the Supreme Court.”—An examination of witnesses under section 115 of the Companies Act, 1862, is a “proceeding in the Supreme Court” within the meaning of the Judicature Act, 1890, s. 5, and therefore the Court has jurisdiction to order the person procuring the examination to pay the witnesses examined under that section their costs, including the costs of being represented by solicitors and counsel, in addition to their expenses. *Appleton, French & Scrafton, Lim., In re*, 74 L. J. Ch. 471; [1905] 1 Ch. 749; 93 L. T. 8; 53 W. R. 601; 12 Manson, 335—Warrington, J.

Private Examination of Witness—Presence of Solicitor for Witness—Undertaking of Secrecy—Exclusion of Solicitor—Discretion of Court as to Disclosure of Information.—The examination of a witness under section 115 of the Companies Act, 1862, is a strictly private proceeding, and the Registrar has jurisdiction to require of the solicitor attending on behalf of the witness, as a condition of his being present at the examination, to give an undertaking to use any information acquired at the examination for the purpose only of the re-examination of the witness, and not to disclose or allow to be disclosed to any one without the leave of the Court any information so acquired, and at the end of the examination forthwith to destroy all notes taken by him at the examination; and if a clerk of a solicitor attends in the place of his principal, he may be required only to disclose the information to his principal after the principal has given a similar undertaking to the Registrar. *London and Northern Bank, In re; Haddock's Case*, 71 L. J. Ch. 511; [1902] 2 Ch. 73; 86 L. T. 430; 50 W. R. 536; 9 Manson, 325—C.A.

The Court can upon an application under rule 1 of the Companies (Winding-up) Rule, November, 1895, allow information obtained at an examination under section 115 of the Companies Act, 1862, to be disclosed to third parties if and so far as in its discretion it thinks it right that the information should be disclosed. *Ib.*

Production of Documents Deposited with Surveyor of Income Tax for Income Tax—Privilege—Practice—Evidence—Discretion of Court.—The jurisdiction of the Court under section

115 of the Companies Act, 1862, to order the attendance of persons to be examined and the production of documents is discretionary; and where the Judge had exercised his discretion the Court of Appeal will not as a rule interfere with it, though in the case of an obvious miscarriage of justice it would have jurisdiction to do so. *Joseph Hargreaves, Lim., In re*, 69 L. J. Ch. 183; [1900] 1 Ch. 347; 82 L. T. 132; 48 W. R. 241; 7 Manson, 354—C.A.

Per WRIGHT, J.—The Court will not without very strong reasons order the production of documents deposited with a Surveyor of Income Tax which the Board of Inland Revenue object to produce on the ground that the production will be against the public interest. *Ib.*

On a summons for production, an affidavit of the secretary of the Income Tax Commissioners, stating the objection to production, is sufficient, without personal attendance of a responsible official. *Ib.*

H.M.S. Bellerophon, In re (44 L. J. Adm. 5), and *Hennessy v. Wright* (57 L. J. Q.B. 530; 21 Q.B.D. 509) followed. *Ib.*

Pending Action—Refusal to Answer Questions.]

—The pendency of an action commenced by the liquidator of a company, which is in course of being wound up, against third persons may be a good ground for postponing the examination of a witness under section 115 of the Companies Act, 1862. But where the witness to be examined was a former manager of a company which was in voluntary liquidation, and the liquidator was simply seeking to obtain information as to the documents of the company which were in the manager's possession, and also information as to how he had dealt with those documents, it was held that it was a proper case for the liquidator to put in force the powers conferred by the section, notwithstanding that the manager had improperly handed over some of the documents to a person with whom the company was in litigation. *London and Northern Bank, In re; Archer, ex parte*, 85 L. T. 698; 50 W. R. 262—C.A.

Depositions—Right to Inspect and Take Copies

—**Answering Interrogatories.]**—A person seeking to inspect depositions taken under section 115 of the Companies Act, 1862, must make out a special case, such depositions being since rule 1 of the Companies (Winding-up) Rules (November), 1895, private. *Merchants' Fire Office, In re*, 68 L. J. Ch. 211; [1899] 1 Ch. 432; 80 L. T. 285; 47 W. R. 480; 6 Manson, 93—Wright, J.

Directors of a company had been separately examined by the voluntary liquidator under section 115 of the Companies Act, 1862. Subsequently the liquidator, in the name of the company, commenced an action against the directors for misfeasance, and obtained leave to deliver interrogatories to the directors who had put in separate defences. On the application of one of the directors for liberty to inspect and take a copy of his depositions,—*Held*, that the applicant had a *prima facie* right to inspect and take a copy of his depositions, and that the mere fact that he was charged with something in an action against himself and other persons

did not deprive him of that *prima facie* right unless it could be shewn that there was a conspiracy to misrepresent the facts of the case, of which there was no evidence in the present case. *Ib.*

(j) PUBLIC EXAMINATION.

Jurisdiction—Sufficiency of Report.]—In order to give jurisdiction to make an order for the public examination of any person under section 8 of the Companies (Winding-up) Act, 1890, the further report of the official receiver mentioned in sub-section 2 of section 8 must state the manner in which the company was formed, give the facts which in his opinion shew that fraud has been committed, express his opinion that there has been fraud by the individual sought to be examined, and also shew how that individual is connected with the facts. The report need not shew that the charge is proved, but only that there is sufficient basis for the opinion of the official receiver. *Civil, Naval, and Military Outfitters, In re*, 68 L. J. Ch. 164; [1899] 1 Ch. 215; 80 L. T. 241; 47 W. R. 233; 6 Manson, 100—C.A.

The report ought not to state that the person sought to be examined was "concerned in the promotion" of the company, but should use the words of section 8, sub-section 3, "taken part in the promotion." *Barnes, Ex parte* (65 L. J. Ch. 394; [1896] A. C. 146), considered and explained. *Ib.*

Order for—Application to Discharge—Limit of Time.]—*Semble*, the time within which an application should be made to discharge an order for the public examination of a person who has taken part in the promotion or formation, or been a director or officer of a company under section 8, sub-section 3 of the Companies (Winding-up) Act, 1890, is fourteen days from the service of the order for such examination, but at any rate the application must be made within a reasonable time. *National Stores, In re*, 69 L. J. Ch. 16; [1899] 2 Ch. 773; 81 L. T. 529; 48 W. R. 185; 7 Manson, 56—Wright, J. Affirmed in C.A.; [1900] 1 Ch. 27.

Where, under sub-section 2 of section 8 of the Companies (Winding-up) Act, 1890, the official receiver has made a further report, containing a finding of fraud against a person who, according to the report, has taken part in the promotion or formation of the company, and upon such report an order for the public examination of such person is made under sub-section 3, an application to discharge the order, on the alleged ground that such person did not take the part which the official receiver has found in his report that he did take, is not an objection to the jurisdiction of the Court to make the order which is sought to be impeached; for the question whether the person did take part, as reported, is the very thing which it is the object of the examination to ascertain. *New Travelers' Chambers, In re* (64 L. J. Ch. 317; [1895] 1 Ch. 395), followed. *Ib.*

(k) FRAUDULENT PREFERENCE.

What is—Debentures—Issue to Creditors to Relieve Surety—"Undue or fraudulent prefe-

rence."—Section 164 of the Companies Act, 1862, although it uses the words "undue or fraudulent preference," does not extend the operation of section 48 of the Bankruptcy Act, 1883. *Stenotyper, Lim., In re; Hastings v. Stenotyper, Lim.*, 70 L. J. Ch. 94; [1901] 1 Ch. 250; 84 L. T. 149; 8 Manson, 203—Cozens-Hardy, J.

H. & Co. were creditors of a joint-stock company for a debt, part of which was secured by an acceptance of the company upon which R., the chairman of the company, was liable. The company was known by its directors to be, if not absolutely insolvent, at least unable to pay its debts as they became due from its own money. Under these circumstances the company issued debentures to H. & Co. as collateral security for the payment of their debt:—*Held*, that, the main motive of the company in issuing the debentures being to relieve R. from his liability on the acceptance, the debentures were not given with a view of preferring H. & Co., although incidentally they would obtain a benefit by them, and that they were therefore valid. *Mills, In re; Official Receiver, ex parte* (5 Morrell, 55), followed. *Id.*

A company, in an insolvent condition, within a few days of a winding-up resolution, preferred one of its creditors, under a sense of moral obligation:—*Held*, a fraudulent preference, under section 164 of the Companies Act, 1862. *New, Prance & Garvard v. Hunting* (66 L. J. Q.B. 554; [1897] 2 Q.B. 19) applied. *Fletcher, In re; Suffolk, ex parte* (9 Morrell, 8), and *Vingoe & Davies, In re; Viney & Norton, ex parte* (1 Manson, 416), followed. *Blackburn & Co., In re*, 68 L. J. Ch. 764; [1899] 2 Ch. 725; 81 L. T. 520; 48 W. R. 186; 7 Manson, 47—Wright, J.

Unregistered Agreement to Give Security when Called upon—Security Given on Eve of Winding-up.—W. J. was "permanent director" and the largest shareholder in a company registered in March, 1904. His son was one of the other two directors. The company had a large turnover in 1904 and 1905. In December, 1904, it applied to its bankers for an overdraft, which the bankers agreed to give on the terms that W. J. should guarantee it. He guaranteed an overdraft up to 2,500*l.*, on an agreement by the company to give him security by means of a debenture or other charge whenever he should call upon the company to do so. In February, 1905, he guaranteed an overdraft up to 4,000*l.* on a similar agreement. He was a large trade creditor of the company. In 1905 the company made a heavy trading loss. On December 8, 1905, W. J. asked the company for the security, and on December 15 the company gave him a debenture for the then amount of the overdraft, charged on all its property. The debenture was duly registered under section 14 of the Companies Act, 1900, but neither of the agreements was registered. On January 1, 1906, the company went into voluntary liquidation. On a summons taken out by the liquidator in the winding-up for a declaration that the debenture was invalid as a fraudulent preference within section 164 of the Companies Act, 1862:—*Held*, that, in view of the constitution of the board of directors, W. J. could have had the debenture at any time; that the

agreement to give it, although made for value, could not be allowed to have legal effect if its performance were postponed until the time within which the law as to fraudulent preference takes effect had arrived, and that the debenture was therefore a fraudulent preference, and invalid. *Fisher, Ex parte; Ash, in re* (41 L. J. Bk. 62; L. R. 7 Ch. 636), and *Kilner, Ex parte; Barker, in re* (13 Ch. D. 245), applied. *Jackson & Bassford, Lim., In re*, 75 L. J. Ch. 697; [1906] 2 Ch. 467; 95 L. T. 292; 13 Monson, 306; 22 T. L. R. 708—Buckley, J.

19. VOLUNTARY WINDING-UP.

(a) RESOLUTION.

Notices for Extraordinary Meeting Issued without Previous Board Meeting.—A resolution for the voluntary winding-up of a company is not valid if passed at an extraordinary general meeting of the company convened by the secretary without the authority, previously or subsequently given, of the board of directors. *Haycraft Gold Reduction Co., In re*, 69 L. J. Ch. 497; [1900] 2 Ch. 230; 83 L. T. 166; 7 Manson, 243—Cozens-Hardy, J.

The consent, separately obtained by the secretary, of directors sufficient in number to form a *quorum*, to the sending out of notices for an extraordinary general meeting of the company is not equivalent to a resolution for the holding of such a meeting passed at a board meeting. *D'Arcy v. Tamar, Kit Hill, and Callington Railway* (36 L. J. Ex. 37; L. R. 2 Ex. 158; 4 H. & C. 463) followed. *Bonelli's Electric Telegraph Co., In re; Collie's Claim* (40 L. J. Ch. 567; L. R. 12 Eq. 246) questioned. *Id.*

Irregularity—Notice of Meeting.—A resolution for the voluntary winding-up of a company is not valid if passed at an extraordinary general meeting convened by the secretary, acting on his own authority and without the authority of the board of directors, upon the requisition of shareholders of the company under section 13, sub-section 1 of the Companies Act, 1900, within the twenty-one days from the date of the requisition being deposited with the company allowed by sub-section 3. The summoning of such a meeting by the secretary on his own authority is a serious matter, and cannot be treated as a mere irregularity in the internal regulations of the affairs of the company. *Haycraft Gold Reduction & Co., In re* (69 L. J. Ch. 497; [1900] 2 Ch. 230), followed. *Wyoming State Syndicate, In re*, 70 L. J. Ch. 727; [1901] 2 Ch. 431; 84 L. T. 868; 49 W. R. 650; 8 Manson, 311—Wright, J.

Title to Object—Contributories but not Members of Company—Trustees of Deceased Shareholder.—Testamentary trustees were, under section 76 of the Companies Act, 1862, contributories but not members of a company in which the deceased held shares at the time of his death:—*Held*, that the trustees had a good title to challenge the validity, on the ground of non-compliance with the articles of association, of a special resolution of the company for voluntary liquidation and the appointment of a liquidator. *Howling's Trustees v. Smith*, 7 F. 390—Ct. of Sess.

Articles of Association — Construction.]—Article 61 of the articles of association of a company incorporated under the Companies Acts provided: "No business shall be transacted at any general meeting except the declaration of a dividend, unless there shall be personally present at the commencement of the business ten or more members." Article 130 provided: "On the dissolution of the Company the affairs of the Company shall be wound up in terms of the Acts of Parliament under which the company is incorporated":—*Held*, that at a meeting for the passing of a special resolution for the voluntary winding-up of the company, there must be at least ten members personally present in terms of article 61 of the articles of association, and that it was not sufficient that the meeting satisfied the provisions of the Companies Acts as to the passing of special resolutions. *Ib.*

Dismissal of Servants.]—A voluntary winding-up of a company unlike a compulsory winding-up or the appointment by the Court of a receiver and manager in a debenture-holders' action, does not operate as a dismissal of the servants of the company, inasmuch as there is no change in the personality of the employer. *Imperial Wine Co., In re; Shirreff's Case* (42 L. J. Ch. 5; L. R. 14 Eq. 417), considered and not applied. *Reid v. Explosives Co.* (56 L. J. Q.B. 388; 19 Q.B. D. 264) discussed. *Midland Counties District Bank v. Attwood*, 74 L. J. Ch. 286; [1905] 1 Ch. 357; 92 L. T. 360; 13 Manson, 20; 21 T. L. R. 175—Warrington, J.

As to voluntary winding-up as a bar to a petition for a compulsory order, see WINDING-UP (PETITION), col. 452.

(b) STAY OF EXECUTIONS.

Voluntary Winding-up—Action by Creditor—Stay of Action—Discretion of Court—Onus of Proof.]—In an action by a creditor against a company in voluntary liquidation the plaintiff claimed a sum certain as an agreed fee for services rendered, and in the alternative claimed the like sum as on a *quantum meruit*. Upon an application for judgment under Order XIV., the liquidator of the company disputed the plaintiff's claim. The liquidator obtained unconditional leave to defend, and an order was made giving directions as to pleadings, discovery, and trial of the action. The liquidator subsequently applied that all further proceedings in the action should be stayed upon the ground that the company was being wound up voluntarily:—*Held*, that the application must be refused. *Currie v. Consolidated Kent Collieries Corporation*, 75 L. J. K.B. 199; [1906] 1 K.B. 134; 94 L. T. 148; 13 Manson, 60—C.A.

Per COLLINS, M.R.—Where, in an action by a creditor against a company in voluntary liquidation, the creditor's claim is disputed by the liquidator, the presumption is in favour of the action being allowed to proceed. *Ib.*

(c) APPLICATIONS IN.

Summons by Creditor.]—The fact that a creditor of a company is also a contributory

entitles him to make an application, under section 138 of the Companies Act, 1862, in respect of a claim in which he is concerned only as creditor. *Central De Kaap Gold Mines, In re*, 69 L. J. Ch. 18; 7 Manson, 82—Wright, J.

Security for Costs—Voluntary Winding-up—Claim by Creditor out of Jurisdiction.]—A person resident abroad who takes out a summons in a voluntary winding-up under section 138 of the Companies Act, 1862, as extended by section 25 of the Companies (Winding-up) Act, 1900, for a declaration that he is a creditor of the company, may be ordered to give security for costs. *Pretoria Pietersburg Railway, In re* (No. 2), 73 L. J. Ch. 704; [1904] 2 Ch. 359; 91 L. T. 285; 53 W. R. 74—Buckley, J.

(d) LIQUIDATOR.

Appointment—Special Resolution—Confirmatory Meeting—Power to Pass Fresh Resolution—Notice.]—As soon as a resolution for the voluntary winding-up of a company has been passed, a resolution for the appointment of a liquidator can be proposed and carried without any previous notice. Consequently, where notice is given of a meeting to confirm resolutions passed at a previous meeting—first, that the company should be wound up voluntarily; and secondly, that a person named should be appointed liquidator—the company can at the confirmatory meeting after the resolution for the winding-up has been passed, allow the other resolution to drop and pass a resolution appointing as liquidator some person other than that named in the notice. *Trench Tubeless Tyre Co., In re; Bethell v. Trench Tubeless Tyre Co.*, 69 L. J. Ch. 213; [1900] 1 Ch. 408; 82 L. T. 247; 48 W. R. 310; 8 Manson, 85—C.A.

Appointment by Court of Additional Liquidator.]—*Semble*, the Court having jurisdiction to wind up companies has power under sections 138 and 141 of the Companies Act, 1862, to appoint a liquidator in a voluntary winding-up, not only where there is no liquidator acting, or where the existing liquidator is removed by the Court, but in any other case "on due cause shewn." *Sunlight Incandescent Gas Lamp Co., In re*, 69 L. J. Ch. 873; [1900] 2 Ch. 728; 83 L. T. 406—Wright, J.

The Court "on due cause shewn" appointed an additional liquidator in a voluntary winding-up on the application of the existing liquidator. *Ib.*

Application to Remove—Circular to Shareholders—Charges against Liquidator—Contempt of Court.]—Where a summons to remove a liquidator in a voluntary winding-up is taken out on behalf of the applicant and all other shareholders, the Court will not, on the ground of contempt, restrain the applicant from issuing a circular to the shareholders asking their support to the summons, though it contains charges against the liquidator, made *ex parte*, to justify the application. *New Gold Coast Exploration Co., In re*, 70 L. J. Ch. 355; [1901] 1 Ch. 860; 8 Manson, 296—Cozens-Hardy, J.

Remuneration of—Basis of Remuneration—

Sale to Another Company—Voluntary Liquidation of Vendor Company—Compulsory Liquidation of Purchasing Company.—On the sale of a company's assets to another company the purchasing company agreed to pay the costs, charges, and expenses of the voluntary winding-up of the vendor company:—*Held*, that the remuneration of the voluntary liquidator was not governed by the regulation as to the mode of remunerating official liquidators adopted by the Master of the Rolls and sanctioned by the Lord Chancellor (1868); such a case must be considered in regard to its own particular circumstances. It is not a proper mode of remuneration that all letters should be paid for on a uniform scale irrespective of the difficulty involved. *Amalgamated Syndicates, In re*, 70 L. J. Ch. 726; [1901] 2 Ch. 181; 84 L. T. 864—Wright, J.

(e) TRANSFERS.

Registration of Transfers—Invalid Resolutions—Interlocutory Injunction—Pending Action—Registration of Transfers in the Meantime.—A transferee of shares under transfers executed before the date of the confirmatory resolution for voluntary liquidation is not entitled to insist on the registration of such transfers after the date of the confirmatory resolution merely because an action has been brought to declare the resolution invalid and an interlocutory order has been made to restrain the company from acting upon the resolution. *Violet Consolidated Gold-Mining Co., In re*, 68 L. J. Ch. 535; 80 L. T. 684; 7 Manson, 102—Kekewich, J.

(f) SUPERVISION ORDER.

Voluntary Winding-up—Service of Liquidator—Costs.—In rule 35 of the Companies Winding-up Rules, 1890, the words "unless presented by the company" govern the rule throughout, and not merely the first paragraph, and therefore, where a company in course of voluntary winding-up presents a petition for a supervision order, it is not necessary to serve the petition upon the liquidator, and the costs of doing so will not be allowed. *Chester & Co., In re*, 52 W. R. 189—Buckley, J.

Report by Liquidator.—In all future cases in which an order is made continuing a voluntary winding-up under the supervision of the Court, the liquidator will be required to report to the Court on each quarter-day instead of monthly as now. *Horner & Co., In re*, 5 Manson, 355—Wright, J.

Solicitor—Costs—Remuneration of Liquidator—Priority.—Where a voluntary liquidation is continued under the supervision of the Court the taxed costs of the solicitor employed by the liquidator incurred during the period down to the date of the supervision order must be paid out of the assets before any remuneration due to the liquidator up to that time. So also must any costs properly incurred after the date of the order in getting in assets of the company, or in work done on the instructions of the liquidator. *Sanitary Burial Association, Lim., In re*, 69 L. J. Ch. 551; [1900] 2 Ch. 289; 82 L. T. 639; 48 W. R. 529; 7 Manson, 459—C.A.

20. SURPLUS ASSETS.

Meaning of.]—"Surplus assets" in articles of association of a company *prima facie* mean the fund remaining in the hands of the liquidator after all claims of outside creditors and costs of winding-up have been met. *Crichton's Oil Co., In re*, 71 L. J. Ch. 531; [1902] 2 Ch. 86; 86 L. T. 787; 9 Manson, 402—C.A.

Arrears of Dividends on Preference Shares—Profit on Year's Trading—Debit on Capital Account—Profits "available for dividends."—By the memorandum and articles of association of a company which was being wound up, the preference shareholders of the company were entitled to a cumulative preferential dividend of 5 per cent. per annum. The articles provided that in the event of winding-up the "surplus assets" should be distributed between holders of preference and ordinary shares according to the amount paid up thereon; that the directors should have power to set aside out of the profits of the company, or otherwise, such sums as they should think proper as a reserve fund or for other purposes; that the profits from time to time "available for dividends" should, subject to the provisions thereinbefore contained, be applicable—first, to the payment of the fixed preferential dividend on the preference shares; and secondly, that the surplus should be applicable to the payment of dividends on the ordinary shares, but that the whole or any part thereof might be carried to reserve or otherwise dealt with; that if the company should be wound up and the surplus assets should be insufficient to repay the whole of the paid-up capital, such surplus assets should be distributed so that losses should be borne by contributories in proportion to the capital paid up on the shares, but this clause was to be without prejudice to the rights of holders of shares issued upon special conditions. No profits had been earned and no dividends on preference shares had been paid for three years, and at the end of that period the balance-sheet shewed a debit balance of over 4,000*l.* In the fourth year there was a profit of 1,675*l.* on the year's trading, but no dividend had been declared previous to the winding-up. There were no unpaid creditors of the company:—*Held*, that the preference shareholders were not entitled to have the sum of 1,675*l.* applied in payment of arrears of dividends on their shares, as it had not been shown to be profits "available for dividends," and that it must be applied in repaying the capital on the preference and ordinary shares. *Ib.*

Bridgewater Navigation Co., In re (60 L. J. Ch. 415; [1891] 1 Ch. 155; 2 Ch. 317), distinguished. *Bishop v. Smyrna and Cassaba Railway* (64 L. J. Ch. 617; [1895] 2 Ch. 265) not followed. *Ib.*

Distribution—Assets more than Sufficient to Repay Paid-up Capital—Fully Paid and Partly Paid Shares.—One of the articles of a company provided that "if upon the winding up of the company the surplus assets shall be more than sufficient to repay the whole of the paid-up capital, the excess shall be distributed among the members in proportion to the capital paid

or which ought to have been paid, on the shares held by them respectively at the commencement of the winding-up, other than amounts paid in advance of calls." The company, which was in liquidation, had issued certain fully paid shares of 1*l.* each, and certain partly paid shares of 1*l.* each on which 10*s.* only per share had been called up and paid. In the winding-up there remained in the hands of the liquidators a sum available for distribution amongst the shareholders:—*Held*, that the distribution must be in accordance with the agreement shown by the articles, the balance of the surplus assets after repaying the paid-up capital being divided amongst the shareholders in proportion to the amounts paid up on their shares. *Birch v. Cropper*; *Bridgewater Navigation Co.*, *In re* (59 L. J. Ch. 122; 14 App. Cas. 525), distinguished. *Mutoscope and Biograph Syndicate*, *In re*, 68 L. J. Ch. 417; [1899] 1 Ch. 896; 81 L. T. 22; 47 W. R. 520; 6 Manson, 298—Wright J.

Unlimited Company—Fully Paid and Partly Paid-up Shares—Deed of Settlement.—A company originally constituted in 1835, under a deed of settlement, was subsequently registered under the Companies Act, 1862, as a company with unlimited liability. The deed of settlement provided that losses should be made good by the proprietors "in proportion to their respective shares"; that profits should be divided amongst the proprietors "according to the amount of their respective shares" and (clause 32) that upon the winding-up, the residue, after payment of debts, should be "divided between the several proprietors for the time being in proportion to their respective shares in the said undertaking." The shares were of the nominal value of 10*l.* each, some of which had been issued as fully paid, and others had only 6*l.* 10*s.* paid up. The undertaking of the company had been sold, and the company was in voluntary liquidation. After payment of all the debts and costs of the liquidation there remained a large surplus for distribution amongst the shareholders:—*Held*, that effect must be given to the express provision of the deed of settlement in clause 32, and that after equalisation of the capital account by a return of all capital paid up the surplus remaining must, according to that clause, be "divided between the several proprietors for the time being in proportion to their shares in the undertaking"—that is, in proportion to the nominal amounts of the shares. *Driffeld Gas Light Co.*, *In re*, 67 L. J. Ch. 247; [1898] 1 Ch. 451; 78 L. T. 162; 46 W. R. 411; 5 Manson, 253—Wright J.

A provision in the memorandum or articles of association regulating the distribution of dividends will not of itself govern the distribution of surplus assets in a winding-up. *Id.*

"Capital paid"—Fully paid and Partly paid Shares—Equalisation.—One of the articles of a company provided that "if upon the winding-up of the company the surplus assets shall be . . . insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid, or which ought to have been paid, on the shares held by them respectively at the commencement of the winding-up, other than "amounts paid in advance of calls." The com-

pany was in liquidation, and at the commencement of the winding-up had issued 100,000 shares of 1*l.* each, on which 5*s.* per share had been paid up, and 25,000 shares of 1*l.* each were fully paid up. In the winding-up the liquidator had discharged all the debts and liabilities of the company, and there remained in his hands a balance, which was, however, insufficient to repay the whole of the paid-up capital:—*Held*, that the liquidator must make a call (either actual or imaginary, as the case might require) on the 100,000 shares sufficient to equalise the capital account in both classes of shares, and after payment of what should be so called up by way of return of capital to the holders of the 25,000 shares should divide the surplus assets equally amongst the whole 125,000 shares. *Birch v. Cropper*; *Bridgewater Navigation Co.*, *In re* (59 L. J. Ch. 122; 14 App. Cas. 525), and *Hodges' Distillery Co.*, *In re*; *Maude, ex parte* (40 L. J. Ch. 21; L. R. 6 Ch. 51), considered. *Anglo-Continental Corporation of Western Australia*, *In re*, 67 L. J. Ch. 179; [1898] 1 Ch. 327; 78 L. T. 157; 46 W. R. 413; 5 Manson, 184—Wright J.

Losses to be borne in Proportion to Amount Paid up on Shares at Commencement of Winding-up—Shares of Same Class with Different Amounts Paid Up.—The Court has power to sanction a scheme for the reduction of capital whereby it is proposed to cancel lost capital in respect of partly paid and fully paid shares alike, notwithstanding a provision in the company's articles that in the event of a winding-up surplus assets insufficient to repay the whole of the paid-up capital shall be so distributed that the losses shall be borne by the members in proportion to the capital paid up on their shares at the commencement of the winding-up, if in the judgment of the Court the proposed scheme will not work inequitably or unjustly in the particular case. *British Insurance Trustee and Finance Corporation v. Couper* (63 L. J. Ch. 425; [1894] A. C. 399) followed and applied. *Credit Assurance and Guarantee Corporation*, *In re*, 71 L. J. Ch. 775; [1902] 2 Ch. 601; 87 L. T. 216; 51 W. R. 20; 10 Manson, 89—C.A.

Preferred and Deferred Shareholders—Distribution Inconsistent with Legal Rights—Right of Majority.—Where a meeting of shareholders of a company had resolved by a majority upon a mode of distribution of surplus assets between preferred and deferred shareholders different from that to which the parties were legally entitled, the Court refused to draw an inference that the shareholders absent or not represented at the meeting had assented to such mode of distribution. *Somes v. Currie* (1 K. & J. 605) and *Beeston Pneumatic Tyre Co.*, *In re* (33 L. J. N.C. 188; W. N. (1898), 34), distinguished. *North-West Argentine Railway*, *In re*, 70 L. J. Ch. 9; [1900] 2 Ch. 882; 83 L. T. 675; 49 W. R. 134—Wright J.

"Undistributed assets"—Scheme of Arrangement—Moneys in Hands of Liquidator.—Assets of a company appropriated to the maintenance and development of the company's property and the gradual payment off of its debentures under a scheme of arrangement sanctioned by the Court under the Joint-Stock Companies Arrangement Act, 1870, are not "undistributed assets" within the meaning of section 15, sub-section 3 of the Companies (Winding-up) Act, 1890,

which the Board of Trade is entitled under that section to call on the liquidators to pay into the Companies Liquidation Account. *Land Mortgage Bank of Florida, In re*, 67 L. J. Ch. 183; [1898] 1 Ch. 444; 78 L. T. 156; 46 W. R. 383; 5 Manson, 178—Wright, J.

"Undistributed assets" mean undistributed assets capable of distribution in the winding-up. *Id.*

Money Standing at Companies Liquidation Account — Garnishee Order upon Inspector-General in Companies Liquidation.—Money standing at the Companies Liquidation Account at the Bank of England is not attachable under the garnishee procedure at the suit of a judgment creditor of a person entitled, as a shareholder in a company that has been wound up, to money at that account representing surplus assets of the company. There is no relation of debtor and creditor in respect of such money between any person and the judgment debtor. *Spence v. Coleman*, 70 L. J. K. B. 632; [1901] 2 K. B. 199; 84 L. T. 703; 49 W. R. 516—C. A.

21. DISSOLUTION.

Voluntary Winding-up—Proceedings against Company—Jurisdiction.—Notwithstanding that section 143 of the Companies Act, 1862, provides that as soon as the affairs of a liquidating company are fully wound up, on the expiration of three months from the registration of the return made by the voluntary liquidator of a meeting having been held (pursuant to section 142) to receive the liquidator's account, "the company shall be deemed to be dissolved," the Court has jurisdiction to make an order against a company after the expiration of the three months, if the application for such order is made before the expiration of the three months. *Crookhaven Mining Co., In re* (36 L. J. Ch. 226; L. R. 3 Eq. 69), followed. *Whiteley Exerciser, Lim. v. Gamage*, 67 L. J. Ch. 560; [1898] 2 Ch. 405; 79 L. T. 20; 47 W. R. 296; 5 Manson, 249—North, J.

—Dissolution at Expiration of Three Months—Transfer of Assets not Possible within the Time—Staying Proceedings.—Where a company went into voluntary liquidation with a view to amalgamation with another company, and it was subsequently discovered that certain assets of the old company, consisting of mining claims in the Transvaal, which were to be transferred to the new company, could not be transferred within the period of three months, at the expiration of which time the old company would, under section 143 of the Companies Act, 1862, automatically cease to exist, and a contributory before the expiration of the three months applied under section 138 for an order to stay the proceedings in the winding-up, the Court, exercising the power conferred upon it by section 89 in a compulsory winding-up, made an order staying all proceedings in relation to the winding-up of the old company, with liberty to apply. *Crookhaven Mining Co., In re* (36 L. J. Ch. 226; L. R. 3 Eq. 69), applied. *Eastern Investment Co., In re*, 74 L. J. Ch. 281; [1905] 1 Ch. 352; 92 L. T. 359; 53 W. R. 186; 12 Manson, 27—Warrington, J.

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—Proceedings against Company—Jurisdiction.—Notwithstanding that section 143 of the Companies Act, 1862, provides that as soon as the affairs of a liquidating company are fully wound up, on the expiration of three months from the registration of the return made by the voluntary liquidator of a meeting having been held (pursuant to section 142) to receive the liquidator's account, "the company shall be deemed to be dissolved," the Court has jurisdiction to make an order against a company after the expiration of the three months, if the application for such order is made before the expiration of the three months. *Crookhaven Mining Co., In re* (36 L. J. Ch. 226; L. R. 3 Eq. 69), followed. *Whiteley Exerciser, Lim. v. Gamage*, 67 L. J. Ch. 560; [1898] 2 Ch. 405; 79 L. T. 20; 5 Manson, 249—North, J.

Remedy of Creditor—Service of Petition—Special Directions.—Where the name of a company has been struck off the register as defunct by the Registrar of Joint-Stock Companies, acting under section 7 of the Companies Act, 1880, and the company has been dissolved, a creditor who seeks to enforce the liability of any director, managing officer, or member under sub-section 4 of that section should do so by a petition to wind up the company. *Anglo-American Exploration Development Co., In re*, 67 L. J. Ch. 45; [1898] 1 Ch. 100; 4 Manson, 389—Vaughan Williams, J.

The provisions as to service of the petition contained in the rules of 1890 do not apply to such a case, nor do the provisions as to service contained in the Act of 1880. Special directions as to service should be obtained. *Id.*

Mortgage Debt—Leasehold Security—No Transfer—Vesting Order.—A company registered under the Companies Act, 1862, agreed to sell all its business and assets, including a mortgage debt and leasehold premises assigned for the residue of the term as security for the same, to a purchasing company, and until the vesting of such assets in the latter should be completed to stand possessed thereof in trust for the purchasers. The sale was carried through, and the title-deeds handed over, but no assignment or transfer of the mortgage debt and security was ever executed. In due course the vendor company became dissolved by virtue of section 143 of the Companies Act, 1862. The Crown did not admit that the legal estate in the term became vested in it. Upon a petition by the purchasing company for a vesting order under sections 26 (ii.) (c) and 35 (ii.) (c) of the Trustee Act, 1893, the Court made an order vesting in the petitioners the mortgage debt, and also the leasehold premises for such estate as was vested in the vendor company at the date of dissolution. *General Accident Assurance Corporation, In re*, 73 L. J. Ch. 84; [1904] 1 Ch. 147; 89 L. T. 699; 52 W. R. 332—Farwell, J.

Sale of Assets—Letters Patent—No Transfer Executed—Subsequent Dissolution of Company—Vesting Order—Registration.—A company registered under the Companies Act, 1862, went into voluntary liquidation, in the course of which the liquidators entered into a contract for the sale to a purchaser of certain letters patent forming part of the company's assets,

and the purchase-money was duly paid. By inadvertence no assignment of the letters patent was executed. The company subsequently became dissolved by virtue of section 143 of the Companies Act, 1862. Upon a petition by the purchaser under sections 85 and 86 of the Trustee Act, 1893, for a vesting order of the invention and letters patent,—*Held*, that, the legal interest in the letters patent, if it existed anywhere, having become vested in the Crown, the Court had no jurisdiction to make the order. *General Accident Assurance Corporation, In re* (73 L. J. Ch. 84; [1904] 1 Ch. 147), not followed. *Taylor's Agreement Trusts, In re*, 73 L. J. Ch. 557; [1904] 2 Ch. 737; 52 W. R. 602—Buckley, J.

— **Leaseholds—No Assignment—Dissolution of Company—"No existing trustee"—Appointment of New Trustee—Vesting Order.**—A company registered under the Companies Act, 1862, went into voluntary liquidation early in 1896, with a view to reconstruction, and the liquidators entered into an agreement for the sale of the property of the company, which included certain leasehold premises, to a new company. Shortly afterwards the new company was let into possession of the leasehold premises and had ever since been in possession thereof, but no formal assignment of the same was executed, and in October, 1896, the old company became dissolved by virtue of section 143 of the Act of 1862. The new company presented a petition for a declaration that the old company was at and immediately before its dissolution possessed of the leasehold premises as trustee for the petitioner within the meaning of the Trustee Act, 1893, and for the appointment pursuant to section 25 of the same Act of a named person as trustee of the premises in place of the old company, and for a vesting order pursuant to section 26 of the same Act. The Court made the appointment of the new trustee and the vesting order asked for by the petition. *Hanover (King) v. Bank of England* (L. R. 8 Eq. 350), *Trusts of Land at Farnborough, In re* (unreported), and *General Accident Assurance Corporation, Lim., In re* (73 L. J. Ch. 84; [1904] 1 Ch. 147), applied. *Taylor's Agreement Trusts, In re* (73 L. J. Ch. 557; [1904] 2 Ch. 737), distinguished. *Bomere Road* (No. 9), *In re*, 75 L. J. Ch. 157; [1906] 1 Ch. 359; 94 L. T. 403; 54 W. R. 312; 13 Manson, 68—Warrington, J.

The words of section 25 of the Trustee Act, 1893, "although there is no existing trustee," do not limit the powers given to the Court by that section or make it incumbent upon persons who apply to the Court to exercise its powers to shew that there is no existing trustee. *Ib.*

Right of Crown—Bona Vacantia.—The real and personal chattels of a dissolved corporation aggregate devolve upon the Crown as *bona vacantia*. *Higginson, In re; Att.-Gen., ex parte*, 68 L. J. Q.B. 198; [1899] 1 Q.B. 325; 79 L. T. 673; 47 W. R. 285; 5 Manson, 289—D.

A limited company proved in the bankruptcy of one of its debtors, and received from time to time dividends in respect of its proof. Some years, however, before a final dividend was declared, the company was wound up and dissolved by order of Court:—*Held*, that the

Crown was entitled to the final dividend to which the company would have been entitled, if in existence, as *bona vacantia*. *Ib.*

22. Costs.

Taxation of Costs—Drawing Bill of Costs and Copy.—The N. bank was in voluntary liquidation. The M. bank bought the assets of the N. Bank, and agreed to pay the costs of the liquidator of the N. bank in the winding-up. The liquidator's solicitor prepared bills of costs which were duly paid by the M. bank. On taxation of the bill of costs presented by the solicitor to the liquidators of the N. bank the costs of preparing and copying the bill of costs for payment by the M. bank and for preparing and copying the bill of costs taxed were disallowed. *National Bank of Wales, In re*, 71 L. J. Ch. 679; [1902] 2 Ch. 412; 87 L. T. 436; 50 W. R. 541—Buckley, J.

Costs of Solicitor to Liquidator—Summons to Review.—A liquidator appearing, on a summons to review taxation disallowing certain costs of his solicitor, not by a separate solicitor, but by a solicitor whose bill is under review, will not be allowed costs of the summons out of the estate. *Ib.*

COMPENSATION.

Injury, for.—See STATUTE.

Land, on taking Compulsorily.—See LANDS CLAUSES ACT.

Minerals under Canal.—See MINES.

Office, for Loss of.—See METROPOLIS.

Workman, to.—See MASTER AND SERVANT.

COMPOSITION DEED.

See BANKRUPTCY.

COMPROMISE.

Mistake—Will—Legal Rights—Counsel's Opinion—Common Solicitor—Mistaken Interpretation—Duty of Solicitor.—Generally the Court will support an agreement of compromise entered into after the parties have jointly consulted the family solicitor, even though the agreement may be not quite in accordance with their rights, the very object of the compromise being to avoid the necessity of having the exact relative rights determined by litigation; but the family solicitor is not entitled to keep those consulting him in the dark as to their rights because he thinks it is for the advantage of all parties to compromise, and that if they knew their exact rights there would be no chance of a compromise. *Roberts, In re; Roberts v. Roberts*, 74 L. J. Ch. 483; [1905] 1 Ch. 704; 93 L. T. 253—C.A.

Where one party entered into a compromise

relating to her interests under a will under a false impression as to her legal rights, arising from a wrong interpretation placed upon counsel's opinion by a common solicitor acting for all parties,—*Held*, that the compromise was not binding upon her. *Ib.*

Compromise of Action—Application to Strike out Name.]—*See PRACTICE.*

Release—Alleged Concealment and Fraud—Reduction of Release—Lapse of Time.]—When an attempt is made to re-open transactions completed many years ago, the Court will make every intendment in favour of what has been done as having been lawfully and properly done. *Watt v. Assets Co.*; *Bain v. Assets Co.*, 74 L. J. P.C. 82; [1905] A.C. 317—H.L. (Sc.)

The appellants represented contributories to the City of Glasgow Bank who, in the liquidation of the bank, had entered into compromises and received their discharges from all liabilities to the bank in 1879. The respondents, who, under a private Act of Parliament passed in 1882, had taken over the property and rights of the bank, brought actions in 1901 and 1902 to reduce the compromises on the ground of fraud and concealment of assets:—*Held*, that after so long an interval, during which witnesses had died and opportunities of proof had passed away, the compromises could not be set aside, even if unintentional and non-fraudulent inaccuracy had been discovered, and that no case of fraud or concealment had been made out. *Ib.*

Validity—Creation of Urban out of Rural District—Loss of Rateable Area—Adjustment of Income—Compromise of Claim—Ultra Vires.]—It is no ground for setting aside a compromise that the claim, or one of the claims, made by one of the parties is not well founded in law, provided such claim is put forward *bona fide*. Therefore, although, where a district is taken out of a rural district and created a separate urban district, loss of rateable area may not properly be treated as giving rise to a claim by the rural council against the urban council under the adjustment required by the Local Government Act, 1888, s. 62, yet a *bona fide* compromise under which the urban council agrees to pay a lump sum, spread over a number of years, in settlement of all claims of the rural council, under the adjustment, including a claim for loss of rateable area, is valid. *Holsworthy Urban Council v. Holsworthy Rural Council*, 76 L. J. Ch. 389; [1907] 2 Ch. 62; 97 L. T. 634; 71 J. P. 330; 5 L. G. R. 791; 23 T. L. R. 452—Warrington, J.

Barrister, by.]—*See BARRISTER.*

COMPULSORY PILOTAGE.

See SHIPPING.

COMPULSORY REFERENCE.

See ARBITRATION.

CONCEALMENT OF BIRTH.

See CRIMINAL LAW.

CONDITION.

1. *Precedent or Subsequent*, 486.
2. *Impossibility*, 486.
3. *Marriage*, 487.
4. *Forfeiture on Alienation*, 490.
5. *Name and Arms Clause*, 495.
6. *Residence*, 496.
7. *Entering on a "Calling"*, 497.
8. *Re-settlement of Estates*, 497.
9. *Condition becoming Illusory*, 497.
10. *Other Matters*, 498.

1. PRECEDENT OR SUBSEQUENT.

Precedent or Subsequent Condition.]—A testator left the residue of his property, real and personal, to his only son, provided he should claim same within three years from the testator's death; and in case his son should have died in his lifetime or without claiming the said bequest within three years it should lapse; and in the event of the bequest lapsing, or not being claimed within the said period, the testator left the residue to his brother, who should also be entitled to the rents and profits of same during the three years or such lesser period as should elapse before the son should claim. The son was abroad at the time of his father's death, and did not become aware thereof, or of the terms of the will, until after the expiration of the three years. He contended that the condition was a condition subsequent, and that he, being heir-at-law, did not forfeit the real estate by the non-performance, through ignorance, of the condition:—*Held*, that the condition was a condition precedent, and that, accordingly, the gift over took effect. *Horrigan v. Horrigan*, [1904] 1 Ir. R. 29—V.C. Affirmed in C.A., [1904] 1 Ir. R. 271.—*And see NAME AND ARMS CLAUSE.* *See also cols. 486, 487, 496.*

2. IMPOSSIBILITY.

Bequest to Charity—"Subject to my trustees being made members"—Condition Precedent or Subsequent.]—A testator bequeathed legacies to two charities, B. and S., "subject to my trustees being made members or governors . . . to the intent that they may have votes and voices in the maintenance and conduct of such societies to the fullest possible extent." The B. charity had no governors, but had members who were entitled to vote at general meetings. The S. charity had neither members nor governors. One of the trustees refused to become a member of the B. charity:—*Held*, that the condition was a condition precedent, not subsequent; that it referred to the obligation of the charities, not to that of the trustees; and that consequently the gift to B. was good, and the gift to S. failed. *Emson, In re*; *Grain v. Grain*, 74 L. J. Ch. 565; 93 L. T. 104; 21 T. L. R. 623—Kekewich, J.—*And see NAME AND ARMS CLAUSE, infra, and CONTRACT, IMPLIED TERM, and IMPOSSIBILITY OF PERFORMANCE.*

3. MARRIAGE.

Condition in Restraint of—Contingent Gift—Intermediate Income.]—A testator bequeathed a farm to his wife for life, and upon her death to his nephew W., provided he married M. F., but not otherwise, and appointed his wife residuary legatee. After the death of the widow M. F. refused to marry W. The personal representative of the widow claimed the farm under the residuary gift in the will:—*Held*, first, that the marriage with M. F. was a condition precedent to W. taking the farm; secondly, that W. upon performing the condition was entitled to the farm as from the death of the widow, and that it did not fall into the residue meanwhile, but that the rents and profits should be accumulated from her death until the condition was performed or performance became impossible by the death of one of the parties. *Kiersey v. Flahavan*, [1905] 1 Ir. R. 45—M.R.

Marriage within Certain Degrees of Kindred—Forfeiture Clause in Will—"Shall thenceforth cease and determine"—Marriage in Testator's Lifetime.]—A clause in a will by which the interest of any child of the testator who "shall contract any marriage forbidden by me as hereinafter expressed . . . shall thenceforth cease and determine," *held*, not to apply to a child who after the date of the will, but before the testator's death, had contracted a forbidden marriage. *Chapman v. Perkins*, 74 L. J. Ch. 331; [1905] A.C. 106; 92 L. T. 372; 53 W. R. 485—H.L. (E.)

Gift of Chattels subject to Marriage with Consent—Condition, Precedent or Subsequent.]—A testator by his will bequeathed his farm and "all stock and chattels thereon" to his son, Michael, "provided he marries with the consent of my executors and gets a substantial fortune with his wife, not less than 250*l.*"; and directed that "in the event of his marrying without such consent," Michael should get one shilling, and that the farm, stock, and chattels should go to testator's other son, Patrick. The testator bequeathed to his wife an annuity of 10*l.* for life charged on "the said farm and stock"; and to two of his daughters 100*l.* each and to another daughter 50*l.*, "said legacies to be paid to each of my said daughters on the marriage of Michael, and out of the fortune he receives with his wife, or upon the marriage of each of my said daughters with the consent of my executors":—*Held*, that the proviso annexed to the gift to Michael was a condition precedent, until performance of which nothing vested in him. *Fitzgerald v. Ryan*, [1899] 2 Ir. R. 637—C.A.

Marriage at any Time without Consent—Forfeiture of Previous Gift—Settlement—Condition Subsequent—Gift Over.]—A condition subsequent in a will or deed causing the forfeiture of a previous gift in the event of a marriage at any time without consent is a valid condition if coupled with a gift over, and, where the original gift is by way of settlement on the donee for life with remainder to her children, defeats the interests of the children as well as that of the tenant for life. *Dashwood v. Bulkeley (Lord)* (10 Ves. 230) and *Lloyd v. Branton* (3 Mer. 108) followed. *Whiting's Settlement, In re*; *Whiting v. De Rutzen*, 74 L. J. Ch. 207; [1905] 1 Ch. 96; 91 L. T. 821; 53 W. R. 293; 21 T. L. R. 83—C.A.

Summons—Construction of Settlement—Interests of Unborn Children—Representation by Trustees.]—On a summons raising such a question on the construction of a settlement the trustees of the settlement sufficiently represent the interests of children otherwise unrepresented, whether in existence or not, who may be entitled under the trusts of the settlement. *Id.* *Byrne, J.*

Marriage against Mother's Wish—Consent Given to Daughter's Marriage—Retraction.]—A testator, by his will made in 1888, gave his residuary estate upon trust for his wife for life, and subject thereto unto and equally between his children living at her death, and by a codicil made in 1891 the testator declared that in the event of a certain daughter "marrying against her mother's wish" she was only to receive the interest of a legacy given to her by the testator, and also the interest on her share of his estate, which at her death was to be invested for her children, and, failing children, was to be divided between her brother and sister. In May, 1893, the daughter became engaged to be married with the consent of her parents, their consent being given on condition that the marriage was put off for two years, as the intended husband was not at the time of the consent in a position, as the parents considered, to marry. The testator died in February, 1895. The engagement was still recognised by the widow, but she stipulated, and it was agreed, that the marriage should not take place until the following August. Disputes having arisen between the daughter and her mother, mainly with reference to settlements, the daughter left her mother's house and married in June, 1895. Just before the marriage the mother withdrew her consent:—*Held*, that the consent to the marriage was given with full knowledge of all the circumstances, and nothing had occurred subsequently which justified its retraction; that the refusal of consent by the mother had reference to the date fixed for the marriage, and not to the marriage itself, and that consequently the daughter had not married against her mother's wish. *Merry v. Ryves* (1 Eden, 1) and *Dashwood v. Bulkeley (Lord)* (10 Ves. 230) discussed. *Barclay Brown, In re*; *Ingall v. Brown*, 73 L. J. Ch. 130; [1904] 1 Ch. 120; 90 L. T. 220; 52 W. R. 173—*Byrne, J.*

Forfeiture Clause in Will—Futurity—"Shall thenceforth cease and determine"—Alienation or Bankruptcy—Marriage within Certain Degree of Kindred or without Consent of Trustees—Marriage in Lifetime of Testator.]—Testator, by his will dated March 24, 1881, gave his sons and daughters certain shares in the proceeds of the conversion of his real and residuary personal estate, such shares to be allotted at the date fixed by him for distribution, the daughters' shares being settled. And he declared that if any son or daughter of his "shall do or suffer any act" by way of alienation or charge or under any statutes of bankruptcy for the time being, by reason whereof any share of him or her in the capital or income of his estate to which he or she had not already become entitled in possession would but for that clause become vested in or payable to any other person, or if he or she "shall contract any marriage forbidden by me as hereinafter expressed, then and in any such case his or her

share . . . and interest in . . . my said trust estate and the income thereof shall thenceforth cease and determine, and my said trust estate shall thenceforth go" as therein mentioned. And he declared that the marriages forbidden by him were "in the case of son or daughter marriage with a person of any degree of kindred unless more remote than third cousin, and also in the case of a daughter marriage contracted without the previous written consent of the trustees or trustee for the time being of this my will, or if more than two of a majority of them." A daughter married her first cousin on November 9, 1886. The testator died on December 23, 1902:—*Held* (*dissentiente* COZENS-HARDY, L.J.), that the share of the daughter was not forfeited, there being sufficient on the face of the will to shew that the testator was referring to a marriage such as he described after his death. *Chapman, In re; Perkins v. Chapman*, 73 L. J. Ch. 291; [1904] 1 Ch. 431; 90 L. T. 339; 52 W. R. 467—C.A.

Per VAUGHAN WILLIAMS, L.J., and STIRLING, L.J.—Although, in the case of alienation or a bankruptcy which had not been annulled between the date of the will and the death of the testator, the Court would have been bound by the decision in *Metcalf, In re; Metcalf v. Metcalf* (60 L. J. Ch. 647; [1891] 3 Ch. 1), to hold that a forfeiture had occurred, that decision ought, having regard to the grounds of it, to be applied only in the case of the particular act of forfeiture there dealt with, and not in the different case of marriage:—*Held*, by COZENS-HARDY, L.J., that there was not sufficient in the context of the will to justify one construction being put on the clause in the case of alienation and a different one in the case of marriage. *Ib.* And see *infra*, FORFEITURE ON ALIENATION.

Annuity on Condition of Marriage with Consent—Restraint of Marriage—Validity.—Where a testator bequeaths an annuity in any event, followed by an additional annuity conditional on the annuitant marrying with consent, the condition is operative and not *in terrorem* merely. *Gillet v. Wray* (1 P. Wms. 284) followed. *Reynish v. Martin* (3 Atk. 330) distinguished. *Nourse, In re; Hampton v. Nourse*, 68 L. J. Ch. 15; [1899] 1 Ch. 63; 79 L. T. 376; 47 W. R. 116—Stirling, J.

Marriage of Beneficiary at any Time—Consent of Third Party Necessary—Gift over.—A condition subsequent in a settlement providing for forfeiture of the interest of a beneficiary and her issue in the settled property if she should marry at any time without the consent of a specified person is good provided there is a gift over of the settled property. *Whiting's Settlement, In re; Whiting v. De Rutzen*, 52 W. R. 653; 20 T. L. R. 538—Warrington, J.

Re-marriage—Defeasance.—"In case testator's wife marry again a person of ample fortune to maintain her in comfort and affluence."—W. A. M. devised and bequeathed all properties, real, freehold, and personal, of which he might die entitled to trustees upon trust to pay to his wife during her natural life the annual income to arise from his estates, and subject to legacies to his two daughters and a son devised and bequeathed the residue of his estates and pro-

perties of every kind by way of contingent remainder to two of his sons and his two daughters respectively, and continued: "In case my dear wife M. E. M. should marry again a person of ample fortune to maintain her in comfort and affluence then I revoke the bequest of the life estate in my estates"; and directed the provision made for his children to take effect on their reaching twenty-one years or sooner if his executors approved, but in case all his children died before twenty-one (which did not happen), then he bequeathed to his wife all his property. The testator was a land agent, his annual income, exclusive of that derived from investments subject to the trusts of certain settlements, was about 150*l.* derived from the management of landed estates, and he also was tenant *pur autre vie* of a residence and lands. Some years after the testator's death his widow intermarried with F. H., who it was admitted was a person of ample fortune, had settled 10,000*l.* over which M. E. H. (formerly M. E. M.) was given a power of appointment by will, was well able to maintain his wife in comfort and affluence, and in fact did so. On a summons asking whether the life estate of M. E. H. had determined by her marriage with F. H.,—*Held*, deciding the case as a pure question of construction, and construing the words "comfort and affluence" with reference to the testator's position in life, and to the fact that F. H. was in a position to maintain his wife in the state to which she had been accustomed, that the defeasance of her life estate was not too vague to be enforced but was perfectly good. *Moore's Trusts, In re; Lewis v. Moore*, 96 L. T. 44—Kekewich, J.

4. FORFEITURE ON ALIENATION.

Forfeiture on "alienating or incumbering"—Tenant for Life—Presentation of Petition in Bankruptcy—Immediate Adjudication.—A proviso in a will declaring the interest of a tenant for life in settled funds to be forfeited in the event of his "alienating or incumbering" the same will come into operation if the tenant for life presents a petition in bankruptcy and is immediately adjudicated thereon. *Anlerts's Trusts, In re* (41 L. J. Ch. 222; L. R. 13 Eq. 465), followed. *Cotgrave, In re; Mynors v. Cotgrave*, 72 L. J. Ch. 777; [1903] 2 Ch. 705; 89 L. T. 433; 52 W. R. 411; 10 Manson, 377—Kekewich, J.

"Become vested in some other person"—Act of Bankruptcy—Adjudication—Title to Dividend—Apportionment.—Under a will by which a life interest in a fund is made forfeitable if the tenant for life "should do or omit to do or should suffer to be done any act whereby the income if payable to himself would become vested in some other person," the forfeiture, for the purpose of apportioning the income in the event of the bankruptcy of the tenant for life, takes effect from the date of the act of bankruptcy and not from the date of the adjudication. *Montefiore v. Guedalla*, 70 L. J. Ch. 180; [1901] 1 Ch. 435; 83 L. T. 735; 49 W. R. 269; 8 Manson, 126—Buckley, J.

"Do or suffer anything whereby income would become vested"—Garnishee Order on Income—Effect on Life Estate.—Under a will the income

of a certain sum was to be paid to L. G. "during his life or until . . . he shall do or suffer anything whereby the said income, if payable to him absolutely, or any part thereof, would become vested in any other person":—*Held*, that no forfeiture resulted from a garnishee order absolute attaching dividends accrued due in the hands of the trustees. *Sutton, Carden & Co. v. Goodrich*, 80 L. T. 765—Kennedy, J.

"Until he shall assign"—Past Acts.]—A settlement contained a trust for payment of the income of the trust fund to A. for life or "until he shall assign, charge, or incur, or affect to assign, charge, or incur" the same:—*Held*, that under the circumstances this trust had not a retrospective operation so as to include past acts. *Manning v. Chambers* (1 De G. & S. 282) and *Seymour v. Lucas* (29 L. J. Ch. 841; 1 De G. & S. 177) distinguished. *West v. Williams*, 68 L. J. Ch. 127; [1899] 1 Ch. 132; 79 L. T. 575; 47 W. R. 308—C.A.

Gift of Income for Life or until Assignment or Attempted or Affected Assignment—Administration of Testator's Estate by Court—Appointment of Receiver—Request by Life Tenant to Receiver to Deduct a certain Sum from what might be found Due to a Life Tenant on Passing Receiver's Account, and to pay it to a Creditor.]—A testator settled a share of his estate on each of his daughters, and directed the trustees of his will, after the decease of any of his daughters who had married, to pay one-third of the income of her share to her husband "during his life or until he shall become bankrupt or assign, charge, or incur, or attempt or affect to assign, charge, or incur" the same or any part thereof. G. married one of the daughters, who predeceased him, and he thus became entitled to one-third of the income of her share under the above provisions. The testator's estate was administered by the Court, and a receiver was appointed. G. in November, 1902, wrote a letter asking the receiver to deduct from any sum that might become due to G. on the passing of the receiver's accounts on the ensuing 15th of January the sum of 5*l.*, and to pay it to a certain creditor of G. It was contended that this letter operated as a forfeiture of G.'s life interest under the will; and the receiver having ceased to pay G. the income, G. took out a summons in the administration action asking that the receiver might be directed to pay him the income as before. It was admitted that G., at the date of the letter, was entitled to more than 5*l.* in hand:—*Held*, that G.'s letter to the receiver would not have caused a forfeiture if it had been addressed to a trustee, that the appointment of a receiver could not affect G.'s rights, and that he was therefore entitled to be paid the income as before. *Durran v. Durran*, 91 L. T. 187—Joyce, J. Affirmed, 39 L. J. N.C. 581—C.A.

Protected Life Interest—Dispose or Attempt to Dispose of—Assignment to Trustees of Marriage Settlement.]—A son, to whom a life interest determinable on his disposing or attempting to dispose of it had been appointed by his mother in pursuance of a power given by the will of his maternal grandfather, executed a settlement whereby he assigned his life interest to trustees upon trust to pay him the income during his life, and appointed them his attorneys to receive the income, and empowered them to deduct

therefrom the expenses of managing the trusts:—*Held*, that he had not thereby disposed or attempted to dispose of his life interest in such a way as to cause a forfeiture of it. *Porter, In re; Coulson v. Capper* (61 L. J. Ch. 688; [1892] 3 Ch. 481), commented upon. *Tancred's Settlement, In re; Somerville v. Tancred. Selby, In re; Church v. Tancred*, 72 L. J. Ch. 324; [1903] 1 Ch. 715; 88 L. T. 164; 51 W. R. 510—Buckley, J.

Assignment or Attempted or Affected Assignment—Administration of Testator's Estate by Court—Request to Deduct a Sum from what might be found Due.]—A testator settled a share of his estate on each of his daughters, and directed the trustees of his will, after the decease of any of his daughters who had married, to pay one-third of the income of her share to her husband "during his life or until he shall become bankrupt or assign, charge, or incur, or attempt or affect to assign, charge, or incur" the same or any part thereof. G. married one of the daughters, who predeceased him. The testator's estate was administered by the Court, and a receiver was appointed. In November, 1902, G. wrote a letter asking the receiver to deduct from any sum that might become due to G. on the passing of the receiver's account on the ensuing January 5 the sum of 5*l.* and to pay it to a certain creditor of G. It was admitted that at the date of the letter the receiver had in his hands more than 5*l.* to which G. was entitled:—*Held*, that G.'s letter to the receiver did not cause a forfeiture of his interest under the will, as there was at the date of it sufficient money in the receiver's hands to pay the amount; and where such a document is ambiguous it ought to be construed so as not to create a forfeiture if capable of such a construction. *Durran v. Durran*, 91 L. T. 819—C.A.

"Become payable to any other person"—Equitable Charge—Cancellation before Estate Distributable.]—Under the will of his father a son was entitled to a life interest in one fourth share of the income of the residuary estate subject to a forfeiture clause by which such interest was made determinable "on his doing anything whereby his said share or some part thereof would become payable to or vested in some other person." The son charged his life interest with the repayment of certain small loans. At the dates at which these charges were given both the son and the lenders had forgotten the existence of the forfeiture clause in the will. On the matter being brought to their notice the charges were given up and cancelled. This took place before the testator's estate became distributable:—*Held*, that the son in charging his interest had done an act whereby some part of his share "would become payable to some other person," and that the forfeiture thereupon took effect, and that the fact that the estate had not become distributable was immaterial. *Baker, In re; Baker v. Baker*, 73 L. J. Ch. 172; [1904] 1 Ch. 157; 89 L. T. 742; 52 W. R. 213—Buckley, J.

Life Estate and Remainder in Fee to Husband—Gift Over on Insolvency or Alienation.]—By a marriage settlement the husband's lands were settled upon trust to pay to him the rents, &c., during the term of his natural life "except in the events hereinafter stated"; and after his death, subject to an annuity for

his wife, upon trust for the husband. The wife's lands were settled upon trust to pay the rents to her for her life, and after her death, in case her husband should survive her and leave children of the marriage living (which event happened), upon trust to pay the rents to the husband during his life "except in the events hereinafter provided"; and after the death of the survivor upon trust for the children of the marriage, as the husband and wife should jointly appoint; and in default thereof, in equal shares. The settlement contained a proviso that in case the husband should, during the lifetime of his wife or any of the children, incur the lands, or become bankrupt or insolvent, the lands should remain vested in the trustees upon trust for the wife for life, and after her death in trust for the children of the marriage as was thereinbefore expressed concerning the wife's lands. There were several children of the marriage. The husband made an arrangement with his creditors. Part of the husband's property included in the settlement was the sub-lessee's interest in the lands of B., held for lives renewable for ever, and also the lands of M. held in fee-simple. The husband purchased the interest of the sub-lessor, and accepted a fee-farm grant from the head lessor. The husband mortgaged to the Hibernian Bank his interest in B. and M.:—*Held*, that in the events which had happened the gift over took effect not only as regarded the life estate, but also as regarded the estate in remainder. *Walsh's Estate, In re*, [1905] 1 Ir. R. 261—Ross, J.

Settlement of Settlor's own Property—Life Estate Determinable on Bankruptcy—Payment of Debts—Second Bankruptcy.—An unmarried man settled his own property on himself for life, determinable on bankruptcy, with certain limitations over. He subsequently became bankrupt, and his trustee in bankruptcy obtained an order setting aside the settlement so far as was necessary to pay the bankrupt's debts. The debts were accordingly paid, but the bankruptcy was not annulled. The settlor then became bankrupt a second time, and the trustee in that bankruptcy applied for a declaration that the bankrupt's life estate had vested in him, the trustee:—*Held*, that the first bankruptcy operated as a forfeiture of the settlor's life estate, and that it did not therefore vest in the trustee in the second bankruptcy. *Johnson Johnson, In re*; *Matthew & Wilkinson, ex parte*, 73 L. J. K.B. 220; [1904] 1 K.B. 194; 90 L. T. 61; 52 W. R. 804; 11 Manson, 14—D.

Share of Residue at Time of Testator's Decease or at any Time Prior to Actual Payment of Share—Gift over on Bankruptcy—"Actual payment"—"Actual receipt"—Vesting of Legacy—Notice—Assignment by Trustee in Bankruptcy—Effect of Gift Over.—Bequest by a testator after death of a tenant for life of a share of residue to J., "but if J. should be unable at the time of his (the testator's) decease, or at any time prior to the actual payment to him of his share or any part thereof on the division of the estate, to give a receipt to his trustees for his share by reason of his having committed or suffered any act whereby he had deprived himself of the right to the benefit of such share either in whole or in part," then in such case the share or that part which

he could not receive for his own benefit, was to be divided equally between J.'s children. On the day of distribution by the trustees they received notice that two bankruptcy notices had been served on J., and accordingly refused to pay him his share of the residue:—*Held*, on the construction of the will, that the divesting had happened before the legacy had taken effect, and that the gift over was valid, and must be given effect to. *Johnson v. Crook* (48 L. J. Ch. 777; 12 Ch. D. 639); *Chaston, In re*; *Chaston v. Seago* (50 L. J. Ch. 716; 18 Ch. D. 218); *Wilkins, In re*; *Spencer v. Duckworth* (50 L. J. Ch. 774; 18 Ch. D. 634), followed. *Martin v. Martin* (35 L. J. Ch. 679; L. R. 2 Eq. 404) and *Bubb v. Padwick* (49 L. J. Ch. 178; 13 Ch. D. 517) disapproved. *Goulder, In re*; *Goulder v. Goulder*, 74 L. J. Ch. 552; [1905] 2 Ch. 100; 93 L. T. 163; 53 W. R. 531—Swinfen Eady, J.

Settlement—Settlor's Life Interest—Forfeiture—Separation Deed—Alienation by Law—Receiving Order.—By a settlement, dated in 1859, and made upon the marriage of A and B, certain property of the husband was vested in trustees upon trust to invest the same, and to pay the interest, dividends, and annual produce thereof unto or permit the same to be received by the husband until he should be outlawed, or be found or declared a bankrupt, or become an insolvent debtor within the meaning of some Act of Parliament for the relief or relating to insolvent debtors, or should do or commit any other act, or any other event should occur whereby the income or any part thereof would or might if thereby settled absolutely upon or in trust for him become alienated by law or vested in any other person or persons; and from and after the decease of the husband, or the sooner determination of the trust thereinbefore declared for his benefit, upon trust to pay the whole of such interest, dividends, and annual produce unto, or permit the same to be received by, the wife and her appointees or assigns during her life for her separate use; and subject thereto upon trust for the children of the marriage as therein mentioned. A receiving order was made against the husband in 1885, but was rescinded in February, 1886. By a separation deed dated in September, 1886, and made between the husband and the wife, the husband covenanted that he would, during their joint lives if they should so long live separate from each other, allow the wife to receive for her own benefit the interest, dividends, and annual income of the property therein mentioned, being the property brought into the marriage settlement by the husband:—*Held*, by KEEWICH, J., that by the receiving order there had been an alienation by law within the meaning of the settlement; and that, as the alienation by law occurred in favour of the husband's creditors generally, the gift over to the wife was void. *Held*, on appeal (*dissentiente* VAUGHAN WILLIAMS, L.J.), that the covenant in the separation deed operated as an equitable assignment of the husband's life interest; and that consequently a forfeiture had occurred; and that therefore, on this ground, without deciding the point upon which KEEWICH, J., based his decision, the appeal must be allowed. *Spearman, In re*; *Spearman v. Lowndes*, 82 L. T. 302—C.A.

5 NAME AND ARMS CLAUSE.

Order of Names.—Where a name and arms clause directs a person entitled under the limitations to take upon himself or herself and use in all deeds or writings which he or she shall sign, and upon all occasions, a particular surname "alone or together with his or her own family surname," a person so becoming entitled has the option of placing the assumed surname before or after his own surname. *D'Eyncourt v. Gregory* (45 L. J. Ch. 205; 1 Ch. D. 441) distinguished. *Eversley (Viscount), In re*; *Mildmay v. Mildmay*, 69 L. J. Ch. 14; [1900] 1 Ch. 96; 81 L. T. 600; 48 W. R. 249—Byrne, J.

Limit of Time for Taking—Continued Use Implied—Use of Surname by Peeress—Ordinary Correspondence—Visiting-cards.—Where a will requires that a person shall within a specified time after becoming entitled under the limitations of the will take and use a certain surname, and there is a condition of forfeiture if such person shall "refuse or neglect to take or use such surname as aforesaid and in manner aforesaid," a continued use of the surname after the period is to be implied. *Drax, In re*; *Dunsany (Baroness) v. Sawbridge*, 75 L. J. Ch. 317; 94 L. T. 611; 54 W. R. 418; 22 T. L. R. 343—Swinfen Eady, J.

Although such clause requires the surname to be used "in deeds and documents and on all other occasions," it imposes no obligation except on occasions when a surname is commonly used. There is no forfeiture for signing a family letter with a Christian name alone, nor, in the case of a peeress, for signing an ordinary business letter with the Christian name and title, or using these latter on her visiting-cards. *Ib.*

Condition Subsequent—Impossible of Fulfilment—"Lawfully assume."—In order to comply with a clause in a will requiring the devisee of an estate thereunder to "lawfully assume" a certain name and arms, on penalty of forfeiting the estate, such devisee must take some active steps to obtain a legal title to the arms, as the testator by the use of the word "lawfully," must be taken to have intended something more than merely "assume." *Crozon, In re*; *Crozon v. Ferrers*, 73 L. J. Ch. 170; [1904] 1 Ch. 252; 89 L. T. 733; 52 W. R. 343—Keke-wich, J.

If the devisee cannot obtain a legal title to assume the arms, the condition, being impossible of fulfilment, will not be binding upon him. *Ib.*

Devisee to Take and Use Testator's Name only—Condition Precedent or Subsequent—Period for Performance—Devisee's Life—Default—Death—Act of God—Lunacy.—A testator devised his real estate upon trust for his daughter for life, and after her death for her children, and if she should have no child he devised his real estate to his cousin N. "on condition that he take and use the name of Greenwood only." The testator died in 1853. N. was a lunatic during the last eighteen months of his life. He died intestate in 1855, in the lifetime of the daughter, and without having

taken the name of Greenwood. The daughter married and was still living, but was fifty-nine years of age and childless. The plaintiff, who was the heir-at-law and legal personal representative of N.'s heir-at-law, who had died intestate, claimed to be entitled in remainder, after the daughter's death, to the real estate devised by the testator:—*Held*, that as the condition, whether precedent or subsequent, was one which might have been performed by N. at any time during his life, without the consent or concurrence of any other person, the period for the performance of the condition was naturally and necessarily the life of the devisee, and no longer; that the plaintiff had not shewn that the performance of the condition became impossible by the act of God and not by the devisee's own fault; and that the plaintiff's claim failed. *Greenwood, In re*; *Goodhart v. Woodhead*, 71 L. J. Ch. 579; [1902] 2 Ch. 198; 86 L. T. 500—Joyce, J.

In the case of such a condition, the subsequent lunacy of the devisee will not excuse him from the obligation of performance. *Ib.*

Condition that Devisee should take Testator's Name—Condition Precedent or Subsequent—Performance Impossible.—A testator devised his real estate upon trust for his daughter for life, and after her death for her children, and if she should have no child he devised his real estate to his cousin N. "on condition that he take and use the name of Greenwood only." N. survived the testator, and died in the lifetime of the daughter, who was now in her fifty-ninth year, and had had no children:—*Held*, that, on the true construction of the will, the condition was a condition subsequent to be performed by N. only after he became entitled in possession, and such performance having now become impossible the devise took effect free from the condition. *Greenwood, In re*; *Goodhart v. Woodhead*, 72 L. J. Ch. 281; [1903] 1 Ch. 749; 88 L. T. 212; 51 W. R. 358—C.A.

6. RESIDENCE.

Will—Conditional Gift of House—"Residing" on the Premises During Lifetime—Condition of Remaining Unmarried—Forfeiture.—A testator gave a leasehold house to a legatee for her life, subject to her residing upon the premises during her lifetime. In a subsequent part of the will there was a proviso that the gift was made subject to the legatee remaining single and unmarried. After the testator's death the legatee married and went to live with her husband in another house, but she still continued to occupy one room in the house in question:—*Held*, that the legatee did not reside in the house within the meaning of the condition. *Held*, also, that the two conditions must be construed together, and that the true construction was that the gift was subject to the legatee residing on the premises so long as she remained unmarried, and that, having married, the condition as to residence no longer applied, and, the proviso in restraint of marriage being void, there had been no forfeiture of the house. *Wright, In re*; *Mott v. Issett*, 76 L. J. Ch. 89; [1907] 1 Ch. 231; 95 L. T. 697—Keke-wich, J. And see *Richardson, In re*, 69 L. J. Ch. 804; [1900] 2 Ch. 778; and *Edwards' Settlement, In re*, 66 L. J. Ch. 658; [1897] 2 Ch. 412.

7. ENTERING ON A "CALLING."

Bequest to Legatee on Condition of Entering on a "Calling"—Teacher in Jesuit College—Teaching carried on under Control of Society.]

—A testator directed his trustees to hold his residuary estate in trust for his son J. until he should attain the age of twenty-five, and in case he should attain that age and should before then have obtained a University degree, or should have become qualified to practise as a barrister, or solicitor, or doctor, &c., "or entered into any other profession, trade, or calling with the approbation of my trustees," then the residuary estate should be held in trust for him during the remainder of his life. There was a gift over in the event of J. dying under twenty-five or not fulfilling the other condition. J. attained twenty-five and had become a member of the Order of Jesuits and was engaged in study preparing for the priesthood. As a Jesuit he became a prefect of Stonyhurst College, and under the control and direction of the Order took part in the teaching and management of pupils in the College. In return for these services he was supported free of all charge. The trustees of the will approved of the course adopted by J. He never obtained a University degree:—*Held*, that having become a teacher in a Jesuit College he had entered on a "calling" within the words of the will and was entitled to the legacy. *Galwey v. Barden*, [1899] 1 Ir. R. 508—M.R.

8. RE-SETTLEMENT OF ESTATES.

Conditional Bequest — "Hereditaments" — Money under Trust for Investment in Land.]—A testator devised certain property to his son on condition that the latter should re-settle, on certain specified limitations, the "hereditaments" of which the testator was tenant for life, and the son was tenant for tail, under a certain settlement. Part of the real estate subject to this settlement had been sold at the time of the testator's death, and was then represented by certain funds and securities that were held in trust for re-investment in land:—*Held*, that, on the construction of the will, these funds and securities were included in the term "hereditaments," and that it was necessary, accordingly, that the son should re-settle them, not less than the real estate that still remained unsold, in order to satisfy the conditions of the testator's will. *Gosselin, In re*; *Gosselin v. Gosselin*, 75 L. J. Ch. 88; [1906] 1 Ch. 120; 54 W. R. 193—Farwell, J.

9. CONDITION BECOMING ILLUSORY.

Dispensing with Performance—Discretion of Executors—Executors Dead—Trust Carried out by Court.]—A testator left two farms to his son M., and by a codicil he provided that in case of his son R., who was then in New Zealand, wishing to return and to settle in his native country, one of the farms should be given to him by the testator's executors at such time and coupled with such conditions as they might deem expedient. The farms were sold in a suit under an order which reserved the question of the rights of the parties in respect of the proceeds, and realised 1,100*l.* and 400*l.* respectively. The executors were dead. R. had never returned and was still in New Zealand:—*Held*, that the proceeds of the two

farms should be divided into two equal parts, and that R. was entitled to be paid one moiety without returning to this country. *Croskery v. Ritchie*, [1901] 1 Ir. R. 487—V.C.

10. OTHER MATTERS.

Sale of Goods on.]—See SALE OF GOODS.

Residence, as to.]—See *Richardson, In re, post*, SETTLED LAND.

CONDITIONS OF SALE.

See VENDOR AND PURCHASER.

CONFESSIONS.

See CRIMINAL LAW.

CONFLICT OF LAWS.

See INTERNATIONAL LAW.

CONSIDERATION.

Bill of Exchange, for.]—See BILL OF EXCHANGE.

Bill of Sale, for.]—See BILL OF SALE.

Contract, for.]—See CONTRACT, cols. 510-512.

CONSIGNEE.

Bill of Lading, under.]—See SHIPPING.

Carriage of Goods or Animals, on.]—See CARRIER.

CONSPIRACY.

Wrongful Act—Injury.]—The plaintiff, a Roman Catholic, was appointed, with the approval of the National Board, to give manual instruction (chiefly in sewing) in a National school under Presbyterian management. The defendant called a meeting of parents of children attending the school, at which several of those present came to an arrangement to withdraw their children from the school. The result of this was to injure the plaintiff by reducing her salary, which depended on a capitation grant. The plaintiff claimed an injunction and damages:—*Held*, that on the evidence the defendant did combine with other parents at the meeting to withdraw their children from the school, and that such withdrawal resulted in a loss to the plaintiff; but that the object of the combination was not unlawful, and that no unlawful means were used to attain it, and therefore the plaintiff had no cause of action (*WALKER, L.J., diss.*). *Sweeney v. Coote*, [1906] 1 Ir. R. 51—C.A.

Affirmed on the facts, which disclosed no evidence of conspiracy on the part of the respondent against the appellant. *Sweeney v. Coote*, 76 L. J. P.C. 49; [1907] A.C. 221; 96 L. T. 748; 23 T. L. R. 448—H.L. (Ir.)

Intent to Injure—Trade Dispute—Damage Resulting—Inducing to Breach of Contract—Inducing Persons to Withdraw Custom or from Employment.]—A conspiracy to injure, if there be damage, gives rise to civil liability; and an

oppressive combination differs widely from an invasion of civil rights by a single person. It is a violation of right to interfere with contractual relations recognised by law if there be no justification for the interference. This principle cannot be confined to inducements to break contracts of service. If such wrongful interference with a man's liberty of action is intended to injure and in fact damages a third person, such third person has a remedy by an action. *Quinn v. Leatham*, 70 L. J. P.C. 76; [1901] A.C. 495; 85 L. T. 289; 50 W. R. 139; 65 J. P. 703—H.L. (Ir.)

Annoyance and coercion by many may be actionable where like conduct on the part of one person would not be so. *Ib.*

The appellant, an officer of a trade union, in combination with other members of the union—first, induced a servant of the respondent to break his contract with the respondent; secondly, induced a customer of the respondent, by threats of calling out the customer's men, to withdraw his custom; and thirdly, induced the respondent's servants to leave his service:—*Held*, that the appellant had been guilty of an actionable conspiracy for which he was liable in damages, and that, as there was no "trade dispute" within the meaning of the Conspiracy and Protection of Property Act, 1875, s. 3, the appellant was not entitled to the benefit of that section. *Ib.*

By LORD LINDLEY.—Section 3 has no application to civil actions; it is confined entirely to criminal proceedings, and the civil liability does not depend on the criminality of a combination. *Ib.*

Allen v. Flood (67 L. J. Q.B. 119; [1898] A.C. 1) distinguished. *Lumley v. Gye* (22 L. J. Q.B. 463; 2 E. & B. 216) and *Temperton v. Russell* (62 L. J. Q.B. 412; [1893] 1 Q.B. 715) approved. *Ib.*

Liability of Person for Damages flowing from Conspiracy before he became Party to it.]—*Semble*, a party to a conspiracy is not liable for the damage flowing from the conspiracy before the date of his joining it; but acts done in furtherance of the conspiracy prior to that date may be given in evidence against him for the purpose of shewing the origin, nature, and objects of the conspiracy. *O'Keefe v. Walsh*, [1903] 2 Ir. R. 681—C.A.

In such a case the jury may differentiate between, and assess separate damages against, separate defendants, according to the respective dates when such defendants became members of the conspiracy. *Ib.*

Contract, to Induce Breach of.]—See CONTRACT, col. 537.

Criminal Proceedings for.]—See CRIMINAL LAW, cols. 625–627. See also MALICIOUS PROCEEDINGS.

CONSTABLE.

See POLICE.

CONSULAR COURTS.

Japan—Criminal Trial—Jury of Five.]—In countries in which "by treaty, capitulation,

grant, usage, sufferance, and other lawful means" the Queen has obtained jurisdiction within the meaning of the Foreign Jurisdiction Act, 1890, by which she is empowered to exercise such jurisdiction "in the same and as ample a manner as if she had acquired it by the cession or conquest of territory," she is by Order in Council empowered to establish Courts and regulate procedure in the manner prescribed in such order. The Japan Order in Council, 1865, constituted a Court with a jury of five, and in the Court so established the appellant was convicted of the murder of her husband:—*Held*, that the order was not *ultra vires*, and that the appellant was not entitled as a British subject to a jury of twelve. *Carew v. Japan (Crown Prosecutor)*, 66 L. J. P.C. 95; [1897] A.C. 719; 77 L. T. 1; 18 Cox C.C. 625—P.C. And see INTERNATIONAL LAW.

CONTEMPT OF COURT.

Nature of Proceedings—Settlement of Proceedings for Contempt of Court.]—Applications for attachment for contempt of Court are not proceedings taken, and ought not to be regarded as proceedings taken, by one party to redress a wrong or obtain pecuniary consideration. Such proceedings are analogous to and in the nature of criminal informations, which therefore cannot be settled by the parties except with the sanction of the Court. *Rex v. Newton*, 67 J. P. 453—D.

Criticism of "pending" Proceeding.]—Where a prosecution for seditious libel had taken place but the jury had disagreed, and it was intended (though not formally stated) that a new jury would be empanelled,—*Held*, that the proceeding was still a "pending" one, and that it was a contempt of Court to criticise the proceeding in a newspaper. *Rex v. Freeman's Journal*, [1902] 2 Ir. R. 82—K.B. D.

Application against Incorporated Company.]—An application for alleged contempt of Court committed by an incorporated company should be by motion, not for attachment, but to attend and answer in respect of such contempt. *Ib.*

Proceedings before Justices—Comments on Case before Committal of Prisoner for Trial—Jurisdiction of High Court to Grant Attachment.]—The High Court of Justice has jurisdiction to grant a writ of attachment against a person who publishes improper comments with reference to the defendant in a case pending before Justices which may possibly, though not necessarily, come before the High Court. *Rex v. Davies*, 75 L. J. K.B. 104; [1906] 1 K.B. 32; 93 L. T. 772; 54 W. R. 107; 22 T. L. R. 97—D.

Publication Tending to Prejudice Fair Trial—Newspaper—Cause not yet Pending in High Court—Jurisdiction of High Court to Attach.]—Where a person having been charged before the petty sessions with an indictable offence triable only at the assizes, matter is published in a newspaper tending to interfere with the fair trial of the charge, the High Court has jurisdiction to attach the publisher of such matter for contempt of Court, notwithstanding that at the time of the publication the person

had not yet been committed for trial. *Rea v. Parke*, 72 L. J. K.B. 839; [1903] 2 K.B. 432; 89 L. T. 439; 52 W. R. 215; 67 J. P. 421—D.

Publication of Official Receiver's Report before Presentation to Court—Comment Thereon.] Comment on the report of the official receiver in bankruptcy before it has been read to the Court may amount to contempt of Court. The Court will not however commit except in a case where a real attempt has been made to interfere with the course of justice. A limited company cannot be committed for contempt of Court. *Hooley In re; Hooley, ex parte* (No. 1), 79 L. T. 706; 6 Manson, 44—Wright, J.

Publication in Newspaper of Doctors' Reports—Lunacy Proceedings.]—A reception order having been made against a person under the Lunacy Act, 1890, proceedings were taken under section 49 of the Act for the examination of the patient by two medical practitioners appointed by the Commissioners in Lunacy with a view to his discharge. Reports were made by two medical practitioners under the section, but the Commissioners refused to order the discharge of the patient. A newspaper subsequently published the two reports in an article commenting on the detention of the patient. A day before the publication of the reports an application was made under section 116 of the Act for the appointment of a receiver of the patient's property during his detention, and the reports of the two doctors were made exhibits to an affidavit in these proceedings. Neither the publisher nor the editor of the newspaper knew of these proceedings under section 116, nor did the article discuss them. Upon an application to commit for contempt of Court in publishing the reports of the doctors and the article,—*Held*, that, as the proceedings under section 49 were concluded, it was not a contempt of Court to publish the reports and the article; and that, as to the pending proceedings under section 116, there was no evidence that the respondents knew of those proceedings, and they were therefore not guilty of contempt. *Townshend (Marquis), In re*, 22 T. L. R. 341—C.A.

Offer of Money to Bankrupt to Suppress Evidence at Public Examination.]—It is a contempt of Court to offer money to a bankrupt to induce him at his public examination to suppress evidence, which, although capable of satisfactory explanation, would be liable to misconstruction, and which might damage a limited liability company of which the offerer is a director. *Hooley, In re; Rucker's Case*, 79 L. T. 306; 5 Manson, 331—Wright, J.

Scandalising the Court—Publication in a Newspaper of Scandalous Matter—Distribution of Newspaper in Ignorance of Contents.]—No contempt of Court is committed where a person distributes a newspaper containing matter scandalising the Court in ignorance of its contents. *McLeod v. St. Aubyn*, 68 L. J. P.C. 197; [1899] A.C. 549; 81 L. T. 158; 48 W. R. 173—P.C.

In this country committal for contempt for scandalising the Court itself has become obsolete. *Ib.*

But such committal is a weapon only to be

used with reference to the interests of the administration of justice, and not for the vindication of the Judge as a person; he must resort to action for libel or criminal information. *Ib.*

There is no duty in a person who hands a newspaper to another to make himself acquainted with its contents, even if he be the agent and correspondent of such newspaper; and if the newspaper contain scandalous matter of which he is ignorant, he cannot be committed for contempt. *Ib.*

Abuse of Judge—Newspaper Article.]—Prior to the commencement of a trial at assizes for an indecent publication, the presiding Judge warned the representatives of the press that some of the evidence would be unfit for publication, and threatened, in the event of his warning being disregarded, to see that the law was enforced against the parties offending. After the conclusion of the trial, which resulted in the conviction of the prisoner, a leading article appeared in one of the local newspapers scurrilously abusing the Judge in his judicial character and conduct. Proceedings for contempt of Court having been instituted against the manager of the company which owned the newspaper, the editor thereof voluntarily submitted himself to the jurisdiction of the Court, stating in an affidavit that he was solely responsible for the article; that he wrote it on the impulse of the moment under a strong feeling that sufficient reliance had not been placed upon the journalists and reporters for the press by the learned Judge; and that he deeply regretted its publication, and humbly apologised to the Judge:—*Held*, that he had been guilty of a serious contempt of Court, for which he was liable to be committed for a term of imprisonment; but that in consideration of his subsequent conduct he should only be ordered to pay a fine and to be detained until it was paid. *Reg. v. Gray*, 69 L. J. Q.B. 502; [1900] 2 Q.B. 36; 82 L. T. 534; 48 W. R. 474; 64 J. P. 484—D.

Power of High Court to Suspend Advocate—Reasonable Cause.]—A High Court of Judicature established in India by letters patents had power "to approve, admit, and enrol such . . . advocates . . . as to the said High Court shall seem meet," and, further, "to remove or to suspend from practice on reasonable cause the said advocates":—*Held*, that the Court had power to suspend from practice a member of the English Bar who had been admitted as an advocate of the Court; and that the fact that an advocate had written and published, in a periodical of which he was editor, an article which was a libel reflecting on the Judges of the High Court in their official capacity, though professing to be a vindication of his own professional conduct, amounted to a contempt of Court, which was a reasonable cause for suspending him from practice. *Sarbadhicary, In re*, 95 L. T. 894; 23 T. L. R. 180—P.C.

Right of Contumacious Person to Appeal.]—A person in contempt may be heard for the mere purpose of appealing against an order made subsequently to the contempt on the ground that the order was made without jurisdiction. *Gordon v. Gordon*, 73 L. J. P. 41;

[1904] P. 163; 90 L. T. 597; 52 W. R. 389; 20 T. L. R. 272—C.A.

Attachment, Motion for.—See PRACTICE.

Breach of Undertaking.—See PRACTICE.

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CONTRACT.

1. *Creation of*, 503.
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1. CREATION OF.

"Subject to an agreement"—Reference to Formal Contract—Intention of Parties.—In answer to an offer to purchase land for 275*l.*, the vendor accepted "subject to the conditions of sale and an agreement." At that time the property was subject to some incumbrances which the vendor had not yet removed, though he was trying so to do. The purchaser had apparently been allowed to go on the land, and had executed some repairs there, but the vendor had remained in occupation. The conditions of sale referred to were conditions used at an abortive auction at which the property had been offered for sale:—*Held*, on the facts, in an action by the purchaser for specific performance, that there was in this case no concluded contract. *Filby v. Hounsell* (65 L. J. Ch. 852; [1896] 2 Ch. 737) discussed. *Clark v. Robinson*, 51 W. R. 443—Byrne, J.

Letter—Conditional Promise.—A letter in which the writer promises to "favourably consider an application" for the renewal of a subsisting contract, "if we are satisfied with you as a customer," does not constitute a contract or agreement susceptible of legal enforcement. *Montreal Gas Co. v. Vasey*, 69 L. J. P.C. 134; [1900] A.C. 595; 83 L. T. 233—P.C.

Offer—Ambiguous Telegrams—Mistake—Action for Breach of Contract—Onus Probandi.—Where words in a proposal for a contract are understood and acted upon by the parties in different senses there is no contract, and it is

for the plaintiff, in an action for breach of contract, to shew that his construction is the true one. It is not for the Court to determine the true construction. *Falck v. Williams*, 69 L. J. P.C. 17; [1900] A.C. 176—P.C.

Offer and Acceptance—Quotation or Firm Offer.—A merchant wrote to a firm of oil millers:—"I am offering to-day Plate linseed for January-February shipment to Leith, and have pleasure in quoting you 100 tons at 41/3 usual Plate terms. I shall be glad to hear if you are buyers, and await your esteemed reply." On the following day the oil millers telegraphed, "Accept hundred January-February Plate, 41/3, Leith, per steamer Leith," and confirmed this by a letter of same date, in which, referring to their telegram, they wrote, "Thus buying from you 100 tons Plate linseed January-February steamer shipment usual contract":—*Held*—first, that the merchant's letter was an offer to sell and not merely a quotation of price; and secondly, that this offer was accepted so as to constitute a concluded contract by the oil millers' telegram, although it did not expressly refer to the condition of "usual Plate terms," mentioned in the offer. *Harvey v. Facey* (62 L. J. P.C. 127; [1893] A.C. 552) distinguished and explained. *Philp v. Knoblauch*, [1907] S.C. 994—Ct. of Sess.

Voluntary Trust—Intended Transfer of Property—Representations Influencing Conduct.—N., a promoter of and vendor to an unsuccessful mining company, publicly and in good faith promised to create a trust, under which the company and its shareholders would have benefited, but died before the trust was created:—*Held*, that a person who heard of the contemplated trust could not, in virtue of the fact that he bought or held shares of the company in confidence of N.'s promise being carried out, establish a case of contract as against N., and in the absence of any fraud or special representation, neither N. nor his executors would be estopped from denying liability, notwithstanding that N. himself might have benefited by the promise having been made. *Coleman v. North*, 47 W. R. 57—Romer, J.

Acceptance—Application for "Quotation"—Quotation Furnished.—The plaintiffs wrote to the defendants (canvas manufacturers): "Please give us your lowest quotation for 3,000 yards of canvas, 32½ inches wide, to the enclosed sample, or near, and your shortest time for delivery." The defendants replied: "We enclose sample nearest we have to match yours. Lowest price, 32½ inches wide, is, 4½*d.* per yard, 36 inches measure. Delivery of 3,000 yards in 5/6 weeks." The plaintiffs replied: "Please get made for us 3,000 yards canvas, 32½ inches wide, as per your quotation, at 4½*d.* per yard; deliver same as quickly as possible. Also please quote us for same 52 inches wide for quantity of about 20,000 yards annually. As we have not had the pleasure of doing business with you before, we give you as reference," &c. (mentioning two firms):—*Held*, that the defendants' letter was not an offer to sell, but merely a quotation of terms on which the plaintiffs might offer an order; that the plaintiffs' letter in reply was an offer of an order, and not an acceptance of an offer; and that there was no

completed contract between the parties. *Boyers v. Duke*, [1905] 2 Ir. R. 617—K.B. D.

Building Scheme—Purposes of Scheme—Failure in One Purpose—Action by Party Injuriouly Affected.]—Where a contract has been entered into and a scheme made for carrying out two purposes which turn out to be incompatible with each other, neither party has any remedy against the other in respect of damage sustained by the execution of the scheme where nothing has been done or omitted which was not contemplated by both parties. *“Lyttelton Times” Co. v. Warners*, 76 L. J. P.C. 100; [1907] A.C. 476; 97 L. T. 496; 23 T. L. R. 751—P.C.

The appellants, who were printers, occupied premises adjoining those of the respondents, who were hotel keepers. Under a scheme approved by both parties additional bedrooms for the hotel were provided over the printing office, under the common anticipation that there would be no appreciable interference with the comfort of the bedrooms from the nearness of the printing works. This expectation, however, was not fulfilled, and the respondents brought an action for an injunction and damages:—*Held*, that the claim could not be sustained. *Ib.*

Joint Telegram by Shipowners and Charterer to Master—Ambiguity—Master Bona Fide Acting upon Telegram in Sense not Intended by Senders.]—The principle laid down in *Ireland v. Livingston* (41 L. J. Q.B. 201; L. R. 5 H. L. 395) is not confined to cases between principal and agent, but is of wider application. Where a person makes a communication to another in ambiguous terms he cannot afterwards complain if the recipient of the communication *bona fide* puts upon it a meaning not intended by the sender. This principle held to apply to a joint telegram, ambiguous in its terms, sent by shipowners and charterer to the captain of the chartered ship at Hongkong, where the captain *bona fide* acted upon a construction of the telegram of which it was capable, but which was not the construction intended by the senders. *Miles v. Haslehurst*, 12 Com. Cas. 83; 23 T. L. R. 142—Channell, J.

Contract of Marriage—Agreement by Father to Leave “Share” of Property to Wife—Specific Performance.]—A father, on the treaty for his daughter's marriage, wrote to his intended son-in-law: “You are of course aware that with my large family Eliza will have little fortune. She will have a share of what I leave after the death of her mother.” The father by his will left his daughter a legacy of 2,000*l.*, which did not amount to an equal share of his property with his other children:—*Held*, first, that the letter did not amount to a contract by the testator to leave his daughter a share of his property specific performance of which could be enforced, but merely to a representation that he intended to give her something at his death; and secondly, that, even assuming that it did, the words “a share” were not equivalent to “an equal share,” and that therefore the contract was satisfied by the legacy to the daughter of the 2,000*l.* *Fickus, In re; Farina v. Fickus*, 69 L. J. Ch. 161; [1900] 1 Ch. 381; 81 L. T. 749; 48 W. R. 250—Cozens-Hardy, J.

Contract by Post—Application for Shares—Delivery of Allotment Letter to Postman to Post—Notice of Withdrawal.]—Although it is settled law that an offer is to be deemed accepted when the letter containing the acceptance is posted, yet a town postman is not an agent of the Post Office to receive letters; and, consequently, the delivery to him of a letter of acceptance of an application for allotment of shares will not, for the purpose of fixing the time of the acceptance, be regarded by the Court as a posting of the letter. *London and Northern Bank, In re; Jones, ex parte*, 69 L. J. Ch. 24; [1900] 1 Ch. 220; 81 L. T. 512; 7 Manson, 60—Cozens-Hardy, J.

2. FORM OF: WRITING UNDER THE STATUTE OF FRAUDS.

Signature by Agent “thereunto lawfully authorised.”]—A document signed by an agent within the scope of his authority, which refers to and recognises the terms of an agreement made by his principal, may be a sufficient note or memorandum of the agreement to satisfy section 4 of the Statute of Frauds, although the agent was not authorised to sign the document as a record of the agreement. *Jones v. Victoria Graving Dock Co.* (46 L. J. Q.B. 219; 2 Q.B. D. 314) followed. *Smith v. Webster* (45 L. J. Ch. 528; 3 Ch. D. 49) explained. *Griffiths Cycle Corporation v. Humber & Co.*, 68 L. J. Q.B. 959; [1899] 2 Q.B. 414; 81 L. T. 310—C.A.

Land—Offer “subject to agreement stating fully the conditions being prepared and signed.”]—W.'s solicitors wrote on his behalf to M. as follows: “*Re* Mason's Arms, Dinnington.—We agree to sell the above for 1,775*l.* subject to agreement stating fully the conditions being prepared and signed at our office on Monday, say at eleven o'clock.” The agent of M. replied: “I beg to accept yours of this date *re* Mason's Arms on behalf of Mr. M.”:—*Held*, that these two letters did not constitute a contract between the parties. *Watson v. McAllum*, 87 L. T. 547—Joyce, J.

— Interest in or Concerning—Collateral Agreement.]—A wife made a verbal contract with her husband that if he would buy a certain house, to which she was desirous that they should move their residence, she would make him a present of it. The husband bought the house, and they lived in it together for some years, but the wife refused to pay to the husband the amount of the purchase-money of the house:—*Held*, that an action could be maintained upon the verbal contract, as it was not a contract or sale of an interest in or concerning lands within the meaning of section 4 of the Statute of Frauds. *Boston v. Boston*, 73 L. J. K.B. 17; [1904] 1 K.B. 124; 89 L. T. 468; 52 W. R. 65; 20 T. L. R. 23—C.A.

— Sale of—Agreement Signed by Purchaser on Paper Containing Printed Name and Address of Vendor—No Signature by Vendor.]—An offer to purchase land written on paper containing the printed name and address of the vendor, but not signed by him, is not a sufficient memorandum of the contract to satisfy the Statute of Frauds, unless it be written at his dictation. *Schneider v. Norris* (2 M. & S. 286)

and *Evans v. Hoare* ([1892] 1 Q.B. 598) distinguished. *Hucklesby v. Hook*, 82 L. T. 117—Buckley, J.

— **Memorandum in Writing Signed by Purchaser — Signature of Vendor's Agent as "witness."**—Certain lands were sold to a purchaser by private treaty, through an auctioneer authorized to act as agent for the vendor, subject to conditions originally prepared for a sale by public auction, which had proved abortive. The purchaser signed the memorandum in writing attached thereto, acknowledging that he had purchased from the vendor the premises mentioned in the annexed particulars for 800*l.*, subject to the conditions of sale thereunto annexed, and that he had paid the deposit, and that he agreed to pay the balance on or before the date mentioned in the conditions of sale. The memorandum was also signed by the auctioneer as "witness." The vendor refused to complete:—*Held*, that the vendor was bound by the signature of the auctioneer, although merely purporting to sign as "witness," he having been duly authorized to sell by the vendor. *Wallace v. Roe*, [1903] 1 Ir. R. 32—V.C.

Letting — Alternative Written Offer to Let Property or Sell Part—Acceptance of Offer to Let—Sufficiency.—Where, after negotiations for the letting of a certain property, a letter signed by the agent of the owner and containing an alternative offer to let the property on conditions named therein, or to sell part at the price therein stated, is sent to the intending lessee, and in reply thereto he accepts the offer of the property, there is evidence of a concluded contract for letting sufficient to satisfy the Statute of Frauds. *Dictum* of LORD CAIRNS, L.C., in *Hussey v. Payne* (48 L. J. Ch. 846, 849; 4 App. Cas. 311, 317), followed. *Lever v. Koffler*, 70 L. J. Ch. 395; [1901] 1 Ch. 543; 84 L. T. 584; 49 W. R. 506—Byrne, J.

— **Not to be Performed Within a Year.**—The owner of a chattel agreed to let it out on hire for the term of three years at a quarterly rent:—*Held*, that the consideration for the hirer's promise was not capable of being performed within the space of one year, and that therefore the contract was within section 4 of the Statute of Frauds. *Milsom v. Stafford*, 80 L. T. 590—C.A.

Lease—Agreement for Commencement of Term not Stated.—In order to satisfy the requirements of section 4 of the Statute of Frauds, the written memorandum of a contract for the grant of a lease must, either expressly or by reasonable inference, state the time at which the term is to commence. *Humphery v. Conybeare*, 80 L. T. 40—C.A.

— **Terms Embodied in Consent Order—Subsequent Memorandum of Suggested Alterations—Alleged New Agreement Varying Terms of Order — Parol Evidence.**—Although parol evidence is admissible to prove rescission of a written agreement concerning land, such evidence cannot be given to prove a subsequent agreement to vary the terms of the written agreement. *Vezey v. Rashleigh*, 73 L. J. Ch. 422; [1904] 1 Ch. 634; 90 L. T. 663; 52 W. R. 442—Byrne, J.

Where, therefore, in an action for a declaration that a lease was valid and had not been forfeited, an order had been made by consent that the defendant should grant the plaintiff a new lease upon the terms set out in the order, and at a subsequent interview between the parties suggested alterations in the lease were embodied in a memorandum signed by them, the Court, holding that the memorandum was not intended to operate as an agreement, refused to allow the plaintiff to give parol evidence of a fresh agreement alleged by him to have been made at the interview for the variation of the terms of the order, and directed the order to be carried out. *Price v. Dyer* (17 Ves. 356) and *Robinson v. Page* (3 Russ. 114) applied. *Id.*

— **Memorandum—Purchaser not Named, but Described as "You"—Payment of Purchase-money admitted by Vendor.**—By an agreement in writing signed by the lessor of certain premises he agreed as follows: "Dear Sir,—In consideration of you having this day paid me the sum of 50*l.*, I hereby agree to grant you or your assigns a further lease of 24 years" of the premises in question. The agreement contained no other description identifying the person to whom the further lease was to be granted. The then lessee of the premises had in fact paid the 50*l.*, and he subsequently assigned the benefit of the agreement. In an action by the assignee for specific performance of the agreement, the lessor admitted that the assignor had paid the 50*l.*, but pleaded the Statute of Frauds:—*Held*, that there was a sufficient description of the parties to satisfy the statute. *Carr v. Lynch*, 69 L. J. Ch. 345; [1900] 1 Ch. 613; 82 L. T. 381; 48 W. R. 616—Farwell, J.

Hiring Agreement—Contract for a Year from Day Following—Agreement not to be Performed Within a Year.—A hiring agreement for a year from the day after that upon which the agreement is made is an agreement "not to be performed within the space of one year from the making thereof" within section 4 of the Statute of Frauds, and therefore it cannot be enforced unless there is a note or memorandum in writing of it signed by the party to be charged. *Bracegirdle v. Heald* (1 B. & A. 722) followed. *Dicta* in *Canthorne v. Cordrey* (13 C. B. (N.S.) 406) dissented from. *Dollar v. Parkington*, 84 L. T. 470—Darling, J.

Service—Agreement for—Time for Commencement—Managing Director.—A memorandum in writing of an agreement by a company to employ a managing director for a term of five years is not sufficient within the Statute of Frauds unless it shews the date at which the service is to begin. *Semble*, it should also contain some definition of the nature of the service. *Alexander's Timber Co., In re*, 70 L. J. Ch. 767; 8 Manson, 392—Wright, J.

— **Agreement for a Year's Service—Service to Commence the Day after Agreement—Agreement to be Performed within a Year—Memorandum in Writing.**—A contract made on one day for a year's service to commence on the next day is not an "agreement that is not to be performed within the space of one year from the making thereof" within the meaning of section 4 of the Statute of Frauds. *Dicta* in *Canthorne*

v. Cordrey (32 L. J. C.P. 152; 13 C. B. (N.S.) 406) and *Britain v. Rossiter* (48 L. J. Q.B. 362; 11 Q.B. D. 123) followed. *Smith v. Gold Coast and Ashanti Explorers, Lim.*, 72 L. J. K.B. 235; [1903] 1 K.B. 538; 88 L. T. 442; 51 W. R. 373—C.A.

Marriage Contract—Real Estate.—The principle applied in *Forster v. Hale* (3 Ves. 696; 5 ib. 308) and *Dale v. Hamilton* (16 L. J. Ch. 126, 397) to contracts of partnership is also applicable to a marriage contract, and the defence of the Statute of Frauds will not avail. *De Nicols, In re; De Nicols v. Curlier* (No. 2), 69 L. J. Ch. 680; [1900] 2 Ch. 410; 82 L. T. 840; 48 W. R. 602—Kekewich, J.

Guarantee—Indemnity—Contract in Writing.—The defendant verbally promised the plaintiffs that he would indorse bills for the amount of the debt if they would not proceed to execution on a judgment debt recovered against a limited company in the success of which the defendant was largely interested both as a shareholder and creditor, but on the property of which the defendant had no security:—*Held*, that this was a promise to answer for the debt of another within section 4 of the Statute of Frauds, which required the contract to be in writing. *Harburg Indianrubber Comb Co. v. Martin*, 71 L. J. K.B. 529; [1902] 1 K.B. 778; 86 L. T. 505; 50 W. R. 449—C.A.

Where the obligation to pay the debt of another is only an incident of a larger contract, the case is an exception from section 4 of the Statute of Frauds; but where the only object of the contract is to obtain forbearance from the creditor in respect of his debt, the motives which led the promisor to enter into the contract cannot enlarge its object or subject-matter so as to take the case out of the statute. *Id.*

Fraudulent Representation as to Credit of Another—Writing—Signature by Party to be Charged—Representation Signed by Agent of Company Incorporated under Companies Acts—Action against Company—"Person."—A company incorporated under the Companies Acts is a "person" within the meaning of section 6 of the Statute of Frauds Amendment Act, 1828, and entitled to the benefit of the enactment. Consequently, such a company is not liable for a fraudulent representation as to the credit of another person not signed by it, but made by its agent acting within the scope of its authority, although the representation is in writing signed by the agent and is made in the interest of the company. *Hirst v. West Riding Union Banking Co.*, 70 L. J. K.B. 828; [1901] 2 K.B. 560; 85 L. T. 3; 49 W. R. 715—C.A.

Goods—Memorandum—Name of Seller only on Case—Sale of Goods Act, 1893.—A purchaser of goods signed a memorandum in a paper book, in which orders were generally put, slipped into a leather cover. The name of the seller did not appear in the memorandum, but was stamped upon the cover:—*Held*, that this was a sufficient memorandum to satisfy section 4 of the Sale of Goods Act, 1893. *Jones v. Joyner*, 82 L. T. 768—D.

Part Performance—Sufficiency.—An agreement was entered into between C. & O'S.,

whereby the latter was to acquire certain premises, with stock-in-trade and book debts, and business was to be carried on in partnership between them for a period of not less than three years. In pursuance of this agreement the purchase was effected by O'S., with his own money, and thereupon C. & O'S. entered into possession under the style of O'B. & Co. They opened a bank account in that name, and carried on business as partners for a period of seven months. The heads of the agreement were drawn up, but were never signed, and a draft deed of co-partnership passed from one to the other during the seven months, undergoing revision of its details. Finally, O'S. refused to execute this deed when called upon by C. to do so, whereupon C. instituted an action at common law for damages and obtained a verdict for 700l.:—*Held*, that the agreement being one of which a Court of equity would have had jurisdiction to enforce specific performance the doctrine of part performance applied to take the case out of the Statute of Frauds, the parol evidence upon which the verdict was founded was properly admitted, and the verdict should be upheld. *Crowley v. O'Sullivan*, [1900] 2 Ir. R. 478—Q.B. D.

Payment of Increased Rent—Part Performance.—The payment by a tenant in possession of rent at an increased rate is sufficient part performance of an alleged agreement for a lease to take the case out of the operation of the Statute of Frauds. *Nunn v. Fabian* (L. R. 1 Ch. 35) followed. *Miller and Aldworth v. Sharp*, 68 L. J. Ch. 322; [1899] 1 Ch. 622; 80 L. T. 77; 47 W. R. 268—Byrne, J.

Verbal Agreement to Demise—Payment of Rent—No Possession.—A contract to grant a lease of a furnished flat is a contract concerning an interest in land within section 4 of the Statute of Frauds, and part payment of rent is not, unless possession is taken by the tenant, such a part performance as to take the case out of the operation of the section. *Thursby v. Eccles*, 70 L. J. Q.B. 91; 49 W. R. 281—Bigham, J.

Parol Agreement—Unequivocal Acts—Specific Performance.—The defendant entered into a parol agreement with the plaintiff to buy a plot of land together with a dwelling-house to be built by the plaintiff for her at an agreed price according to a special plan approved by her. During the construction the defendant frequently visited the premises and requested certain alterations and additions, which were carried out:—*Held*, that the defendant's conduct in visiting the works and inducing the alterations was of such an unequivocal nature as to imply the existence of an agreement, parol evidence of which was therefore admissible, and that the alterations amounted to part performance so as to prevent the defence of the Statute of Frauds. *Frame v. Dawson* (14 Ves. 386) and *Caton v. Caton* (35 L. J. Ch. 292, 295; L. R. 1 Ch. 137, 148) applied. *Dickinson v. Barrow*, 73 L. J. Ch. 701; [1904] 2 Ch. 339; 91 L. T. 161—Kekewich, J.

3. CONSIDERATION.

Banker's Overdraft—Customer's Accounts—Principal and Agent—Substitution of One Se-

curity for Another—Special Damage.—A bank's customer instructed an agent to pay money into the bank for the purpose of meeting cheques drawn by the customer. The agent, with the bank's consent, deposited store warrants in place of money as security. This was done without the customer's authority, but was subsequently approved by him. The cheques were in the first instance dishonoured, but were paid on the day following their first presentation:—*Held*, that there was, within the doctrine laid down in *Currie v. Misa* (44 L. J. Ex. 94; L. R. 10 Ex. 153), a consideration moving from the customer to the bank entitling the former to substantial damages. But *held* also, that evidence of special damage in respect of loss of custom and credit from particular persons was not admissible. *Fleming v. Bank of New Zealand*, 69 L. J. P.C. 120; [1900] A.C. 577; 89 L. T. 1—P.C.

Undue Preference—Electric Lighting.—An electric lighting company were empowered under their provisional orders (duly confirmed) to supply a district with electric energy. They agreed to supply a customer for five years at 4½d. a unit upon his taking the whole of his supply from them. They were supplying another customer for two years at 4d., but he was a large consumer, and took his supply in the daytime, which was an advantage to the company:—*Held*, that the supply to this customer was not an undue preference, and that, consequently, the contract with the first-named consumer was not wanting in consideration. *Held* also, that the contract was authorised by sections 19 and 20 of the Electric Lighting Act, 1882, and the provisional orders of the company. *Metropolitan Electric Supply Co. v. Ginder*, 70 L. J. Ch. 862; [1901] 2 Ch. 799; 84 L. T. 818; 49 W. R. 508; 65 J. P. 519—Buckley, J.

Agreement to Accept Debt by Instalments—Subsequent Agreement for Payment by Instalments after Death—Right to Claim Whole Debt—Appropriation of Payments—Rule in Clayton's Case.—A deceased testator had been accustomed for many years to pay moneys to the defendant, who had out of such moneys made all necessary payments for the deceased; and a balance was struck every quarter, and on such balance the defendant allowed interest at 10 per cent. per annum. By an agreement in February, 1897, in consideration of the defendant making use of certain moneys of the deceased and paying interest for the same at 10 per cent., the deceased agreed to accept 25l. every quarter in part payment of the principal that might be due from the defendant to the deceased; and some months afterwards another agreement was made whereby the deceased agreed that in the event of his death all his moneys in the possession of the defendant at the time of his death should be repaid in quarterly payments of 25l., to include principal and interest, until the whole should be paid, and that no person should be entitled to enforce payment of any larger sum. No instalments as such had been paid by the defendant under the first agreement, but the defendant had continued to make payments on the deceased's behalf, as requested, out of the moneys from time to time paid to him by the deceased. The deceased died some years afterwards, the defendant then having a considerable sum be-

longing to the deceased. In an action brought by the executors of the deceased to recover the whole sum due to the deceased at the time of his death,—*Held*, giving judgment for the defendant, that there was sufficient consideration to support both agreements, which were therefore good, and that under the second agreement the defendant was not bound on the death of the deceased to pay the whole sum then due; and, further, that, as to the instalments alleged to be due under the first agreement, the payments made by the defendant from time to time to the deceased must, according to the rule in *Clayton's Case*, be taken to have been appropriated to and paid in respect of these instalments, which were therefore satisfied. *Egg v. Craig*, 89 L. T. 41—Phillimore, J.

Portion of Consideration Illegal—Tippling Acts.]

—The circumstance that portion of the consideration for a mortgage consists of spirituous liquors supplied upon credit contrary to the provisions of the Tippling Acts vitiates the security only to the extent of the illegal consideration. *Sheehy v. Sheehy*, [1901] 1 Ir. R. 239—C.A.

4. PRIVACY.

Covenant to Pay Annuity to Third Party—Action by Third Party and Personal Representative of Covenantor—Right to Enforce.—By deed made between A and B, A, who carried on business as a dentist, and B his son, agreed to become partners as dentists for five years; a valuation was to be made of the furniture, instruments, &c., the property of A upon the premises where he carried on business; in the event of a dissolution B was to have the right to purchase that property at the amount of the valuation; and in the event of A's death during the continuance of the partnership B agreed to pay to his brothers and sisters certain annuities. A died within the five years, and B exercised his right of purchase. In an action brought by the executors of A and B's brothers and sisters, against B to enforce payment of the annuities,—*Held*, that the plaintiffs were entitled to maintain the action. *Drimmie v. Davies*, [1899] 1 Ir. R. 176—C.A.

5. IMPLIED TERM.

Crown Contract.—A contract to do work for the Crown not containing a stipulation that the Crown shall give all or any of such work to the contractor, is not enforceable against the Crown, and no such stipulation can be implied. *Reg. v. Demers*, 69 L. J. P.C. 5; [1900] A.C. 103; 81 L. T. 795—P.C.

Interest on Tradesmen's Accounts—Notification that Same would be Charged—Implied Agreement by Customer to Pay.—During a period of ten years a tradesman had delivered to a customer, since deceased, a yearly account, in which it was stated that interest would be charged on all sums due for more than three years. The customer never objected to the charge, and had from time to time made payments on account generally:—*Held*, that there was an implied agreement to pay interest. *Anglesey (Marquis), In re; Wilmot v. Gardiner*, 70 L. J. Ch. 810; [1901] 2 Ch. 548; 85 L. T. 179; 49 W. R. 708—C.A.

Agreement by Wholesale Dealer to Pay Bonus to Retailers for Fixed Period—Sale of Business before End of Period—Damages for Breach.—An agreement by manufacturers to distribute on certain conditions and for a fixed period a bonus among their customers is not terminated by the sale of the business by the manufacturers before the end of the period, and a customer who has complied with the conditions is entitled to damages for the breach of the agreement involved in such sale. *Ogdens, Lim. v. Nelson*, 74 L. J. K.B. 433; [1905] A.C. 109; 92 L. T. 478; 53 W. R. 497; 21 T. L. R. 359—H.L. (E.)

Contract of Employment—Contract with Partners—Dissolution of Partnership—Liability of Partners.—The plaintiffs entered into a contract with the defendants, who carried on business in partnership, whereby the latter were appointed sole buying agents for the plaintiffs for a certain district in England, the intention being that the whole district should be represented by the defendants for a period of five years. The plaintiffs agreed that the defendants should retain the agency so long as they met their engagements and kept strictly to the terms of the engagement for a period of five years, and in consideration the defendants agreed to act as buying agents for the district on the terms stated in the agreement, and to accept delivery and pay for a minimum quantity of the plaintiffs' products during each year of the term. The defendants had the option of renewing the agreement at its termination. During the five years the defendants dissolved partnership, and the plaintiffs sued for damages for breaches of the contract committed after the dissolution:—*Held*, that there was no implied term in the contract that the defendants would not dissolve partnership during the term and thus disable themselves from carrying out the contract, and that therefore the defendants were not liable. *Ogdens, Lim. v. Nelson* (73 L. J. K.B. 865; [1904] 2 K.B. 410) distinguished. *Bovine, Lim. v. Dent and Wilkinson*, 21 T. L. R. 82—Kendy, J.

—Agreement to do Work as might be Required—Implied Obligation to Provide Employment.—In an agreement between a contractor and a municipal corporation, whereby the contractor agreed to supply horses, carts, &c., as might be required, for the scavenging of a certain district for one year at certain agreed rates, the Court, upon consideration of all the terms of the contract, held that no term could be implied imposing on the corporation the duty of giving employment to the contractor so as to enable him to earn payment under the contract. *Moon v. Camberwell Borough Council*, 89 L. T. 595; 68 J.P. 57; 2 L. G. R. 309; 20 T. L. R. 43—C.A.

—Contract not to Discharge Workman without Twenty-eight Days' Notice—Obligation of Employer to Find Work up to Expiration of Notice—Inability to Carry on Business at a Profit.—The plaintiff was a roller in the employ of the defendants at their tinplate works, under a contract which embodied certain printed rules applicable to all the workmen in the works. One rule was that no person regularly employed should quit or be discharged

from the works "without giving or receiving 28 days' notice in writing." The defendants, being unable to carry on the business at a profit, closed their works, and gave the plaintiff notice in accordance with the above rule. In an action brought by the plaintiff to recover damages from the defendants for failing to provide him with work during the period covered by the notice,—*Held*, that the contract raised an implication that the defendants would provide a reasonable amount of work for the plaintiff up to the expiration of the notice, and that such implication was not affected by the fact that the defendants were unable to carry on their business at a profit. *Devonald v. Rosser*, 75 L. J. K.B. 688; [1906] 2 K.B. 728; 95 L. T. 232; 22 T. L. R. 682—C.A.

Failure of Object—Money Payable before Performance became Impossible—Right to Retain Part Payment made Prior to Impossibility of Performance—Right to Sue for Balance.—The plaintiff agreed to let to the defendant a room for the purpose of viewing the procession which was to have taken place on the occasion of the King's Coronation, but which became impossible owing to the King's illness. The price for the use of the room was payable prior to the date when the procession became impossible, and a part of the price was paid accordingly. The procession having subsequently become impossible, the plaintiff sued the defendant to recover the money paid on account of the price, and the defendant counterclaimed for the balance of the price:—*Held*, that the defendant was entitled not only to retain the money paid on account, but to recover the balance, the right to which had by the contract accrued prior to the date when the contract became impossible of performance. *Chandler v. Webster*, 73 L. J. K.B. 401; [1904] 1 K.B. 493; 90 L. T. 217; 52 W. R. 290; 20 T. L. R. 222—C.A.

—Payment made "on account of" Contract—Express Provision in Event of Performance becoming Impossible—Coronation Procession.—The plaintiff, a refreshment contractor, agreed with the defendants, who were acting on behalf of the Navy League, to supply refreshments on a steamer engaged for the purpose of taking members of the society to the Naval Review on the occasion of the King's Coronation. By the terms of the contract a sum of 300l. was to be paid to the plaintiff "on account of the refreshments" on a day previous to the review day; and the contract contained a stipulation that, in the event of the cancellation of the review before any expense was incurred by the contractor, there should be no liability on the part of the defendants. The plaintiff expended a small sum on extra knives, forks, and crockery for the purposes of the contract, but nothing on refreshments. A cheque for 300l. was sent by the defendants to the plaintiff in accordance with the contract. On the next day, owing to the illness of the King, the review was countermanded. The cheque not having been presented by the plaintiff, payment of it was stopped by the defendants:—*Held*, in the action on the cheque, that the plaintiff was not entitled to recover, the true construction of the contract being that, in the event of the cancellation of the review, the defendants should only be liable to reimburse the plaintiff for any

expense already incurred by him. *Elliott v. Crutchley*, 73 L. J. K.B. 406; [1904] 1 K.B. 565; 90 L. T. 497; 52 W. R. 499; 20 T. L. R. 286—C.A.

— **Foundation of Contract — Determination of Contract — Licence to Use Rooms on Route of Public Procession — Failure of Procession to Take Place.**—Plaintiff was the owner of a flat on the proclaimed route of the processions announced to take place on June 26 and 27, 1902, on the occasion of the Coronation of King Edward 7. The defendant saw an announcement on the premises that windows were to be let there to view the processions. He had an interview with the housekeeper on the subject, and agreed to take the flat for the two days for 75*l.*, and to pay a deposit of 25*l.* This was confirmed by two letters which passed between him and the plaintiff's solicitor, in which it was expressed that he was to have "the entire use of these rooms during the days (not the nights) of the 26th and 27th June." He paid his deposit, and agreed to pay the balance of 50*l.* on June 24. The processions not taking place owing to the illness of the King, the defendant declined to carry out the contract:—*Held*, that the agreement was a licence to use the rooms for a particular purpose, and no other, and the taking place of the processions on the proclaimed days along the proclaimed route was regarded by both parties as the foundation of the contract, and, as they failed to take place, the defendant was not bound to carry out the contract. The principle of *Taylor v. Caldwell* (32 L. J. Q.B. 164; 3 B. & S. 826) applied. *Krell v. Henry*, 72 L. J. K.B. 794; [1903] 2 K.B. 740; 89 L. T. 328; 52 W. R. 246—C.A.

Each case of this kind must be judged by its own circumstances, and the questions to be asked are—First, what, having regard to all the circumstances, was the foundation of the contract? secondly, was the performance of the contract prevented? and thirdly, was the event which prevented it of such a character that it could not reasonably be said to have been in the contemplation of the parties at the date of the contract? Parol evidence is admissible to shew what is the subject-matter of the contract, and if the last two questions are answered in the affirmative both parties are discharged from further performance of the contract. *Id.*

— **Right to Recover Back Money.**—Tickets having been purchased for seats to view the Coronation Procession on June 27, the money was paid over to the vendors. The Coronation Procession did not take place on June 27, owing to the illness of the King, and was abandoned. In actions by the purchasers to recover back the money so paid to the vendors,—*Held*, that the money could not be recovered back. Where money has been paid under a contract, the further performance of which has become impossible owing to the non-existence of the subject-matter of the contract, the contract is not rescinded *ab initio*, but both parties are excused from any further performance under the contract. *Per CHANNELL, J.*—If the money had been payable by the contract on some day subsequent to the abandonment of the procession, it could not have been recovered. If the money was payable prior to the abandonment it

would be the same as if it had been actually paid, and could be recovered by action. *Blakeley v. Muller*; *Hobson v. Pattenden*, 88 L. T. 90; 67 J. P. 51—D.

— **Contract to take Room to View Procession — Purpose Incorporated into Contract — Postponement of Procession — Impossibility of Performance at Time of Making Contract — Amended Contract for Postponed Procession — Right to Recover Back Money Paid for Room.**—On June 24, 1902, the plaintiff agreed to take and the defendant agreed to let to the plaintiff a room for the purpose of viewing the Coronation Procession on June 27, upon the condition (amongst others) that the room should be used by the plaintiff only for the purpose of viewing the procession on that day, and the plaintiff agreed to take the room upon those terms and conditions for the purpose and period specified, and he then paid his money for the letting of the room. There was no provision in the contract for the return of the money if the procession did not take place. Immediately afterwards the plaintiff saw an announcement in a newspaper that the procession had been postponed, and he then went back to the defendant and showed him the announcement. The defendant replied that the postponement was only for a day or two, and the defendant then at the plaintiff's request wrote and signed under the conditions a note that if the procession should be postponed the plaintiff was to have the use of the room on the same conditions as arranged for June 27. At the time the contract was made the condition of the King had been ascertained to be such as to make the procession impossible, and the procession was ultimately abandoned. In an action by the plaintiff to recover back the money paid by him for the room,—*Held*, as to the contract in its original form, that as the purpose for which the contract was made—namely, the viewing of the procession—was incorporated into and became part of the contract and the substance of it, the contract must be taken as subject to the implied condition that if the intention to hold the procession were abandoned neither party should be bound by the contract, and consequently, as the purpose was, at the time the contract was made, impossible of performance, the contract was inoperative, and the plaintiff upon that ground would have been entitled to recover back the money paid by him, if no subsequent arrangement had been made. But *held*, further, that the effect of the subsequent arrangement was to make a new contract between the parties in respect of a postponed procession into which no such implied condition could be imported, and as this postponed procession was not impossible at the time the arrangement was made, the money must remain in the hands of the receiver, and the plaintiff was not entitled to recover it back. *Clarke v. Lindsay*, 88 L. T. 198—D.

— **Charter of Ship for Naval Review — Object of Voyage — Postponement of Review.**—The defendant hired a passenger steam vessel from the plaintiff company under an agreement by the terms of which the ship was to "be at the defendant's disposal . . . on June 28 . . . to take out a party for the purposes of viewing the Naval Review and for a day's cruise round the fleet; also on June 29 for similar purposes. . . . Price 250*l.*, payable 50*l.* down; balance

before ship leaves Herne Bay." Owing to the postponement of the review the defendant repudiated the contract as no longer binding:—*Held*, that the objects with which the defendant hired the ship concerned the hirer alone and not the shipowner, and that the happening of the review did not form the foundation of the contract between the parties within the doctrine of *Taylor v. Caldwell* (32 L. J. Q.B. 64; 3 B. & S. 826); that there had been no total failure of consideration, and that the defendant was liable to the plaintiff company for breach of contract. *Herne Bay Steamboat Co. v. Hutton*, 72 L. J. K.B. 879; [1903] 2 K.B. 683; 89 L. T. 422; 52 W. R. 183; 9 Asp. M.C. 472—C.A.

— The plaintiffs hired a steamer from the defendants for the term of three days from the hour she was placed at the charterers' disposal on the day preceding that of the Coronation Naval Review to be held at Spithead in June or July, 1902. By the charterparty the sum of 1,500*l.* was payable as the hire of the vessel, of which sum 250*l.* was to be paid on signing the charterparty, and the balance of 1,250*l.* ten days before the date fixed for the review. After these amounts had been paid, an announcement was made that the review would be postponed owing to the King's illness, and it was not in fact held till August, 1902. On such announcement being made, the plaintiffs notified the defendants that they would not require the vessel, which, accordingly, was not placed at their disposal:—*Held*, that the plaintiffs were not entitled to recover back the amount paid by them. *Blakeley v. Muller* (88 L. T. 90) approved. *Civil Service Co-operative Society v. General Steam Navigation Co.*, 72 L. J. K.B. 933; [1903] 2 K.B. 756; 89 L. T. 429; 52 W. R. 181; 9 Asp. M.C. 477; 20 T. L. R. 10—C.A.

— **Payment for Refreshments in Advance—Cheque given in Part Payment—Cancellation of Review—Payment of Cheque Stopped—Right of Action on Cheque.**—The plaintiff agreed with the defendants, who were acting on behalf of the Navy League, to do the catering for a steamer hired by the Navy League for the Naval Review to be held in connection with the Coronation of his Majesty King Edward 7, 300*l.* being payable to the plaintiff on account on the Monday previous to the review day, and in the event of the review being cancelled before any expense was incurred by the plaintiff there was to be no liability on the part of the defendants. The plaintiff incurred some expense in the purchase of knives, &c., but none on account of refreshments. The cheque was sent to the plaintiff on the day fixed by the agreement, and on the next day the arrangements for the review were cancelled owing to the illness of the King. Subsequently, the plaintiff not having cashed the cheque, the defendants stopped it. In an action by the plaintiff upon the cheque,—*Held*, that he was not entitled to recover, upon the ground that by the stoppage of the cheque the plaintiff was remitted to his original right of action on the consideration for the cheque, and that, the performance of the contract having become impossible without fault on either side, both parties were excused from further performance of it. *Elliott v. Crutchley*, 72 L. J. K.B. 927; [1903] 2 K.B. 476; 89 L. T. 417—Ridley, J. *And see IMPOSSIBILITY OF PERFORMANCE, infra.*

6. PERSONAL CONTRACT.

Assignability—Contract to Supply Goods—Sale of Business to Limited Company.—The defendant agreed with K., one of the plaintiffs, a cake manufacturer, to supply him for a period of one year with all the eggs "he shall require for manufacturing purposes." They were to be supplied to three named places of business, one of which was at Martineau Road, Holloway. Payment was to be by two-month bills drawn on K., and the latter undertook not to purchase elsewhere. Subsequently K. sold the business, including the benefit of the above contract, to a limited company, the other plaintiff, which also took over another business at Brewery Road, with which the Martineau Road business had been amalgamated. K. was manager to the company, of which he held practically the whole of the ordinary share capital. The defendant refused to continue to supply either plaintiff under the above contract after the sale to the company:—*Held*, that he was not bound to supply the Brewery Road business, as the Martineau Road business, which it had absorbed, and in respect of which the obligation originally existed, had ceased to exist. And *held*, further, that the benefit of the contract, as it was a personal contract, could not be assigned. *Tolhurst v. Associated Portland Cement Manufacturers* (72 L. J. K.B. 834; [1903] A.C. 414) distinguished. *Kemp v. Baerselman*, 75 L. J. K.B. 873; [1906] 2 K.B. 604—C.A.

Personal Services—Whether Contract Rescinded—Temporary Incapacity—Jockey—"Failure to procure licence."—On October 28, 1899, by an agreement the defendant was to have the first claim on the services of the plaintiff as a jockey for the flat-racing seasons 1900, 1901, and 1902, and in case the plaintiff should die "or shall fail to procure a licence during the said term this agreement shall be at an end." On November 14, 1901, the plaintiff was severely injured in an accident while riding. On March 17 the flat-racing season commenced for 1902. The plaintiff having in due course applied for his licence, the stewards suggested that he should apply when he was sufficiently recovered so as to be able to ride. On April 14, 1902, he applied again and received his licence a few days before he was fit to ride, and rode his first race on May 14:—*Held*, that the incapacity from the effects of the accident to ride for the period from March 18 to May 14 did not involve such a failure of consideration and such destruction of the substance of the agreement as to bring the agreement to an end, and *held*, further, that the plaintiff had not "failed to procure a licence." *Loates v. Maple*, 88 L. T. 288—Wright, J.

Music Hall—Engagement of Troupe—Death of One Member of Troupe—Right to Terminate Contract.—By a contract between the proprietors of a music hall and a troupe consisting of three brothers, called the Harvey Boys, the former engaged the latter to perform for a week at the music hall. The contract was signed "Harvey Boys" by one of the troupe. The two elder brothers shared the profits of the troupe, and paid their younger brother a salary. One of the elder brothers died before the time for the performance arrived, and the surviving

elder brother engaged another person to take his brother's place, he himself taking the profits and paying the two others salaries. The proprietors of the music hall cancelled the contract on account of the death of one of the members of the troupe. In an action by the three members of the troupe to recover damages for breach of contract,—*Held*, that the contract was made with the three original persons who composed the troupe, and that the present members were not entitled to sue upon it. *Harvey v. Tivoli, Manchester, Lim.*, 23 T. L. R. 592—D.

7. IMPOSSIBILITY OF PERFORMANCE.

Condition Precedent.—Where a person by a contract takes upon himself the responsibility that certain events shall take place, or to pay damages if from any cause he is prevented from carrying out the contract, the fact that the contract becomes impossible of performance does not excuse such party for non-performance of the contract. *Ashmore v. Cox*, 68 L. J. Q.B. 72; [1899] 1 Q.B. 436—Lord Russell of Killowen, C.J.

— Repudiation of Contract—Measure of Damages.—Where in a contract for the sale of an intended shipment of a commodity at a named price it is stipulated that shipment is to be made "by sailer or sailers" between named dates, the stipulation as to "sailer or sailers," and also that as to the named dates, are conditions precedent of the contract. Therefore a declaration against the contract of a shipment by steamer, and not between the named dates, of the commodity, of the character and quality which would have satisfied the contract, is not a declaration which conforms to the terms of the contract. In such a contract there is no implied condition that it shall be possible to ship between the named dates by "sailer or sailers," nor will an express condition that "should the goods or any portion thereof not arrive . . . from loss or other unavoidable cause, this contract to be void for such portion," excuse the failure to ship by "sailer or sailers" between the named dates, inasmuch as, having regard to the terms of the contract, the condition applies only to goods in fact shipped. The true measure of damages on the facts in this case for a breach of the contract by failure to ship in the manner and between the dates specified therein is the difference between the contract price and market price at the date when it is notified that no declaration other than the bad one can be made—that is, the date of repudiation of the contract. *Id.*

Sale of Cargo to be Shipped on Specified Ship—Ship Unable to Load through Stranding—Implied Condition that Ship should Exist as a Cargo-carrying Vessel.—A contract for the sale of a cargo to be shipped by a specified steamer at a specified time and place contained a clause expressly providing for its cancellation in case of prohibition of export, blockade, or hostilities preventing shipment:—*Held* (VAUGHAN WILLIAMS, L.J., dissenting), that the contract was subject to the implied condition that the steamer should at the specified time be in existence as a cargo-carrying vessel. The principle of *Taylor v. Caldwell* (82 L. J. Q.B. 164; 3 B.

& S. 826) applied. *Nickoll & Knight v. Ashton, Eldridge & Co.*, 70 L. J. K.B. 600; [1901] 2 K.B. 126; 84 L. T. 804; 49 W. R. 513; 6 Com. Cas. 150; 9 Asp. M.C. 209—C.A.

Conditional Cesser of Liability—Right to Recover.—The appellant offered to supply a steamship and refreshment for passengers desirous of seeing the Naval Review on the occasion of the King's Coronation. The respondents accepted the terms subject to the stipulation that there should be no liability attaching to them if the review should be cancelled before any expense was incurred by the caterer. A cheque was sent in part payment by the respondents, but on the announcement of the King's illness and the consequent postponement of the Coronation, the respondents stopped the cheque. The appellant brought an action on the cheque:—*Held*, that the appellant was not entitled to recover on the cheque and that the respondents were only liable for the actual expenses incurred by the appellant. *Elliott v. Crutchley*, 75 L. J. K.B. 147; [1906] A.C. 7; 94 L. T. 5; 54 W. R. 349; 22 T. L. R. 83—H.L. (E.)

Failure of Crop.—The defendants, who were market gardeners, entered into a contract to supply the plaintiffs with a quantity of gherkins. In reply to the plaintiffs the defendants wrote, "We could offer you in green probably about fifty hogsheads, and say 150 hogsheads large at the same price as last year." The defendants subsequently wrote, "We accept your offer . . . for fifty hogsheads crooked green at 30s. per hogshead; 150 hogsheads large green at 21s. per hogshead; 150 to 200 hogsheads second flower at 27s. as required; terms as usual." Owing to the weather, and through no fault or negligence of the defendants, the crop of gherkins was a failure. An action having been brought for damages for breach of contract,—*Held*, that the contract was for a specific quantity of a particular kind of goods, and did not refer to gherkins only grown on the defendants' land, and that the defendants were liable for the failure to deliver. *Hayward v. Daniel*, 91 L. T. 319—Bigham, J. *And see* col. 514.

8. FRAUDULENT REPRESENTATION.

Clause Disclaiming Responsibility for Representations Made—Questions for the Jury.—A clause in the contract by which the employer disclaims responsibility for the accuracy of the statements and information with which he supplies the contractor, and as to which the contractor is to satisfy himself, does not confer exemption on the employer for statements fraudulently or recklessly made by the employer or his agent. Whatever be the form of the contract, the party who makes an allegation of fraud is entitled to have the question submitted to a jury. *Pearson v. Dublin Corporation*, 77 L. J. P.C. 1; [1907] A.C. 351—H.L. (Ir.) *And see* FRAUD AND MISREPRESENTATION, col. 873.

9. MISTAKE.

Policy of Assurance—Common Mistake—Death of Assured before Completion.—A contract for the sale of a life policy will be set aside by the

Court where it was entered into on the basis of a common belief by the vendor and purchaser that the assured was alive, though he was in fact dead. Such a contract may be rescinded even after it has been completed by assignment of the policy to the purchaser. *Scott v. Coulson*, 72 L. J. Ch. 600; [1903] 2 Ch. 249; 88 L. T. 653—C.A. Affirming, 51 W. R. 394—Kekewich, J.

Tender—Right to Withdraw Tender.]—The plaintiffs advertised for tenders for the supply of coal for one year. The defendants tendered in the form prescribed by the Local Government Board, and their tender was duly accepted, and the defendants were notified thereof. Some days later the defendants purported to withdraw their tender on the ground that they had made a mistake, and they refused to supply the coals at the price stated in the tender. The plaintiffs thereupon bought elsewhere and claimed the extra cost from the defendants:—*Held*, that the defendants were liable, as by the tender and acceptance there was a complete contract, there being no evidence of *mala fides* on the part of the plaintiffs. *Islington Union v. Brentnall*, 71 J. P. 407; 5 L. G. R. 1219—Grantham, J.

Memorandum of Contract—Auctioneer's Authority to Sign—Error in Date of Contract—Errors in Conditions of Sale—Bidding for Different Property.]—The appellant, on November 18, attended an auction with the intention of bidding for a property forming lot 2, but, entirely by his own blunder, bid for lot 1, which was knocked down to him. On discovering his mistake he refused to sign the contract, which the auctioneer thereupon signed for him. The sale of lot 1 had been originally fixed for October 17, and the particulars and conditions of sale and contract had been prepared for that date. The date October 17 had been corrected to November 18 on the particulars, but not in the conditions or contract:—*Held*, that the auctioneer had no authority to sign the contract for sale bearing the wrong date, and that there was therefore no sufficient memorandum in writing of the contract made on November 18 to satisfy the Statute of Frauds. *Quære*, whether under the circumstances there was any *consensus ad idem* between the parties. *Van Praagh v. Everidge*, 72 L. J. Ch. 260; [1903] 1 Ch. 434; 88 L. T. 249; 51 W. R. 357—C.A.

Auditor Unaware of Finality of Audit—Charges of Fraud.]—The appellant advanced 15,000*l.* to the respondent, to be used in the business of the respondent for five years. In return for the advance the appellant was to receive interest and 37½ per cent. of the profits of the respondent's business. The contract stipulated that there should be an annual audit of the respondent's business by the firm of M. & Co., accountants, and that their certificate as to the profits should be binding on both parties. For four years the respondent's books were audited by G., a member of the firm of M. & Co. Subsequently the appellant raised this action against the respondent for a judicial account on the ground that the audits had not been in terms of the agreement in respect that the auditor did not know that his estimate of the profits was to be binding on the appellant

and respondent. G. swore in his evidence that he did not know of this agreement, and that if he had he would have made out the account in a somewhat different form:—*Held*, that there must be a new account taken, the auditor being unaware that his audit was to be final between the parties. *Teacher v. Calder*, [1899] A. C. 451—H.L. (Sc.). *And see* MISTAKE.

10. NOVATION.

Direction to Debtor to Pay to Third Person—Consideration—Release of Lien—Implied Request.]—One Kramrisch sold rubber to the defendants. Kramrisch had rubber in the hands of the plaintiffs, who had advanced money to him under an arrangement by which they had a lien upon the rubber. At the request of Kramrisch, the plaintiffs delivered part of the rubber to the defendants, and Kramrisch, in accordance with his arrangement with the plaintiffs, directed the defendants to remit the price to the plaintiffs, and requested the defendants to sign and forward to the plaintiffs a document undertaking to do so. The defendants signed and forwarded this document. There had been previous similar transactions between Kramrisch and the defendants:—*Held*, that there could be inferred from the circumstances a request by the defendants, through Kramrisch as their agent, to the plaintiffs to release their lien upon the rubber, and that this request was a consideration which would support the promise of the plaintiffs to pay the price to the plaintiffs. *Kleinwort v. Reddaway*, 9 Com. Cas. 292—C.A.

11. ILLEGALITY.

Prohibitory Statute.]—Where by a statute a penalty is imposed—not solely for protection of the revenue, but solely or partly for that of the public—for doing or omitting any act, such act or omission is impliedly prohibited by the statute, and is illegal. *Victorian Daylesford Syndicate v. Dott*, 74 L. J. Ch. 673; [1905] 2 Ch. 624; 93 L. T. 627; 54 W. R. 231; 21 T. L. R. 742—Buckley, J. *S.P. Bonnard v. Dott*, 75 L. J. Ch. 446; [1906] 1 Ch. 740; 94 L. T. 656; 22 T. L. R. 399—C.A.

Statutory Confirmation—Vagueness—Remoteness.]—Where an agreement between parties is confirmed by Act of Parliament, every clause in it has statutory validity, and no objection can be taken to any provision in it on the ground that it is void for remoteness or uncertainty. *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, 70 L. J. Ch. 468; [1901] 2 Ch. 37; 84 L. T. 436; 49 W. R. 418—C.A.

Administration of Justice—Contract Tending to Affect—Agreement in Probate Action that Costs of all Parties should come out of Estate—Infant Beneficiary—Refusal of Court to Sanction Agreement—Liability of other Parties.]—During the pendency of a probate action in which two wills were propounded, one by the plaintiff, who claimed as residuary legatee thereunder, and the other, earlier in date, by the defendant, who had been appointed therein executor and trustee for an infant beneficiary, an agreement was made between the plaintiff of

the one part, and the defendant, the infant beneficiary, and the latter's guardian *ad litem*, of the other part, providing that the costs of all parties should be paid out of the estate whichever of the two wills was upheld and whether the Court so ordered or not. The Court pronounced in favour of the earlier will, but refused to sanction on behalf of the infant beneficiary the agreement as to costs. The plaintiff now claimed to recover by virtue of the agreement the amount of his costs in the probate action from the defendant:—*Held*, that the agreement was not void as tending to affect the administration of justice, and that, although the plaintiff's costs could not be paid out of the estate inasmuch as the infant beneficiary was not bound by the agreement, the defendant was not thereby freed from his obligation under it, and that consequently he was liable to the plaintiff. *Prince v. Haworth*, 75 L. J. K.B. 92; [1905] 2 K.B. 768; 92 L. T. 778; 54 W. R. 249; 21 T. L. R. 402—Lawrance, J.

Bail—Agreement for Indemnifying—Public Policy.—An agreement to indemnify against liability a person who has entered into recognisances for the appearance of a defendant in a criminal matter is invalid as being contrary to public policy, although the indemnity be given by a person other than the defendant. *Consolidated Exploration and Finance Co. v. Musgrave*, 69 L. J. Ch. 11; [1900] 1 Ch. 37; 81 L. T. 747; 48 W. R. 298; 64 J. P. 89—North, J.

Champerty—Licence for Beerhouse—Brewers' Support in Obtaining—Tied House—Payment of Costs.—A contract between the tenant of a beerhouse and a firm of brewers—one of whom was a magistrate—that, in consideration of their paying all the costs of his application to the licensing magistrates for a licence (which involved that the brewers should give the support of their name and business reputation to such application), he would tie the beer trade of the premises when licensed to them and their successors in business, for a specified term of years, was held not to be equivalent to the purchase of a recommendation, and therefore not illegal and void as being contrary to public policy, nor as savouring of champerty. *Savill v. Langman*, 79 L. T. 44—C.A.

Maintenance—Absolute Assignment of Debt in Writing—Trust in Favour of Assignor—Assignee Taking no Beneficial Interest—Purpose of Assignee to Make Debtor Bankrupt.—The plaintiff, being satisfied that it was for the best interests of a company, of which he was a shareholder and director, that the defendant, a co-director of the company, should be removed from the board, obtained from creditors of the defendant an absolute assignment in writing of the debts due to them from the defendant, with the object of making the defendant a bankrupt, and so removing him from the board. The assignment was made in consideration of a covenant by the plaintiff that in case he should be able to recover the amount of the debts he would immediately pay over to the assignors the respective amounts, or so much thereof as he might be able to recover, after payment of all costs necessarily incurred by him:—*Held*, that as the plaintiff was simply asserting a legal right consequential upon the possession

of property which had been validly assigned to him, his action was not open to the objection of maintenance, or otherwise such that upon the grounds of public policy the Court ought to refuse its assistance. *Fitzroy v. Cave*, 74 L. J. K.B. 829; [1905] 2 K.B. 364; 93 L. T. 499; 54 W. R. 17; 21 T. L. R. 612—C.A.

Libellous Pamphlet—Contract to Publish—Right to Recover Money Back.—The plaintiff, against whom a verdict and judgment were pronounced in an action for breach of promise of marriage, prepared a manuscript dealing with the action which contained certain defamatory statements. The plaintiff entered into a contract with the defendants through their agent whereby the defendants agreed to print a certain number of copies of the manuscript, and the plaintiff paid them 50% on account, and gave them an indemnity against any damages which they might be liable to owing to the printing of the manuscript. The plaintiff and the defendants' agent knew, but the defendants did not know, that the manuscript contained libellous matter. The defendants had the manuscript set up in type and several proofs were struck, but they refused to perform the contract upon the ground that the manuscript contained libellous matter. The plaintiff claimed the return of the 50%, and the defendants counterclaimed for the cost of the printing already done:—*Held*, that the contract, being one to print and publish libellous matter, was illegal, and as it had been partly performed the plaintiff was not entitled to recover back the money paid under it; and that, as the knowledge of the defendants' agent must be taken to be the knowledge of the defendants, the latter were not entitled to recover on the counterclaim. *Apthorp v. Neville*, 23 T. L. R. 575—Pickford, J.

Marriage Brokeage—Agreement for Reward to Bring about a Marriage—Recovery by Party to Contract of Money Paid Thereunder.—The plaintiff entered into an agreement with the defendant by which the defendant undertook to assist the plaintiff to get married, and in pursuance of the agreement the plaintiff paid to the defendant 52% and 47% to be returned in nine months should no marriage or engagement take place within that period. The defendant introduced the plaintiff to, and put her in communication with, a number of gentlemen with a view to marriage, but no marriage or engagement had resulted when, before the expiration of the nine months, the plaintiff repudiated the contract, and brought an action for the return of the money paid:—*Held*, that the agreement was an illegal marriage brokeage contract, and that the plaintiff was entitled to recover the money she had paid to the defendant in pursuance thereof. *Hermann v. Charlesworth*, 74 L. J. K.B. 620; [1905] 2 K.B. 123; 93 L. T. 284; 54 W. R. 22; 21 T. L. R. 368—C.A.

Immoral Consideration—Past Cohabitation—Continuance of Cohabitation.—The testator, who had cohabited with a lady for about two years, executed a deed whereby, after reciting that he was desirous of making provision by way of annuity for the lady, he covenanted to pay her an annuity during her life, subject to a proviso that, if he should cease to be on terms of intimacy with her and after such determination

she should molest or annoy him by any act or proceeding whatever, the annuity should be absolutely forfeited and cease to be payable. The intimacy continued almost until the testator's death two years afterwards:—*Held*, that the deed was valid, as it was given in consideration of past cohabitation, the mere contemplation of future cohabitation not being enough to invalidate it. *Wootton Isaacson, In re; Sanders v. Smiles*, 21 T. L. R. 89—Kekewich, J.

Promise of Marriage—Promise to Marry when Divorce Granted—Immoral Relations Pending Divorce Suit—Decree of Divorce Granted—Concealment of Facts.]—The plaintiff instituted proceedings against her husband for divorce. Pending the hearing, she alleged that the defendant promised to marry her if she obtained a decree, and thereupon immoral relations took place between them. A decree *nisi* was afterwards granted, the plaintiff concealing the fact of these immoral relations, and the decree was made absolute. The plaintiff then brought an action against the defendant to recover damages for breach of the promise to marry her:—*Held*, that, assuming the promise to have been made, as the plaintiff only obtained a divorce by deceiving the Divorce Court, and as the divorce was necessary for the performance of the promise to marry, the action was founded on deceit and immorality, and it was against public policy to allow it to be maintained. *Prevost v. Wood*, 21 T. L. R. 684—Darling, J.

Recovery of Money Paid in Pursuance of Illegal Contract—Innocent Misstatement of Law—Illegal Policy of Life Insurance—Recovery of Premiums Paid.]—The rule of law that, where one of two parties to an illegal contract pays money to the other in pursuance thereof, he cannot recover it back, is not displaced by the fact that the contract was entered into in consequence of an innocent misrepresentation of the law made by the other party, in the absence of proof of fraud, duress, oppression, or such a difference in the position of the parties as would create a fiduciary relationship between them. *Harse v. Pearl Life Assurance Co.*, 73 L. J. K.B. 373; [1904] 1 K.B. 558; 90 L. T. 245; 52 W. R. 457; 20 T. L. R. 264—C.A.

The plaintiff effected with the defendants a policy of insurance upon the life of his mother in consequence of a statement made by the agent of the defendants without fraud that the policy was a good one. In an action to recover back the premiums paid under the policy, —*Held*, that, assuming that the policy was illegal and void by reason of the plaintiff having no insurable interest in the life insured, the innocent misstatement of law by the agent did not displace the ordinary rule of law, and that the plaintiff was not entitled to recover back the premiums paid. *Ib.*

Restraint of Trade—Reasonableness—Protection of Covenantee—Master and Servant—Injunction.]—Where an agreement restraining a person from carrying on business is entered into with another person engaged in a similar business for the purpose of protecting him from rivalry in that business, and it is no wider than is reasonably necessary for his protection in that business, it is not invalid as being injurious to the public interests unless some specific ground

can be clearly established for so regarding it. The principles laid down in *Nordenfelt v. Maxim-Nordenfelt Gun and Ammunition Co.* (63 L. J. Ch. 908; [1894] A.C. 535) and *Dubowski v. Goldstein* (65 L. J. Q.B. 397; [1896] 1 Q.B. 478) applied. *Ward v. Byrne* (9 L. J. Ex. 14; 5 M. & W. 548) distinguished. *Underwood v. Barker*, 68 L. J. Ch. 201; [1899] 1 Ch. 300; 80 L. T. 306; 47 W. R. 347—C.A.

Per VAUGHAN WILLIAMS, L.J.—The rule of law, that all covenants in restraint of trade, or binding an individual not to earn his living in the best way he can, are *prima facie* contrary to public policy and void, has not been rescinded by recent decisions; and, in considering the reasonableness of such a covenant for the protection of the business of the covenantee, the question must be taken into account whether the particular covenant is such as to be calculated to injure the public, the interest of the public in maintaining fair dealing between man and man being not sufficient to counterbalance the disadvantage to the public in enforcing a covenant which the covenantor ought not to have been required to enter into. *Ib.*

Per VAUGHAN WILLIAMS, L.J.—An employer ought not to require from a person seeking employment a covenant that he will not after leaving such employment carry on, or enter into the service of those carrying on, the business in which his life has been previously passed, although the restriction is limited as to time. *Ib.*

The defendant, on becoming clerk and foreman at a weekly wage to the plaintiffs, who were hay and straw merchants, agreed that he would not within twelve months next after his leaving, or being dismissed, carry on the business of hay and straw merchant, or enter into the service of, or act as agent for, any person or persons carrying on the business of hay and straw merchants, or trading in hay and straw, in the United Kingdom, or in France, Belgium, Holland, or Canada. The plaintiffs did a large business in buying and selling hay and straw from all parts of the countries named in the agreement:—*Held (dissentiente VAUGHAN WILLIAMS, L.J.)*, that the restraint was not unreasonable, and an injunction could be granted in the terms of the agreement to prevent the defendant from acting contrary to it. *Ib.*

— — — So long as a covenant in restraint of trade is not more than is necessary for the protection of the covenantee the covenant is not unreasonable and must be enforced. *Dottridge v. Crook*, 23 T. L. R. 644—Neville, J.

Observations upon the law as to such covenants, and their enforcement. *Ib.*

— — — **Question of Law for Judge—Covenant without Limit of Space—Cider Merchant.]**—The question whether a contract in restraint of trade is reasonable is a question of law for the Judge, and is not a question of fact for the jury. In deciding the question all the surrounding circumstances ought to be taken into consideration, and are admissible in evidence; and, if an issue of fact arises as to the circumstances, the

jury is the proper tribunal to decide that issue. *Dowden & Pook, Lam. v. Pook*, 73 L. J. K.B. 38; [1904] 1 K.B. 45; 89 L. T. 688; 52 W. R. 97; 20 T. L. R. 39—C.A.

A limited company carrying on business as cider merchants, aerated-water manufacturers, and cordial compounders, and having about 1,200 customers chiefly in the south of England, with a small number over the rest of England, Scotland, Ireland, and abroad, employed a manager for the cider department, who, by agreement under seal, covenanted with the company that he would not, either solely or jointly with or as manager or agent for any other person or persons, directly or indirectly carry on or be engaged or concerned in the business of a cider merchant, manufacturing chemist, or cordial compounder for the term of five years after leaving the service of the company:—*Held*, that upon its true construction the covenant extended to every part of the world, and that it was wider than was necessary for the protection of the business of the company, and therefore unreasonable, and void as being in restraint of trade. *Ib.*

— **Restricted Area—Unrestricted Time—Reasonableness.**—Agreement by a servant not to work for anybody carrying on a business similar to his employer's within a radius of twenty-five miles from the employer's works, — *Held*, good, in the circumstances of the case. *Haynes v. Doman*, 68 L. J. Ch. 419; [1899] 2 Ch. 13; 80 L. T. 569—C.A.

A provision in an agreement in restraint of trade that the servant shall not divulge his master's secrets, does not make unreasonable or unnecessary a subsequent stipulation that he shall not during his life serve in a similar business within a limited area. *Ib.*

— **Evidence of Unreasonableness.**—Evidence by persons engaged in the business in question that the restriction is unreasonable will not be admitted. *Ib.*

— **Severable Contract.**—A covenant in restraint of trade will not be held to be wholly void merely because its language is wide enough to cover possible cases which would be unreasonable, but which were not within the contemplation of the parties. Where the restriction is so worded as to be divisible, the restriction will be held to be good so far as it is free from objections, and bad only as to those parts which are objectionable. *Ib.*

— **Master and Servant—Onus.**—Where a man of sufficient age for business capacity knowingly enters into a contract of service which is only in partial restraint of trade, the onus lies on him to prove that it goes beyond what was reasonably necessary. *Ib.*

— **Hay and Corn Dealers—Limit of Space—No Limit of Time—Reasonableness—Assignment of Benefit of Contract.**—The defendant was in the employ of the plaintiffs' predecessors in business, who were hay and corn dealers, as salesman and manager of one of their branches, at a salary of 24s. per week, with the use of four living rooms over the shop. In consideration of a small increase by way of commission in his

salary, he undertook in the event of ceasing to represent his employers "not to enter into business for myself, or with others, or with any other firm within a radius of two miles from the shop in which I have been engaged." The agreement was written out on the firm's business paper, which stated the nature of the business:—*Held*, that the agreement must be construed with reference to the scope of the business, and not in a wide sense so as to render it void; that although unlimited as to time, it was not in the circumstances unreasonable; and that the plaintiffs were entitled to an injunction restraining a breach. *Haynes v. Doman* (*supra*) followed. *Hood & Moore's Stores v. Jones*, 81 L. T. 169—Cozens-Hardy, J.

— **Limit of Space—"Eastern hemisphere"—Reasonableness—Public Policy.**—Where by an agreement by which the defendant was appointed manager of the plaintiffs' business he had contracted that, if he left the plaintiffs' service, he should not engage or be employed during the following five years in any business similar to that of the plaintiffs "within the limit of the Eastern Hemisphere":—*Held* (*dissentiente* COZENS-HARDY, L.J.), that the agreement, whether regarded as applying to the United Kingdom only or as extending throughout the whole world, was not so wide as to go beyond what was reasonably necessary for the protection of the plaintiffs in their business, having regard to the peculiar nature of that business, and to the position occupied by the defendant therein. *Lamson Pneumatic Tube Co. v. Phillips*, 91 L. T. 363—C.A.

— **Covenant by Publisher—Limit of Time and Space—Assignee of Business—Right to Sue on Covenant.**—The defendant and his partner, who were publishers and proprietors of a magazine, sold their business to a limited company, and agreed to become managing directors of the company for three years. The agreement further provided that the vendors would not during the three years, if they continued to be managing directors either solely or jointly, carry on or engage directly or indirectly in any other trade or business, or if they, or either of them, for any reason ceased to be managing directors or director, they or he would not, during the period of ten years from the date of their or his so ceasing, carry on or assist or take part, directly or indirectly, in the same or a similar business in the City of London or within twenty miles thereof. A receiver, who was appointed on behalf of the debenture-holders in the company, sold the business to the plaintiff, and informed the defendant that his services as managing director would no longer be required:—*Held*, that the covenant was not too wide; that the covenant was not put an end to by the receiver informing the defendant that his services would no longer be required; and that the covenant passed to the assignee upon the assignment of the goodwill of the business. *Welstead v. Hadley*, 21 T. L. R. 165—C.A.

— **Covenant Unlimited in Area but Limited in Time—Manufacturers of Brewing Materials—Manager to Firm of Manufacturers—Reasonableness.**—The defendant was employed as manager by the plaintiffs, who were the manufacturers of certain products used in brewing, and he covenanted with them that he would not, for

a period of five years after leaving their employment, enter or be in the employment of any house carrying on a similar business, or carry on or be engaged in any such business, excepting any business not competing or calculated to compete with the plaintiffs' business. The plaintiffs had a large business in England, and were extending their business to other countries in different parts of the world. Within five years after leaving the plaintiffs' employment the defendant entered into the employment of a person carrying on a similar business in England competing with the plaintiffs:—*Held*, that the covenant was not unreasonable as being too wide, and was therefore valid. *White, Tompkins & Courage v. Wilson*, 23 T. L. R. 469—Swinfen Eady, J.

— **Agent Limited to Particular Business—Reasonableness.**—An agent of an insurance society, who was employed as agent in a particular district, by his contract of service agreed that he would not "interfere directly or indirectly with the business" after resigning or being dismissed from his agency:—*Held*, that, upon the true construction of the contract, the restraint was limited to the business of the society in the district in which the agent had acted for them, and was therefore reasonable and valid. *Barr v. Craven*, 89 L. T. 574; 20 T. L. R. 51—C.A.

— **Clerk and Traveller—Infant—Restrictive Agreement—Reasonableness as to Time and Space—Indivisible Areas.**—In 1898 the defendant, being then an infant, entered the employment of the plaintiffs as clerk and afterwards traveller. He executed an agreement, which provided that he would not for the space of fourteen years after the termination of his employment, at any place within a radius of thirty miles from either of two named centres carry on the business of a builders' merchant or manufacturer of or dealer in building materials which, at any time during his employment, should be manufactured by, or dealt in, or sold on commission by the plaintiffs. The two named centres being about thirty miles apart, the circles overlapped. The defendant attained the age of twenty-one years in 1898, and he remained in the employment of the plaintiffs until 1903. He afterwards traded as a builders' merchant at places within thirty miles of the two named centres:—*Held* (without deciding the question whether the agreement was for the benefit of the defendant when an infant and therefore binding on him), that it involved too wide an area, the language used not being capable of being treated as constituting two separate areas, but only one; and that it was not possible, therefore, to treat the area as severable. *Hooper v. Willis*, 94 L. T. 624; 22 T. L. R. 451—C.A.

— **Doctor—Agreement not to Practise in the District—Reasonableness.**—By agreement between a doctor of medicine and a company who were the employers of about six hundred workmen in B., a village in a remote district, the doctor became bound to give professional attendance to the workmen and their families at a fixed salary payable by the company, he being at liberty to hold local appointments and to practise in the district, but "only during the

tenure of his appointment as medical officer" to the employers. The agreement between the company and the doctor was terminable upon one month's notice on either side, and in the event of either party giving notice it was agreed that the doctor should "then discontinue practice in the district":—*Held* (LORD YOUNG dissenting), that the restriction contained in the contract was reasonable, and that the pursuers, who had duly determined the agreement by notice, had a sufficient interest to enforce the restriction. *Ballachulish Slate Quarries Co. v. Grant*, 5 F. 1105—Ct. of Sess.

— **Music-hall Artist—Covenant not to Sing at any Town within Twenty Miles of Manchester—Restraint to Continue for Six Months after Close of Engagement—Reasonable Restraint.**—By an agreement in writing the defendant agreed to appear at the plaintiffs' theatre at Manchester at a salary of 60*l.* per week. The agreement contained the following clause: "Prior to the commencement of this engagement and during its continuance, or within six months afterwards no artist shall perform at any place of entertainment within twenty miles of Manchester . . . without the written consent of the director. . . ." The defendant having been billed to appear at a theatre at Salford, in violation of this agreement, and after leave to appear there had been refused her, the plaintiffs brought this action claiming an injunction:—*Held*, on the evidence, that the restraint was reasonable, and therefore that the injunction claimed should be granted. *Nordenfellt v. Maxim-Nordenfellt Guns and Ammunition Co.* (63 L. J. Ch. 908; [1894] A.C. 535) followed. *Tivoli, Manchester, Lim. v. Colley*, 52 W. R. 632; 20 T. L. R. 437—Walton, J.

— **Teacher—Assignment of Contract.**—In October, 1901, A, proprietor of schools in Liverpool, Glasgow, Edinburgh, and Dundee, which he named the "Berlitz School of Languages," by a written contract engaged D to teach French in one of his schools, D agreeing that for two years after leaving A's employment he would not teach French "in any town in which he shall have been employed by the employer or in any town where there is a branch of the Berlitz School of Languages and within a ten-mile radius of such towns." In January, 1902, A sold his schools to a company, the "Berlitz School of Languages, Limited," and assigned to it his rights under the contract with D. In September, 1902, D, who since June, 1902, had been teaching in the Berlitz School in Dundee, gave up his employment. He subsequently taught French in Dundee. The Berlitz Company and A applied for an interdict to restrain D from teaching French in Dundee, or in any other town in which there was a branch of the Berlitz School of Languages, maintaining that, although the contract of service was not assignable, the two years' restriction on D was an independent obligation which had been validly assigned:—*Held*, that as the Berlitz School in Dundee had ceased to belong to A, the restriction was no longer applicable. Whether the restriction was not too wide in its scope to be enforceable, *quære*. *Elves v. Croft* (19 L. J. C.P. 385; 10 C. B. 241) and *Jacoby v. Whitmore* (49 L. T. 335) distinguished. *Berlitz School of Languages v. Duchêne*, 6 F. 181—Ct. of Sess.

— **Tailor—Business in Two Places—Reasonableness.**—By an agreement in writing the defendant agreed to serve the plaintiff, who was a tailor, at Weybridge, as a cutter, and he further agreed “not to enter into any business arrangement in competition with or that would in any way interfere with the business carried on by” the plaintiff “at his establishments in Weybridge or the City of London, or at any of his addresses of the future”:—*Held*, that the agreement was unreasonable as being too wide. *Beetham v. Fraser*, 21 T. L. R. 8—D.

— **Traveller—Agreement not to “affect the trade or business”—Setting up Rival Business.**—The defendant was engaged as traveller to the plaintiff, and he agreed that he would not “on the termination of this engagement or within two years thereafter, without the consent in writing of” the plaintiff “either in his own name or in the name or names of any other person or persons, directly or indirectly, interfere with, prejudice, or in any manner affect the trade or business or reputation of the said” plaintiff, and would not solicit the latter’s customers:—*Held*, that the agreement did not prevent the defendant from setting up a rival business provided that he did not solicit the plaintiff’s customers. *Reeve v. Marsh*, 23 T. L. R. 24—Parker, J.

— **Employment by Companies Associated in Carrying on Business—Provision for Protection of Associated Businesses—Validity—Reasonableness.**—Several companies were associated together for the purpose of carrying on similar businesses in various parts of the United Kingdom, and they entered into an agreement by their agent with a traveller whereby he agreed to serve any of the companies as appointed, and also agreed not to carry on or enter the employ of any one carrying on a similar business within the United Kingdom during a limited time after his leaving their employ. The traveller entered into the service of one of the associated companies whose business extended over a small area only. On leaving their employment he entered into the employment of other persons carrying on a similar business. On an application to restrain him from acting in breach of this agreement,—*Held*, that the contract must be construed as made between the traveller and the particular company in whose service he was; that the restraint was wider than was necessary for the protection of that company and could not be enforced. *Leatham v. Johnstone-White*, 76 L. J. Ch. 304; [1907] 1 Ch. 322; 96 L. T. 348; 14 Manson, 162; 23 T. L. R. 254—C.A.

Per FARWELL, L.J.—An employer carrying on more than one business who engages an employee for one business cannot by covenant restrain the employee after leaving his service from competing with him in any other than the business in which the employee has been actually employed. *Ib.*

— **Purchaser not to Sell under a Certain Price.**—An agreement made by a trader with a purchaser of his commodities not to sell them below certain prices set out in the agreement, and that if he sells them again to the trade he will procure a similar signed agreement from every retailer that he supplies, is valid, and

cannot be impeached as being in restraint of trade or against public policy. *Elliman v. Carrington*, 70 L. J. Ch. 577; [1901] 2 Ch. 275; 84 L. T. 858; 49 W. R. 532—Kekewich, J.

Covenant not “to carry on or be concerned or interested in” a Similar Business—Breach of Covenant—Creditor of such Business.—The mere fact of being a creditor of a business does not make a man “concerned or interested” therein within the meaning of a covenant of which such business is alleged to be an infraction. *Cory v. Harrison*, 75 L. J. Ch. 714; [1906] A.C. 274; 93 L. T. 818—H.L. (E.)

The respondent sold his home business to the appellants, with whom he covenanted that he would not “solely or jointly with any other person either directly or indirectly carry on or be concerned or interested in the coal trade in any part of Great Britain or the Isle of Man.” Subsequently he sold his export business to a company, and took the purchase-money in shares. The company then sold this business to a firm on the terms of payment by instalments over a number of years. The firm began to carry on a home as well as an export business. In an action by the appellants against the respondent for breach of covenant,—*Held*, that the respondent was not “concerned or interested in” the firm’s home business in the sense intended by the covenant. *Ib.*

— **“Directly or indirectly engaged, concerned, or interested in” a Business—Servant Entering Employment of Rival Trader.**—Where a person, upon entering the employment of a trader as a servant in the business, covenants that he will not within a certain time after leaving the employment directly or indirectly be engaged, concerned, or interested in or carry on a similar trade or business within a certain distance, it is a breach of that covenant to enter the employment of a trader carrying on a similar business as a servant in that business. *Cade v. Calfe*, 22 T. L. R. 243—Kekewich, J.

— **“Interested in” Business—Salaried Service.**—A covenant not to “set up, or become interested in, either directly or indirectly,” a certain class of business, but not in terms restraining the covenantor from being “concerned” or “engaged” in any such business, is not broken by the covenantor entering a business of the kind merely as a shop assistant at a fixed weekly salary, but without any other interest of any kind whatever in the success or failure of the business. *Smith v. Hancock* (63 L. J. Ch. 477; [1894] 2 Ch. 377) considered and applied. *Gophar Diamond Co. v. Wood*, 71 L. J. Ch. 550; [1902] 1 Ch. 950; 86 L. T. 801; 50 W. R. 603—Swinfen Eady, J.

— **Similar or any other Business—Continuance of Employment—Breach of Contract—Reasonable Injunction.**—A covenant made by a servant on entering into an employment that he will not, “during the engagement,” carry on a business similar to his employer’s, “or any other business whatever,” is legal, although the Court will not enforce it by injunction. But where the engagement is still subsisting and the agreement provides for service for a term of five years, to be followed by an additional term

of five years at the option of the master, and only three years of the first term have expired, and the servant has agreed to devote the whole of his time to the master's business during the engagement, the Court will grant an injunction to restrain the servant from breaking the covenant till the trial of the action, limited to the period during the engagement and without the words "or any other business whatever," on the undertaking of the employer not to extend the service to another term of five years. *Robinson v. Heuer*, 67 L. J. Ch. 644; [1898] 2 Ch. 451; 79 L. T. 281; 47 W. R. 34—C.A.

— **"Neighbourhood"—Injunction.**—By an agreement dated September 18, 1893, Martin sold his retail milk business and goodwill to the defendant Stride, and covenanted "not to employ any one or retail milk on his own account in the neighbourhood of Southampton or Norham." On a breach of this covenant the County Court Judge granted an injunction in the terms of the covenant. The defendant appealed on the grounds that the covenant was wider than was necessary to protect the plaintiff, and therefore void, and that the injunction was bad, not being sufficiently definite in shewing exactly where the defendant could not trade:—*Held*, that the covenant was not too wide to protect the plaintiff, and that the injunction following the terms of the covenant was not too indefinite, as the parties must know its meaning, and that the word "neighbourhood" meant immediate neighbourhood. *Stride v. Martin*, 77 L. T. 600—D.

— **Disuse of Machines.**—The plaintiffs in November, 1900, leased to the defendants, a firm of boot manufacturers, certain machines called the Consolidated Lasting Machines for a term of twenty years unless sooner determined by the lessors. This agreement for the hire of the machinery contained a condition that the lessee should use the machinery to its full capacity so far as the number and kind of boots and shoes made in the factory would permit. There was a provision that a sum of 3*d.* for each 1,000 revolutions of the main shaft of the Consolidated Lasting Machine should be paid by the defendants. The defendants after using this machinery for three years refused to use it any more, giving as their reason that it could not be used by them so as to enable them to compete with any commercial success with rival firms, and now used other machinery in its place. On an action for damages for breach of contract,—*Held*, the defendants might have been foolish in entering into such a contract, but it could not be said it was a contract contrary to public policy. Upon the construction of the contract the machines could not be said to be worked to their full capacity unless they were worked continuously during working hours. It was immaterial whether there was now a better machine for the same purpose. The plaintiffs' machines, on the evidence, were quite satisfactory at least for some of the work in the defendants' factory, and the defendants were bound to use them for all work which they were capable of doing without regard to the fact that another machine could do it better and cheaper. The plaintiffs to be entitled to an enquiry as to damages. *British United Shoe Machine Co. v. Somervell*, 95 L. T. 711—Joyce, J.

12. AVOIDANCE OF.

Undue Pressure—Deed—Inequality in Position of Parties—Validity of Deed.—The plaintiff was engaged by the defendants as manager of a music-hall, of which they were directors. He was responsible for the working accounts, and at a meeting of the directors was called upon to explain certain items in them as to which it was suggested that irregularities had occurred. He was unable to give an explanation satisfactory to the defendants, and thereupon an arrangement was come to, which was embodied in a deed of release, that he should resign and accept a sum of money in respect of his claim for salary, and should execute the deed of release. Subsequent to the execution of the deed, the plaintiff brought an action against the defendants for a balance of salary alleged to be due to him. The jury found that he had been induced to enter into the agreement by undue pressure exercised upon him by the defendants:—*Held*, that, notwithstanding the finding of the jury, the plaintiff was bound by the arrangement embodied in the deed of release, and was not entitled to maintain the action. *Barnes v. Richards*, 71 L. J. K.B. 341; 86 L. T. 231; 50 W. R. 363—Lord Alverstone, C.J. *And see* col. 875.

Avoidance of Contract—Persons Interested.—*See* CORPORATION.

13. CONSTRUCTION.

Computation of Time—"Month."—The primary meaning of the word "month" is "lunar month," as well as in mercantile or commercial documents as in ordinary contracts. *Bruner v. Moore*, 73 L. J. Ch. 377; [1904] 1 Ch. 305; 89 L. T. 738; 52 W. R. 295; 20 T. L. R. 125—Farwell, J.

Variation by Subsequent Conduct of Parties.—Although the subsequent acts of the parties to a contract are not admissible as evidence to vary its terms, they may prevent one of the parties from insisting upon a strict performance of the original agreement. *Hughes v. Metropolitan Railway* (46 L. J. C.P. 583; 2 App. Cas. 439) followed. *Ib.*

Communications by Post and Telegraph.—In the case of two citizens of the United States of America having no permanent residence in England, but residing temporarily at London hotels, and whose business engagements took them frequently to the Continent and apart from one another, it was held that the principle of *Henthorn v. Fraser* (61 L. J. Ch. 373; [1892] 2 Ch. 27) applied, and that they must have contemplated that the post and telegraph would be used as a means of communication. *Ib.*

Assignment—Benefit of Pending Contracts—Sale of Business—Indemnity.—An agreement for the purchase and sale of a newspaper business contained a term or condition that the vendors should sell and the purchasers should purchase "the full benefit of all pending contracts and engagements and of all other property to which the vendors are or may be entitled in connection with the said journal":—*Held*, that

the purchasers took the burden of pending contracts, and did not merely acquire an option to take the benefit of such contracts. *Bowater v. Mirror of Life Co.*, 50 W. R. 381—Kennedy, J.

Sale of Goods—Goods to be Delivered from Ship on to Purchaser's Wharf—Ship too large for Berth—Expenses of Dredging.—The appellants purchased from the respondents a cargo of oil in bulk to be shipped by a named steamer and to be delivered by the steamer into buyers' storage tanks, and the buyers undertook to receive the oil from the steamer through their pipe-lines at the discharging berth. By a contract between the buyers and a dock company the preferential use of a certain wharf in the Thames was granted to the buyers, and facilities for pipe-lines to the storage tanks were also given to them, and the dock company agreed to clear out a berth to enable a steamer 350 feet long to lie safely alongside, but the purchasers had no right as between themselves and the dock company to have vessels of greater length than 350 feet at the wharf. The sellers knew that the buyers' pipe-lines were at that wharf, and they contracted with reference to that place of discharge. The steamer named in the contract of sale was 471 feet long, and could not, therefore, lie at the berth. Dredging operations had accordingly to be undertaken, and then the steamer came alongside and delivered her cargo. The sellers did not know that the berth was too short for the steamer, and the buyers did not know the length of the steamer, though both parties might by enquiry have ascertained these facts:—*Held*, that on the true construction of the contract the buyers undertook to procure for the sellers the right to have the steamer at the berth for the purpose of discharging there, and that, if the dredging operations were necessary in order to get the consent of the dock company to the steamer coming alongside, the expenses of dredging must be borne by the buyers as being an expense necessary to enable them to perform their contract. *Shell Transport and Trading Co. and Consolidated Petroleum Co., In re*, 20 T. L. R. 517—Channell, J.

14. BREACH.

Breach by Party through his own Act or Default—Offer of Different Indemnity—Effect of.—By LORD WATSON.—The rule of law applicable to contracts is that neither of the parties can by his own act or default defeat the obligations which he has undertaken to fulfil, or escape those obligations by offering to the other party an indemnity which is not that which the other party contracted to accept. *The Blairmore*, 67 L. J. P.C. 96; [1898] A.C. 593; 79 L. T. 217; 8 Asp. M.C. 429—H.L. (Sc.)

Breach by One Party—Right to Treat Contract as at an End.—If there is a distinct refusal by one party to be bound by the terms of a contract in the future, the other party may treat the contract as at an end. Short of such refusal, the true principle is to ascertain whether the action of the party who is breaking the contract is such that the other party is entitled to conclude that the party breaking the contract no longer intends to be bound by its provisions. For this purpose the failure to

perform must go to the root of the contract, and it is going too far to hold that, however little remains to be performed, if it is to be gathered from the facts that one party does not intend to fulfil his obligations to perform that part, the other party is justified in treating the contract as wholly determined. The principles laid down by LORD BLACKBURN in *Mersey Steel and Iron Co. v. Naylor* (53 L. J. Q.B. 497, 501; 9 App. Cas. 434, 442, 443) followed and applied. *Rhymney Railway v. Brecon and Merthyr Tydfil Junction Railway*, 69 L. J. Ch. 813; 83 L. T. 111; 49 W. R. 116—C.A.

Repudiation—Measure of Damages—Agreement by Broker on Stock Exchange to Carry Over Stock—Closing of Client's Account without Authority.—Brokers on the London Stock Exchange made an agreement with their client to carry over stocks purchased for him for the current account to the next account, and in pursuance of the agreement made contracts with jobbers on the Exchange for that purpose; but before the next settlement they, without authority, closed the client's account by selling the stocks at prices lower than the carrying-over prices. The client gave notice to the brokers that he repudiated the loss on the sale of the stocks, and claimed the benefit of the carrying-over contracts. The prices of the stocks at the next settlement were higher than the carrying-over prices:—*Held*, in an action brought by the client after the settlement against the brokers for breach of their agreement, that the closing of the client's account was an anticipatory breach only of the agreement, and not a final breach thereof, and that, as the plaintiff had elected to treat the agreement as subsisting, the brokers could not claim to have the damages assessed with reference to the date of the closing of the account, but the client was entitled to recover the difference between the carrying-over prices of the stocks and their prices at the date fixed for the performance of the agreement—that is, at the next settlement. *Michael v. Hart*, 71 L. J. K.B. 265; [1902] 1 K. B. 482; 86 L. T. 474; 50 W. R. 308—C.A. Affirmed on the facts, 89 L. T. 422—H.L. (E.)

Quære, whether the client was entitled to recover the difference between the carrying-over prices and the highest prices reached between the closing of his account and the settlement. *Id.*

Justifying Repudiation—Question for Judge or Jury.—The question whether a breach of contract is of such a character as to justify the treatment of the contract as repudiated may, when it depends on the construction of a written contract, be decided by the Judge without the jury. *George D. Emery Co. v. Wells*, 75 L. J. P.C. 104; [1906] A.C. 515; 95 L. T. 589—P.C. And see FRAUD.

Guarantee—New Contract with Guarantor—Contractor made Agent of Guarantor—Wrongful Interference by Contractor—Damages—Liability of Guarantor.—The appellants guaranteed the execution of work for a municipal corporation, but the contractor made default and abandoned the work. Thereupon the appellants made a

new contract with the respondent. The corporation, through their engineer, were made the agents for the guarantors in respect of all matters relating to the respondent's execution of the contract. The corporation, on the plea that the respondent was not fulfilling the contract, took possession of the works. In an action by the respondent against the appellants the jury found that the corporation had improperly prevented the execution of the work and wrongfully taken possession:—*Held*, that the respondent was entitled to treat the contract as at an end, and to sue on a *quantum meruit* for work and labour done and materials supplied. *Lodder v. Slowey*, 73 L. J. P.C. 82; [1904] A.C. 442; 91 L. T. 211; 53 W. R. 181; 20 T. L. R. 597—P.C.

Construction—Work.]—Where one trader agrees with another that during a term of years he will not “erect or assist, or be in any way concerned or interested in the erection or use” of works, or “do anything of the like nature which may in any way interfere with or restrict the output, business, trade or profits” of the other, it is not a breach of such agreement to contract with a third person to take the whole output of his business, or to contract to purchase at the end of the term the whole business of that third person, although in the meantime additional works are to be constructed in connection therewith; nor is it a breach to lend money to that third person where such loan is independent of the contract with him. *Southland Frozen Meat and Produce Export Co. v. Nelson Brothers*, 67 L. J. P.C. 82; [1898] A.C. 442; 78 L. T. 363—P.C.

Procuring Breach—Tort—Cause of Action—Damage.]—A contract by B to buy special goods from A on the condition of not re-selling (except to certain persons) at less than a fixed minimum price is not such a contract as will render C, who induces or procures B to commit a breach of it, liable to an action of tort at the instance of A. Such inducement or procurement is not interference with a contractual relation within the meaning of *Quinn v. Leathem* (70 L. J. P.C. 76; [1901] A.C. 495). *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.*, 76 L. J. Ch. 194; 96 L. T. 218; 23 T. L. R. 189—Joyce, J.

In cases where interference with a contractual relation is actionable substantial damage must be proved. *Ib.*

Combination to Induce Breach of Contract—Legal Justification—Trade Union.]—It is unlawful, in the absence of legal justification, for persons to combine in procuring a breach of contract by others, and the absence of malice or sinister or indirect motive, and the desire, in discharge of a supposed duty, to benefit the persons induced to break their contracts, constitute no defence to an action for damages based on such procurement. *South Wales Miners' Federation v. Glamorgan Coal Co.*, 74 L. J. K.B. 525; [1905] A.C. 239; 92 L. T. 710; 53 W. R. 593; 21 T. L. R. 441—H.L. (E.)

Interference with Contractual Rights—Conspiracy—Trade—Cause of Action—Knowingly Inducing Commission of Actionable Wrong—Employment of Illegal Means—Justification.]—A person who, without sufficient justification,

interferes with the contractual relations of another, commits an actionable wrong. *Read v. Friendly Society of Operative Stonemasons*, 71 L. J. K.B. 994; [1902] 2 K.B. 732; 87 L. T. 493; 51 W. R. 115; 66 J. P. 822—C.A.

Justification, to be of any avail as a defence, must cover the whole conduct of the person who interferes—the means he used as well as the end he had in view. *Ib.*

Persuasion by an individual for the purpose of depriving another person of the benefit of a contract, if effectual in bringing about a breach of such contract to the damage of such person, gives a cause of action; and honest belief on the part of the persuader that he is acting for his own interests does not improve his position; still less so when he does not confine himself to persuasion but joins with others to enforce their common interests, by coercion, at the expense of such other person. *Ib.*

Persons who, acting in concert, knowingly and for their own ends induce the commission of an actionable wrong and employ illegal means to bring it about, commit an actionable wrong which is incapable of justification. *Ib.*

The mere procurement of a breach of contractual rights is not necessarily actionable. *Glamorgan Coal Co. v. South Wales Miners' Federation*, 71 L. J. K.B. 1001; [1903] 1 K.B. 118; 87 L. T. 232; 51 W. R. 59—Bigham, J.

To constitute a cause of action the procurement must be without sufficient justification. *Ib.*

A person who, without any motive of injuring a third person or profiting himself at the expense of a third person, honestly and *bona fide* in the interests of a person seeking advice advises him to break a contract with such third person, has sufficient justification. *Ib.*

The procurement of a breach of contract does not become actionable merely because it is the act of several in combination having sufficient justification. *Ib.*

Lumley v. Gye (22 L. J. Q.B. 463; 2 H. & B. 216), *Bowen v. Hall* (50 L. J. Q.B. 305; 6 Q.B. D. 333), *Mogul Steamship Co. v. McGregor, Gow & Co.* (58 L. J. Q.B. 465; 23 Q.B. D. 598; 61 L. J. Q.B. 295; [1892] A.C. 25), and *Quinn v. Leathem* (70 L. J. P.C. 76; [1901] A.C. 495) considered and discussed. *Ib.*

Conduct Inducing—Officials of Trade Union.]—*See TRADE UNION.*

Damages.]—*See DAMAGES.*

Maliciously Procuring Breach.]—*See MALICIOUS PROCEEDINGS.*

15. DISCHARGE OF.

Partnership—Personal Services—Effect of Death of One Partner.]—The plaintiffs entered into a contract with a firm of three partners who described themselves as a company, but the plain-

tiffs knew nothing about the composition of the company or of the firm. The contract was signed by one of the partners as "manager" for the company, and under it the plaintiffs were engaged to give two series of performances at different dates at a music-hall. One of the partners died, but no notice of his death was given to the plaintiffs, who subsequently carried out the first series of performances, and were paid for the same by the surviving partners. The plaintiffs afterwards received a notice that, owing to the death of the partner, the contract was cancelled:—*Held*, that as the contract had no relation to the personal conduct of the deceased partner, the liability of the three partners was not discharged, but could be enforced against the survivors. *Tasker v. Shepherd* (30 L. J. Ex. 207; 6 H. & N. 575) distinguished. *Phillips v. Hull Alhambra Palace Co.*, 70 L. J. K.B. 26; [1901] 1 K.B. 59; 83 L. T. 431; 49 W. R. 223—D.

16. OTHER MATTERS.

Assignment.—*See* ASSIGNMENT.

Book, to Edit.—*See* COPYRIGHT.

Companies, by.—*See* COMPANY, col. 368.

Conflict of Laws.—*See* INTERNATIONAL LAW.

Damages for Breach.—*See* DAMAGES.

Fraud, Effect of.—*See* FRAUD.

Infant, by.—*See* INFANT.

Interest—Disqualification.—*See* LOCAL GOVERNMENT AND CORPORATION.

Master and Servant, between.—*See* MASTER AND SERVANT.

Penalty, under.—*See* PENALTY.

Sale of Business.—*See* TRADE NAME AND GOODWILL.

Sale of Goods.—*See* SALE OF GOODS.

Seal, whether Necessary.—*See* LOCAL GOVERNMENT.

Settlement, for.—*See* SETTLEMENT.

Work and Labour, for.—*See* WORK AND LABOUR.

CONTRIBUTION.

Joint Covenants—Contribution—Evidence of Intention—Implied Contract—Inference from Circumstances.—The doctrine of contribution between joint covenants is based on a broad principle of equity, or, as it has sometimes been expressed, on an implied contract, and depends on the intention of the parties contracting. Evidence of such intention is admissible after the death of one of such covenants; and when a father, on the marriage of his son, had entered, together with the son, into a joint and several covenant with the trustees of the marriage settlement to pay a certain sum of money six months after his death and had

specifically charged some of his own property with payment of the same, and the son, at the date of his marriage, was possessed of a reversionary interest only which he brought into settlement, and, the father having died insolvent, the security had to be realised, the Court declined to infer, in the absence of express contract, an intention on the part of the father to reserve a right to his executors to sue his son for contribution. *Bentinck, In re*; *Bentinck v. Bentinck*, 80 L. T. 71—Stirling, J.

Co-directors, by.—*See* COMPANY.

Co-surety, by.—*See* PRINCIPAL AND SURETY.

Shareholders, by, in Winding-up.—*See* COMPANY.

CONTRIBUTORY.

See COMPANY.

CONVERSION (COMMON LAW, AT).

See TROVER.

CONVERSION (EQUITY, IN).

Trust for Conversion—Postponement of Conversion—Disposal of Income.—A testator by his will left the residue of his real and personal estate to trustees upon trust for conversion, with power to postpone the conversion for a period not exceeding twenty-one years from his death, at their discretion, and directed that the surplus income of his unsold and unconverted estate should be accumulated during the said period of twenty-one years. Part of the residuary real estate consisted of land containing valuable seams of coal, which were not worked or let during the testator's lifetime. The testator died in 1872. The estate was not converted within twenty-one years. In 1876 the trustees, in accordance with a power in that behalf, granted a lease of the coal for forty years, and large sums were received under the lease for rents and royalties:—*Held*, that the trustees were bound to accumulate the income received under the mining lease till the expiration of the period of twenty-one years from the testator's death. But (reversing the judgment of the Court below), that on the expiration of the twenty-one years, the tenants for life were entitled to receive out of the rents and royalties under the mining lease a fair equivalent for the income that would have been received by them if the residuary estate had been sold and the proceeds invested. *Wentworth v. Wentworth*, 69 L. J. P.C. 13; [1900] A.C. 163; 81 L. T. 682—P.C.

Power or Trust for Sale—Settlement of Real Estate—Ultimate Limitation to Husband and his Heirs—Declaration that Lands should be considered Personal Estate.—By marriage settlement, fee-simple lands and certain securities

were vested in trustees upon trust as to the lands that the trustees should, upon such application, or with such consent, or at such discretion, as thereafter mentioned, sell the same, and hold the sale-moneys and the rents until sale upon the trusts thereafter declared; and it was declared that the trustees should stand seised and possessed of the lands, sale-moneys, and securities upon trust to permit the same to remain in their then state of investment, or should, on the application or with the consent in writing of the husband and wife, or the survivor, and after the death of the survivor at the discretion of the trustees, call in the securities and receive the moneys to arise therefrom, or arising from a sale of the lands if sold, and invest the same as therein mentioned, and pay the rents of the lands till sold and the interest of the sale-moneys and securities to the husband, &c., with an ultimate limitation as to the lands or sale-moneys, and portion of the securities, for the husband, his heirs, executors, administrators, and assigns. The settlement contained a power to lay out the trust funds in the purchase of hereditaments, and it was thereby declared that the hereditaments so to be purchased and the said lands should be considered for all the purposes of the settlement as personal estate only. The lands had been recently bought by the husband; part of the purchase-money was paid out of the wife's fortune, and the settlement contained provisions for securing the repayment of same in certain events. The lands were not sold, and the ultimate limitation took effect:—*Held*, that there was no conversion of the lands, and that they passed, on the death of the husband, as real estate to his heir-at-law. *McCGuire v. McCGuire*, [1900] 1 Ir. R. 200—V.C.

Partition Action—Payment to Persons Absolutely Entitled—Trustees with Power of Sale with Consent.—An order in a partition action ordering payment of the proceeds of sale of real estate to trustees with power of sale with the consent of the tenant for life of the hereditaments sold, and made in the presence of the trustees and the tenant for life, is a payment to persons "becoming absolutely entitled," and the proceeds of sale subsequently devolve as personalty. *Hobson's Trusts, In re* (47 L. J. Ch. 310; 7 Ch. D. 708), followed as binding on a Court of first instance, notwithstanding the criticisms in *Smith, In re* (58 L. J. Ch. 108; 40 Ch. D. 386). *Morgan, In re; Smith v. May*, 69 L. J. Ch. 735; [1900] 2 Ch. 474; 48 W. R. 670—Stirling, J.

Contract by Lunatic to Purchase Real Estate—Contract Carried out by Committee under Direction of Court—Voidable Contract.—A direction by the Master in Lunacy to the committee of a lunatic to carry out a contract by such lunatic for the purchase of real estate, and to provide the purchase-money out of such lunatic's personal estate, amounts to an election on the part of the lunacy authorities to confirm the lunatic's voidable contract, and the result will be to effect a conversion of the estate so contracted to be purchased as between the lunatic's heir-at-law and next-of-kin, and such estate will accordingly descend to the heir. *Baldwyn v. Smith*, 69 L. J. Ch. 336; [1900] 1 Ch. 588; 82 L. T. 616; 48 W. R. 346—Byrne, J.

Partition Action—Order for Sale.—*See* PARTITION.

Power of Conversion.—*See* POWER.

Settled Land, in Case of.—*See* SETTLED LAND.

Trust for Conversion—Omission to Convert.—*See* ESTATE.

CONVICTION.

See CRIMINAL LAW.

COPYHOLDS.

Fines for Renewal—Leases for Lives—Tenant for Life and Remainderman.—Where a tenant for life of a manor who is unimpeachable for waste, and under no obligation to renew, has nevertheless renewed leases for lives of copyholds according to the custom of the manor, upon the payment of arbitrary fines, such fines will be considered as casual profits, and belong to the tenant for life as against the remainderman. And this will be so in a case where the tenant for life holds under a settlement which only empowers him to grant leases for twenty-one years, provided that the renewals have been granted in a customary and reasonable manner. *Meadows, In re; Norie v. Bennett*, 67 L. J. Ch. 145; [1898] 1 Ch. 300; 78 L. T. 13; 46 W. R. 297—Kekewich, J.

Admittance—Arbitrary Fine—Fine Payable only on First Admittance—Colourable Purchase of Small Property to Avoid Fine on Subsequent Purchase of Large Property—Remedy of Lord—Amount of Fine—Assessment.—By the custom of a manor, if a stranger purchased copyhold property he paid to the lord on admittance an arbitrary fine which was assessed with reference to the yearly value of the property, but if a copyholder purchased additional copyhold property he paid only a nominal fine. The defendant, who was a stranger to the manor, having agreed to purchase a large copyhold property, in order to avoid payment of an arbitrary fine in respect thereof, entered into an agreement with a copyholder to purchase from the latter a small cottage for a certain sum on the terms that he should reconvey it after three months, that the vendor should collect and retain all rents received while the defendant held the cottage and should pay all outgoings, and that in case the defendant should wish to keep the cottage he should pay a further sum to the vendor. The cottage was thereupon surrendered in favour of the defendant, and the lord admitted him as tenant thereof on payment of an arbitrary fine. The defendant then completed his purchase of the larger property, and was admitted tenant thereof on payment of a merely nominal fine:—*Held*, that the agreement for the purchase of the cottage by the defendant was merely colourable. *Held*, also, that the lord was entitled to be put in the same position as if he had never admitted the defendant as tenant of the cottage, and that the defendant must pay

to the lord an arbitrary fine in respect to the larger property. *Att.-Gen. v. Sandover*, 73 L. J. K.B. 478; [1904] 1 K.B. 689; 90 L. T. 480; 52 W. R. 573; 20 T. L. R. 351—Channell, J.

Where by the custom of a manor an arbitrary fine is payable only on the first and not on any subsequent admittance, in assessing the amount of the fine which would be reasonable in any particular case regard should be had to the value of the property purchased and to the probability of its being purchased to enable the purchaser to avoid paying an arbitrary fine on being afterwards admitted to other property of greater value. *Ib.*

— **Recovery of, by Action—Accrual of Cause of Action—Limitation of Time.**—The right of the lord of a manor to a fine arbitrary accrues at the date of admittance of the copyhold tenant, and the lord's action of debt to recover such a fine is barred by section 3 of the Civil Procedure Act, 1833, unless brought within six years from the date of admittance; and the lord cannot, by delaying to assess and demand the fine for upwards of six years after admittance, prevent the operation of the statute. *Monckton v. Payne*, 68 L. J. Q.B. 951; [1899] 2 Q.B. 603; 81 L. T. 204; 48 W. R. 44—A. L. Smith, L.J.

Special Custom—Only one Joint Tenant Admitted—Admittance of One not Admittance of All.—A special custom of a manor by which one only of several joint tenants of copyholds can be admitted, and only one fine is payable on such admittance, is a special circumstance which excludes the general rule that the admittance of one joint tenant operates as the admittance of all; and, in case of a devise to joint tenants, such custom is not bad as restraining the power given to testators by section 3 of the Wills Act to devise their copyholds without stint. *Howard v. Gwynn*, 84 L. T. 505; 65 J. P. 327—D.

Freehold Tenement—Heriot—Seisin—Mortgage.—By custom of a manor a heriot was due on the death of the tenant of a certain freehold tenement dying "solely seised." A tenant in fee-simple of the tenement by deed mortgaged his tenement and died without redeeming the mortgage, but in possession as mortgagor:—*Held*, that a heriot was due. *Copestake v. Hoper*, 76 L. J. Ch. 232; [1907] 1 Ch. 366; 96 L. T. 322; 23 T. L. R. 310—Kekewich, J.

— **Mortgagor in Possession.**—A mortgagor in possession of freehold land is seised as a freehold tenant. *Heath v. Pugh* (50 L. J. Q.B. 473; 6 Q.B. D. 345) and *Leach v. Jay* (47 L. J. Ch. 876; 9 Ch. D. 42) followed. *Ib.* Reversed, C.A. 48 L. J. N. C. 327.

Tenure of Ancient Demesne—Customary Freehold—Fine on Alienation.—The freehold of land held by the tenure of ancient demesne is in the tenant and not in the lord of the manor. A custom for the lord of a manor of ancient demesne to receive a fine arbitrary upon the purchase of lands within the manor is bad, whether limited to purchases by "strangers" (that is, persons not already tenants of the manor) or not, as being contrary to the statute *Quia Emptores* and other statutes. *Merttens*

v. Hill, 70 L. J. Ch. 489; [1901] 1 Ch. 842; 84 L. T. 260; 49 W. R. 408; 65 J. P. 312—Cozens-Hardy, J.

Title to Manor—Possession—Presumption of Lost Grant.—*Semble*, where a manor has existed in the hands of the Crown, and the Crown has granted some of the lands of the manor to a subject by a grant which did not pass the manor, but the successors in title of the grantee have held manorial courts and kept court rolls continuously, and shew a long modern paper title to the manor, a grant of the manor itself from the Crown will be presumed. *Ib.*

Devolution—Equitable Estate—Personal Representative.—An equitable estate in copyholds devolves, upon the death of the owner, to his legal personal representative under the Land Transfer Act, 1897, s. 1, and not to the customary heir. *Somerville and Turner's Contract, In re*, 72 L. J. Ch. 727; [1903] 2 Ch. 533; 89 L. T. 405; 52 W. R. 101—Kekewich, J.

Duty of Copyholder to Repair—Forfeiture—Implied Contract—Action for Damages.—The lord of a manor brought an action against the executors of a deceased copyhold tenant for breach of an implied contract by the tenant to keep his tenement in tenable repair. As the basis of this implied contract the lord alleged a custom of the manor imposing upon the copyholders the duty to keep their tenements in tenable repair. To prove this custom he produced—(a) the customary of the manor, from which it appeared that the copyholders were entitled to housebote; (b) entries in the court rolls containing presentments and forfeitures for non-repair of copyhold tenements, and admittances of tenants containing licences to sub-let provided all due reparations had been performed; and (c) oral evidence shewing that copyholders had repaired their tenements at the instance of the lord without any presentment by the homage:—*Held*, that this afforded no evidence of the custom alleged, being referable to the customary law applicable to all copyhold tenure—namely, that the tenement may be forfeited for non-repair. *Blackmore v. White* (68 L. J. Q.B. 180; [1899] 1 Q.B. 293) distinguished. *Galbraith v. Poynton*, 74 L. J. K.B. 649; [1905] 2 K.B. 258—Bigham, J.

Copyholds for Lives—Non-repair of Buildings—Tenant's Customary Obligation to Repair—Implied Contract—Lord's Right to Action for Damages for Non-repair—Liability of Executors of Last Tenant in Grant.—A grant by copy of court roll of buildings parcel of a manor implies a contract on the part of the copyhold tenant in possession to fulfil the customary obligation to repair which attaches upon admission by force of custom to each successive tenant where the grant is for more lives than one; and such implied contract entitles the lord of the manor to an action for damages for non-repair against the tenant in possession in his lifetime, and to a like action against the executors of the last tenant in the grant after his death. *Blackmore v. White*, 68 L. J. Q.B. 180; [1899] 1 Q.B. 293; 80 L. T. 79; 47 W. R. 448—Lord Russell of Killowen, C.J.

Land Parcel of Manor—Long-continued Possession—Lease for 999 Years—Variation of Rent

—**Additions to Holding—Quit-rent or Yearly Tenancy—Freeholder or Cottager—Evidence.**—A piece of land parcel of a manor, of which there were no copyhold tenants, had been held since 1709 at a rent which had from time to time increased from 1s. to 5s. 1d. Some of the additions to the rent were traceable to additions to the holding, but some were not so traceable. There was no trace of the holding prior to 1709:—*Held*, that the defendants, the present holders, were not freehold tenants at a quit-rent, but merely annual tenants of the lord of the manor. *Foljambe v. Smith's Tadcaster Brewery Co.*, 73 L. J. Ch. 722; 91 L. T. 312—*Kekewich, J.*

Waste of Manor—Custom to Kill Rabbits—Right of Copyholders—Reasonableness.—A custom or customary by-law, whereby the commoners of a manor might take or destroy rabbits or game on the waste, is not necessarily void for unreasonableness. *Seemle*, that a custom for any person, not merely any copyholder, to kill rabbits on a manor without molestation would be on the face of it unreasonable. *Coot v. Ford*, 83 L. T. 482—*Kennedy, J.*

Lease by Lord for Training Horses—Liability for Damage to Commoner's Rights.—The lord of the manor by deed leased the right to train and gallop horses on the waste of the manor:—*Held*, that the lord would not be liable for damage done to the rights of common of pasturage of the copyholders by the lessee, unless it was proved that the lessee caused the damage as the lord's agent or with his licence. *Ib.*

Seemle, a licence to train and gallop horses does not of necessity involve injury to the right of pasturage. *Ib.*

Coal under Tenements—Special Custom for Tenants to Work and Sell Coal, not thereby Hindering the Lord's Sale—Meaning of Hindrance.—In an action by the lord of the manor to restrain copyhold tenants from working and selling coal under their tenements, the defendants set up a special custom for the tenants of the manor to work and sell the coal so long as the sale thereof in no way hindered the lord's sale:—*Held*, that the custom was proved, and that the defendants' sales, being comparatively small, were not in the circumstances a hindrance within the meaning of the restriction. *Sitwell v. Worrall*, 79 L. T. 86—*Byrne, J.*

Manor—Lord—Steward—Custody of Court Rolls.—The steward of a manor is entitled to the possession of the court rolls to enable him to properly discharge the duties of his office, for the neglect of which he would be responsible. The lord is, in respect of the court rolls, "a trustee and guardian of the tenants' rights," and the steward is not entitled to hold the rolls as against the lord if there is proof of any improper conduct on the part of the steward. In such case the Court will order the rolls to be delivered to the lord, but if there is no suggestion of misconduct the Court will not deprive the steward of their custody. *Raves v. Raves* (5 L. J. Ch. 114; 7 Sim. 624) discussed and explained. *Jennings, In re*, 72 L. J. Ch. 454; [1903] 1 Ch. 906; 88 L. T. 387; 51 W. R. 425; 67 J. P. 367—*Buckley, J.*

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1. GENERAL.

Application of English Statute.—The Copyright (Works of Art) Act, 1862, conferring on British subjects and persons resident in British dominions copyright in pictures, drawings, and photographs, is not applicable to any part of the British dominions outside the United Kingdom. *Graves v. Gorrie*, 72 L. J. P.C. 95; [1903] A.C. 496; 89 L. T. 111; 52 W. R. 113—P.C.

2. BOOKS.

"Book"—Designs—Illustrations Substantial Part of Catalogue—Sale of Electrotypes—Personal Licence—Right to Assign.—In September, 1898, the plaintiffs, who were wholesale manufacturers of furs, mantles, &c., published a catalogue of designs containing twelve illustrations. The firm of E. & W., retail drapers, having obtained one of these catalogues, requested the plaintiffs to supply them with some of the electro blocks of the illustrations, and this the plaintiffs did, the price being 4s. 6d. each. E. & W. handed over these blocks to the defendants P. & Sons, a firm of "fashion printers," for production in E. & W.'s catalogue. P. & Sons at the same time purchased the blocks of E. & W., deducting the price from their charge for the catalogues supplied to E. & W. In November, 1898, P. & Sons printed for the defendants B. & Co., another firm of retail drapers, a catalogue containing eight illustrations from the blocks in question, but with different names. Thereupon the plaintiffs registered, under the Copyright Act, 1842, their catalogue containing the twelve illustrations, and brought an action against B. & Co. and P. & Sons claiming an injunction to restrain the

defendants from reproduction and sale of the illustrations, and consequential relief. The action as against B. & Co. was stayed on certain terms. The defendants P. & Sons stated that they had purchased the blocks of E. & W. without any conditions or restrictions, and contended, amongst other defences, that the plaintiffs had no copyright in the illustrations as they had not been registered under the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), and that registration of the catalogue under the Copyright Act, 1842, simply as a "book" was not sufficient to protect the illustrations separately:—*Held*, that engravings published as part of a book, and registered for the purposes of copyright as a "book," were protected by the copyright of the book itself; that in the present case the plaintiffs had a copyright in the illustrations in question as part of their book; and that, the illustrations being a substantial part of the book, there had been an infringement of the book itself. *Cooper v. Stephens* ([1895] 1 Ch. 567) considered and approved. *Marshall v. Bull*, 85 L. T. 77—C.A.

Per BYRNE, J.—A person who is possessed of the copyright in a book does not lose that copyright by reason of the grant of a partial licence or of a licence to use it; and he is not prevented from suing an infringer if before action brought he has registered his book. *Ib.*

"Book"—Illustrated Catalogue—"Sheet of letterpress"—Sheet of Illustrations.—An illustrated trade catalogue, consisting of a sheet of illustrations not folded or stitched, is entitled to copyright as a "book" under the definition in section 2 of the Copyright Act, 1845, for it is a "sheet of letterpress," though the words on it be only formal. *Davis v. Benjamin*, 75 L. J. Ch. 800; [1906] 2 Ch. 491; 95 L. T. 671; 22 T. L. R. 702—Swinfen Eady, J.

Catalogue—List of Articles for Sale.—Copyright may exist in a catalogue or mere lists of articles for sale. *Collis v. Cater*, 78 L. T. 313—North, J.

Phonographic Record of Song—"Sheet of music."—A phonograph record of a song is not a "sheet of music," and therefore not a "book" within section 2 of the Copyright Act, 1842. *Newmark v. National Phonograph Co.*, 23 T. L. R. 439—Sutton, J.

Encyclopædia—Separate Articles—Author Employed and Paid by Publisher.—Where a publisher employs and pays a person to write an article as part of a work which the publisher is producing at his own risk and expense, the natural inference of fact—no agreement in writing or express words being necessary to the assignment of copyright—is, in the absence of evidence to the contrary, that the publisher acquires the copyright in such articles. *Sweet v. Benning* (24 L. J. C.P. 125; 16 C. B. 459) and *Lamb v. Evans* (62 L. J. Ch. 404; [1893] 1 Ch. 218) approved. *Lawrence & Bullen v. Aftalo and Cook*, 73 L. J. Ch. 85; [1904] A.C. 17; 89 L. T. 569; 52 W. R. 369; 20 T. L. R. 42—H.L. (E.)

Author and Publisher—Agreement to Share Profits—Sole Right of Publishing Book—Bankruptcy of Publisher.—The plaintiff agreed to

act as reader and literary adviser to the defendant, who was a publisher. Subsequently the plaintiff wrote a book, which was to be published by the defendant, it being agreed that the profits should be shared equally between them. Several editions of the book were published, and subsequently the defendant became bankrupt:—*Held*, that the agreement as to sharing profits did not vest the copyright in the book in the defendant; and that the contract was a personal one, and that, therefore, the defendant's trustee in bankruptcy had not the right of reprinting and publishing the book. *Lucas v. Moncrieff*, 21 T. L. R. 683—Warrington, J.

— Agreement to Edit—"Cheaper or other form of edition"—Parol Agreement—Damages for Breach.—An author and publisher entered into an agreement in 1894 under which the author was to edit the whole of the plays of Shakespeare (to be called the Temple Shakespeare), and was to write an introduction, notes, and glossary for each play. The publisher was to pay the author a royalty, and the copyright was vested in the publisher. Clause 10 provided: "In the event of a cheaper or other form of edition of any or either of the plays being thought advisable by the publisher, it shall form the subject of an agreement with the author on similar *pro rata* terms to those embodied herein." The publication was very successful, and in 1899 a large Temple Shakespeare was produced, the notes and glossary being identical with those in the smaller edition, but illustrations were added. A royalty was paid to the author upon this edition. Discussion took place as to the production of a Shakespeare for schools, and the author stated that in March, 1901, a definite agreement was made as to the royalty to be paid him in respect of this edition, and denied that he ever failed or neglected or threatened to abandon its production. The publisher produced a Temple Shakespeare for schools with notes, introduction, and glossary written by a person other than the author. The author applied for an injunction restraining the issue of this edition, or, in the alternative, for damages for breach of the agreement. *Held*, that there had been an agreement that the author should be paid a royalty on the school Shakespeare, and that he had always been ready to perform the work, and that the publisher had committed a breach of the agreement of 1894, supplemented by the verbal agreement of 1901; that it was not a case for an injunction, but that there must be a reference to chambers to assess the damages. *Gollancz v. Dent*, 88 L. T. 358—Swinfen Eady, J.

Biographical Notes Made from Enquiries—"Author"—Assignment by Defendant of Copyright before Action.—The plaintiffs sent out questions to a number of golf players, and from the answers they compiled biographical notes in their golf annual. The golf annual was registered under the Copyright Acts:—*Held*, that the plaintiffs were the "authors" of the biographical notes. The defendants, before an action was brought to restrain them from publishing or selling a golf annual containing biographical notes taken from the plaintiffs' annual, assigned their annual and the copyright therein to third persons. They, however, admitted on the pleadings that they had sold and intended

to sell the book:—*Held*, that the plaintiffs were entitled to an injunction. *Nisbet v. Golf Agency*, 23 T. L. R. 370—Kekewich, J.

Agreement to Print for Another for Profit—Partnership—Diary for Shippers—Printer of Infringing Part Employed by other Party—“Cause to be printed”—Agent.]—L. agreed with G. to print and publish in L.’s name a diary for merchant shippers in consideration of certain payments. G. obtained lists of merchant shippers which were an infringement of the plaintiff’s copyright. By agreement with L., and to save time in publication, G. employed another printer, who was paid by G., to print the pirated portion, and L., without any knowledge of the piracy, included the infringing portion in the diary, which bore on the title-page, “Printed at L.’s”:—*Held*, that L. had not “caused to be printed” the infringing portion within section 15 of the Copyright Act, 1842. *Kelly’s Directories v. Gavin*, 71 L. J. Ch. 405; [1902] 1 Ch. 631; 86 L. T. 393; 50 W. R. 385—C.A.

Commentator—Originality—Common Sources of Information.]—The plaintiffs were the registered proprietors of the copyright in an annotated edition of one of Shakespeare’s plays, edited by T. P., and published in 1893. In March, 1900, the defendants G. & Sons published an annotated edition of the same play, edited by the defendant F. M. The plaintiffs alleged that the book published by the defendants G. & Sons was a colourable imitation of the plaintiffs’ book, and an infringement of their copyright therein in respect to general arrangement, sketches of character, literary notes, and quotations:—*Held*, that the plaintiffs’ book was a subject-matter of copyright; that the use which the defendant F. M. had made of the plaintiffs’ book was illegitimate and an infringement of their copyright therein; and that therefore they were entitled to an injunction. *Moffatt & Paige v. Gill*, 86 L. T. 465; 50 W. R. 528—C.A.

Foreign Reprints—Copyright in English Book—Notice to Customs Commissioners—Imperial Act in Force in Canada.]—Street, J., in the High Court of Justice for Ontario, having held (5 Ont. L. R. 184) that section 152 of the Imperial Customs Consolidation Act, 1876, requiring notice to be given to the Commissioners of Customs of copyright in a book, was not, having regard to section 151 of the Act, in force in Canada, and that section 17 of the Imperial Copyright Act, 1842, was applicable, and having granted an injunction restraining the Imperial Book Co. from importing into Canada any copies of the ninth edition of the *Encyclopædia Britannica*, and having ordered the delivery up of unsold copies thereof, and this judgment having been affirmed by the Court of Appeal for Ontario and by the Supreme Court of Canada,—The Privy Council refused leave to appeal. *Imperial Book Co. v. Black*, 21 T. L. R. 540—P.C.

Assignment—Part Payment—Volume Rights—Serial.]—An author can assign the copyright of a book not yet in existence, and such an assignment may be in the form of an agreement to assign. *Ward, Lock & Co. v. Long*,

75 L. J. Ch. 732; [1906] 2 Ch. 550; 95 L. T. 345; 22 T. L. R. 798—Kekewich, J.

Section 18 of the Copyright Act, 1842, applies not only to serials, but to any book and to any publisher. The section does not necessarily exclude rights by assignment. *Ib.*

A publisher agreed with an author to pay 200*l.* for the complete copyright of a story containing not less than 80,000 words on the lines of a synopsis which had been supplied by the author. The manuscript was delivered and partly paid for, but contained only about 70,000 words:—*Held*, that the transaction might fall either within section 2 as an assignment, or within section 18 as a contract of employment, but that the intention of the parties was that the plaintiffs were to have the complete copyright at once, and without any reference to the conditions contained in section 18. *Ib.*

3. DRAMATIC REPRESENTATION.

Registration—Mistake in Time and Place of First Representation.]—The effect of an incorrect entry in the register at Stationers’ Hall as to the place and date of the first representation of a dramatic piece is merely to vitiate the registration so as to deprive the plaintiff of the advantage conferred by section 11 of the Copyright Act, 1842, of being able to rely upon the entry as *prima facie* evidence of title, and does not take away his title, but leaves him at liberty to prove it in other ways, and leaves him the remedies provided by the Dramatic Copyright Act, 1833. *Hardacre v. Armstrong*, 21 T. L. R. 189—Wills, J.

“Dramatic piece”—Mimetic Sketch.]—A “dramatic piece” within the meaning of section 2 of the Copyright Act, 1842, may exist without any words, and be entitled to protection. An idea or plot *plus* the manual and physical actions may be such a “dramatic piece.” *Tate v. Fullbrook*, 23 T. L. R. 715—Phillimore, J.

4. LETTERS.

Right to Publish—Publication after Author’s Death—“Proprietor of author’s manuscript.”]—In the case of a book first published after the author’s death since the Copyright Act, 1842, section 3 of that Act vests the copyright in the proprietor of the author’s manuscript—the actual sheets of paper—from which the book is first published. *Macmillan v. Dent*, 76 L. J. Ch. 136; [1907] 1 Ch. 107; 95 L. T. 730; 23 T. L. R. 45—C.A.

By an agreement made in 1895, Mr. and Mrs. S., the proprietors of certain manuscript letters written by Charles Lamb, who died in 1834, assigned to the plaintiffs “all copyright which we possess and the exclusive right of publishing” the letters, the plaintiffs “undertaking to return to us all the MSS. when copied.” The plaintiffs copied and returned the manuscript letters, and published them in 1898. In 1903 Mr. and Mrs. S. sold the manuscript letters and any rights which they might still have in them to the defendants, who knew of the previous

transaction with the plaintiffs, and in the same year the defendants also published the letters. The plaintiffs then brought an action for infringement of copyright, after the commencement of which the defendants obtained an assignment from Charles Lamb's personal representative of all his rights in the letters:—*Held*, that the rights of the parties depended upon section 3 of the Copyright Act, 1842, and not upon the earlier repealed Copyright Acts; that, assuming the property in the letters to have remained in Mr. and Mrs. S., the inchoate right of Mr. and Mrs. S. to acquire the copyright under section 3, and the copyright itself, when it came into existence on publication by the plaintiffs, were effectually assigned to the plaintiffs by the agreement of 1895, and that the copyright was therefore now vested in the plaintiffs. *Ib.*

Held, also, by BUCKLEY, L.J., that the actual property in the letters for the purposes of publication passed to the plaintiffs under the agreement. *Ib.* And see LETTERS, col. 1278.

5. MUSICAL PRODUCTIONS.

Statute.]—2 Edw. 7 c. 15 is the *Musical (Summary Proceedings) Copyright Act, 1902.*

— 6 Edw. 7 c. 36 is the *Musical Copyright Act, 1908.*

Registration—Musical Composition—Author and Publisher—Publishing Agreement—Assignment of Copyright—Assignment in Writing—Assignment by Entry—Expunging Entry—Order—Appeal.]—An order of a Judge of the High Court under section 14 of the Copyright Act, 1842, expunging from the book of registry an entry of copyright is subject to appeal to the Court of Appeal. *Jude's Musical Compositions (Liedertafel Series of Carols), In re*, 76 L. J. Ch. 542; [1907] 1 Ch. 651; 96 L. T. 766; 23 T. L. R. 461—C.A.

J., who was the registered proprietor of the copyright in a series of musical publications called *Music and the Higher Life*, on July 27, 1900, agreed with N., the managing director of a company, that, in consideration of J. giving N. "the sole and exclusive right of printing and publishing" this series and issuing the same in volume form—first, the cost of printing and issuing the volume should be borne by N.; secondly, N. should pay J. 6*d.* on every copy sold; and thirdly, N. should supply J. with such copies as he should require at 1*s.* 6*d.* per copy, such copies not to be liable to the royalty of 6*d.* N. afterwards assigned his rights under the agreement to the company. In 1903 the company registered themselves as proprietors of the copyright in an abridged edition of *Music and the Higher Life*, and also in two further series of musical compositions by J., alleging that under the agreement of 1900 and subsequent agreements, to the effect that the three subsequent publications should be upon the same terms as the first, the copyright in all these compositions belonged to them:—*Held*, that the agreement of July 27, 1900, was a publishing agreement and not an assignment of copyright. *Held* also, that the registrations effected by the company in 1903 were not entries of assignments within the Copyright Act, 1842, s. 13, so as to transfer the copyright in the publications registered. *Ib.*

Mechanical Instrument.]—A sheet of paper perforated so that, when it is placed in a mechanical instrument and made to pass under tubes through which air is forced, a copyright tune is reproduced, is not a copy of a sheet of music so as to constitute an infringement of the copyright within the meaning of the Copyright Act, 1842. *Boosey v. Whight*, 69 L. J. Ch. 66; [1900] 1 Ch. 122; 81 L. T. 571; 48 W. R. 228—C.A.

Sheet of Music.]—Neither do marks printed on the perforated sheet, as on the original music, indicating the mode in which the mechanical instrument is to be regulated by the player so as to produce the appropriate expression, constitute such an infringement. *Ib.*

Musical Instrument containing Pirated Expression Marks—Form of Order—Delivery up of Infringing Copies.]—A plaintiff, having partially succeeded in an action for the infringement of copyright, is entitled, where the infringing parts can be severed, to an order for the delivery up to him of such parts of the defendant's product as constitute an infringement of the plaintiff's copyright. *Warne v. Seebohm* (39 Ch. D. 73) followed. *Hole v. Bradbury* (12 Ch. D. 886) not followed. *Boosey v. Whight* (No. 2), 81 L. T. 265—Stirling, J.

Pirated Copies—Seizure on Request of Apparent Owner of Copyright—Application that Copies be Forfeited or Destroyed—No Summons Served—Jurisdiction of Magistrate.]—A Court of summary jurisdiction has no power to make an order under section 2 of the Musical (Summary Proceedings) Copyright Act, 1902, that pirated copies of a musical work shall be forfeited, destroyed, or otherwise dealt with, unless a summons has been served upon the person from whom the copies have been seized calling upon him to shew cause why the order should not be made. *Francis, Day & Hunter, Ex parte* (No. 1), 72 L. J. K.B. 120; [1903] 1 K.B. 275; 88 L. T. 176; 51 W. R. 267; 67 J. P. 153; 20 Cox C.C. 381—D.

Sale of Pirated Music—Private House—Order to Seize.]—A magistrate must issue (under section 1 of the Musical (Summary Proceedings) Copyright Act, 1902) an order authorising a constable to seize without warrant copies of alleged pirated music, even although it appears that the music is being sold at a private house. Such an order does not confer on the constable the power of a search warrant. *Francis, Day & Hunter, Ex parte* (No. 2), 88 L. T. 806; 51 W. R. 699; 67 J. P. 301—D.

6. NEWSPAPER ARTICLES AND REPORTS.

Report of Speech Delivered in Public—"Author."]—The reporter of a speech, in which the speaker claims no rights, is an "author" within the meaning of the Copyright Act, 1842, and has copyright in his own report. *Walter v. Lane*, 69 L. J. Ch. 699; [1900] A.C. 539; 83 L. T. 289; 49 W. R. 95—H.L. (E.)

Narrative Contributed to Newspaper—Publication of Paragraph Containing the Facts in Ab-

brevised Form—Reprinting of Paragraph by another Newspaper—Authorship of Paragraph.]

—S., a journalist, contributed to a London morning newspaper an article containing an account of the escape from drowning of a distinguished ophthalmologist. The newspaper did not publish the article as written by S., but from the information contained in it the sub-editors of the newspaper compiled a paragraph containing the facts in an abbreviated form, and this paragraph was published in the newspaper. It was reprinted with slight alterations in an evening newspaper of the same day. S. having demanded payment from the publisher of the evening newspaper, which was refused, commenced an action against him claiming an injunction restraining him from selling copies of S.'s article, or substantial parts of it, and a declaration that S. was the owner of the copyright. S. had meanwhile registered himself as the owner of the copyright in the paragraph:—*Held*, that the paragraph was in substance a different statement of the facts in the plaintiff's article or some of them; that the true authors of the paragraph were the sub-editors of the morning newspaper; and that the action therefore failed. *Springfield v. Thame*, 89 L. T. 242—Joyce, J.

7. PICTURES.

Infringement—Photographic Reproduction—"Copy" of the Work or the Design thereof.]

The plaintiff, who was the owner of the copyright in an oil painting representing a winged female kneeling on a rock and gazing into water below, reproduced the picture in various forms and sizes by photographic processes. The defendants sold copies of an American magazine containing on a page of its advertising section a small and rude photographic reproduction of the more distinctive features of this picture, omitting the background and wings. This reproduction was placed amongst various other similar reproductions of other pictures grouped round an announcement in which the readers were offered a prize if they could name a certain percentage of the advertisers who used the pictures as advertisements. On complaint being made by the plaintiff the page in question was torn out of all copies of the magazine. In an action for an infringement of copyright,—*Held*, that the reproduction in question must be held to be a "copy" of the original "work, or the design thereof," within the meaning of the Fine Arts Copyright Act, 1862, and there must be judgment for the plaintiff with one farthing damages, and the costs of the action. *Hampstaengl v. W. H. Smith & Son*, 74 L. J. Ch. 304; [1905] 1 Ch. 519; 92 L. T. 351; 21 T. L. R. 291—Kekewich, J.

— Separate Offences—Minimum Penalty.]

The copyright in certain pictures was infringed by the distribution of over a million copies, which altogether cost to produce not more than 120*l*. Upon summons to fix the amount of the penalties payable under section 6 of the Artistic Copyright Act, 1862,—*Held*, that each copy constituted a separate offence, for which the minimum sum which the Court could impose as a penalty was one farthing. *Hildesheimer v. Faulkner*, 83 L. T. 144; 48 W. R. 682—Kekewich, J.

8. PHOTOGRAPHS.

Photograph Taken at Photographer's Risk of Sale—Photograph of Interior of Private School—"Good" Consideration.]

A photographer took certain photographs of a private school, it being understood that he did so speculatively and at his own risk, and that the school proprietor was to be at liberty afterwards to buy, or not to buy, copies entirely at his own pleasure. The school proprietor, on this understanding, admitted the photographer into the interior of his private house; indicated to him what seemed the best points of view; placed the cricket eleven; and assembled the whole school into a group:—*Held*, that, under these circumstances, there was such "good" consideration moving from the school proprietor to the photographer for the taking of the photographs as was sufficient to transfer the copyright in the photographs from their "author," the photographer, to the school proprietor, under the terms of the proviso in section 1 of the Fine Arts Copyright Act, 1862. *Dictum* of COLLINS, M.R., in *Boucas v. Cooke* (72 L. J. K.B. 741, 744; [1903] 2 K.B. 227, 235, 236), discussed and distinguished. *Stackemann v. Paton*, 75 L. J. Ch. 590; [1906] 1 Ch. 774; 54 W. R. 466—Farwell, J.

Photograph Taken at Request of Sitter—Implied Promise to Pay—Ownership of Copyright—"Negative of any photograph made or executed for or on behalf of any other person for a good or a valuable consideration."]

Where a photograph is in the ordinary way taken by a photographer for a sitter at the request of the sitter, and upon a promise by him, express or implied, to pay for it, the negative of the photograph is, within the true meaning of the proviso to section 1 of the Fine Arts Copyright Act, 1862, "made or executed for or on behalf of any other person for a good or a valuable consideration," and the copyright belongs to the sitter, notwithstanding that the photographer retains the property in the negative. *Dictum* of KEKEWICH, J., in *Melville v. "Mirror of Life" Co.* (65 L. J. Ch. 41; [1895] 2 Ch. 531), disapproved. *Boucas v. Cooke*, 72 L. J. K.B. 741; [1903] 2 K.B. 227; 88 L. T. 760; 52 W. R. 99—C.A.

Confidentiality—Rights of Photographer and Customer.]

A photographer who has taken a photograph for a customer is not entitled, without the consent of the customer, to sell or exhibit copies of the photograph. *McCosh v. Crow*, 5 F. 670—Ct. of Sess.

In 1893 a firm of photographers took two photographs for the pursuer, and thereafter without instructions made an enlargement of each of the photographs and exhibited same in their studio. The pursuer knew that the enlargements were being thus exhibited, but stated no objection. The photographic business changed hands several times, and in 1901 the defenders were the owners of it, they having bought the business, negatives, &c., including the two enlargements of the photographs taken for the pursuer. The defenders having refused, when requested by the pursuer, to remove these enlargements from the walls of the studio,—*Held*, that the plaintiff was entitled to an

interdict restraining the defenders from selling or exhibiting the enlargements, and to a decree ordaining them to remove these enlargements from the walls of the studio. *Ib.*

9. SCULPTURE

Artistic Production—Toys—Models of Soldiers—Stamping Proprietor's Name on Models—Date of Publication.]—Metal models of mounted yeomen produced and sold as toys are, where there is evidence that they are anatomically and technically correct and display artistical skill and merit on the part of the producer, within the protection of the Sculpture Copyright Act, 1814. The proviso in section 1 as to stamping such models with the proprietor's name is satisfied by the insertion of the name of one of the partners of the firm of proprietors, if he himself be the producer of the model. The effect of the requirement in the same proviso as to the date of publication is that the date must not be misleading; and the insertion of a date upon the cast a few days earlier than the absolute date of putting forth and publication is no contravention of the proviso. *Britain v. Hanks*, 86 L. T. 765—Wright, J.

10. DESIGNS.

"Pattern"—"Shape"—Novelty—Marking.]—An applicant for registration of a design need only state "the nature of his design." The object of the interpretation clause (section 60) of the Patents, Designs, and Trade Marks Act, 1883, was to give an extensive meaning to the word "design," and not to draw a hard-and-fast distinction between designs as applicable to "pattern," or "shape or configuration," or "ornament." *Heath v. Rollason*, 67 L. J. Ch. 565; [1898] A.C. 499; 79 L. T. 1—H.L. (E.)

Copyright is not forfeited under section 51 where a trifling mistake in the marking denoting that the design is registered is made inadvertently, and is rectified as soon as discovered. *Ib.*

Infringement—Penalties.]—Ignorance of the fact that a design is copyright does not exempt the person copying, repeating, or multiplying the same from penalties for such infringement of copyright. The owner of the design whose right is so infringed is entitled to a penalty in respect of each reproduction. *Green v. Irish Independent Co.*, [1899] 1 Ir. R. 386—C.A.

— — — Damages.]—The owner of a design under the Copyright Act, 1862, sued a firm which had inserted the design in a newspaper as a pictorial advertisement for their goods, for damages and penalties:—*Semble*, that he was entitled to damages and also to penalties. *Green v. Irish Independent*, *supra*. And see TRADE MARK.

11. INTERNATIONAL LAW OF COPYRIGHT.

Infringement.]—The International Copyright Act, 1886, limits the duration of the term of copyright to that prescribed by the law of the

country of origin of the proprietor; but when the right to sue in the country of origin is established, the remedies are regulated by the law of the country in which the infringement takes place. *Baschet v. London Illustrated Standard Co.*, 69 L. J. Ch. 35; [1900] 1 Ch. 73; 81 L. T. 509; 48 W. R. 56—Kekewich, J.

Fine Arts Copyright—Pictures—Penalties—Damages.]—Under section 6 of the Fine Arts Copyright Act, 1862, the printers, although merely innocent agents, are liable for penalties for an infringement as well as the publishers; and a penalty must be assessed in respect of each copy of the infringement which has been sold. *Ib.*

12. ACTION FOR INFRINGEMENT.

Action on the Case—Detinue—Trove—Measure of Damages.]—The registered proprietor of the copyright in a book, to whom a special action on the case against an infringer is given by section 15 of the Copyright Act, 1842, is also entitled to bring an action against him under section 23 in detinue for the copies of the book retained, and also in trove for damages arising from the wrongful conversion. The measure of damages will be the total amount realised by the sale of the books. *Muddock v. Blackwood*, 67 L. J. Ch. 6; [1898] 1 Ch. 58; 77 L. T. 493; 46 W. R. 166—Kekewich, J.

Recovery of Penalty—Aggregate Sum—Minimum for Each Offence.]—In an action to recover penalties for several infringements of copyright under the Fine Arts Copyright Act, 1862, s. 6, the Court can award a sum of money which in relation to each of the several offences may represent only a fractional part of the lowest coin in the realm as the penalty for each offence, and is not bound to award such a sum as will represent a farthing at the least in respect of each offence. *Ellis v. Marshall & Son* (64 L. J. Q.B. 757), *Baschet v. London Illustrated Standard Co.* (69 L. J. Ch. 35; [1900] 1 Ch. 73), and *Nicholls v. Parker* (17 Times L. R. 482) overruled on this point; and the decision of the majority of the Court in *Green v. Irish Independent Co.* ([1899] 1 Ir. R. 386) dissented from. *Hildesheimer v. Faulkner*, 70 L. J. Ch. 800; [1901] 2 Ch. 552; 85 L. T. 322; 49 W. R. 708—C.A.

Each infringing copy constitutes a separate offence under section 6. *Beal, Ex parte* (87 L. J. Q.B. 161; L. R. 3 Q.B. 387), approved. *Ib.*

CORONER.

Statute.]—62 & 63 Vict. c. 48 is the *Lincolnshire Coroners Act, 1899*.

Inquest in Prison—Death of Prisoner caused by Wound Inflicted before Admission to Prison—Previous Investigation by Magistrates on Charge of Assault—Duty to Hold Full Enquiry.]—When an inquest is held by a coroner in a prison upon the body of a person who has died within the prison, it is the duty and obligation

of the coroner to make as full and complete an enquiry touching the death of the deceased as in the case of an ordinary inquest outside the prison; and his duty of making enquiry does not necessarily terminate when the jury have found that no one in the prison is to blame for such death. *Re v. Graham*, 93 L. T. 371; 69 J. P. 324; 21 T. L. R. 576—D.

If the inquest be upon a prisoner who has died within the prison from the effects of a wound inflicted upon him before his admission to the prison, and if the circumstances under which the wound was inflicted upon the deceased have been previously investigated by magistrates on a charge and cross-charge of assault, and the magistrates have found that the prisoner was the aggressor and was alone to blame, and have sentenced him to imprisonment in respect of such assault, the fact of such previous investigation by the magistrates, and their finding that the prisoner was alone to blame for the injury inflicted upon himself, does not exonerate the coroner from the obligation of holding as full an enquiry into the circumstances under which the wound which caused the death of the deceased was inflicted as if no such investigation by the magistrates had taken place. *Ib.*

Inquest — Fees.] — See MEDICAL PRACTITIONER.

CORPORATION.

1. *Statutes*, 557.
2. *Powers*, 557.
3. *By-laws*, 559.
4. *Officers*, 559.
5. *Expenditure*, 560.
6. *Contracts*, 561.
7. *Liability for Acts of Agent*, 563.
8. *Elections*, 563.
9. *Other Matters*, 567.

1. STATUTES.

62 & 63 Vict. c. 20 is the *Bodies Corporate (Joint Tenancy) Act*, 1899.

3 Edw. 7 c. 14 is the *Borough Funds Act*, 1903.

6 Edw. 7 c. 12 is the *Municipal Corporations Amendment Act*, 1906.

2. POWERS.

Statutory Powers — Tramway Business — Common Carrier — Incidental Powers — Ultra Vires.]—The defendants were incorporated by Royal charter, and subject to the Municipal Corporations Act, 1882. The Manchester Corporation Tramways Act, 1899, enabled the Manchester Corporation to run carriages and take tolls on all the network of tramways mentioned therein, and to use such tramways for the purpose of carrying passengers and of conveying and delivering animals,

goods, minerals, and parcels:—*Held*, it was not *ultra vires* for the corporation to deliver by cart or otherwise at the consignee's house or to any other place authorised by him, including the station of a railway company, such goods as they have brought on their tram lines, such delivery being fairly incidental to their authorised business. There was nothing in the Acts relating to the Manchester Corporation which authorised them to act as carriers generally without reference to their tramways. The defendants were not entitled to expend money for the purpose of establishing or maintaining or carrying on the business of carriers, except as part of or in connection with their tramway undertaking, and in respect of articles carried along all or part of the tramways. *Att.-Gen. v. Manchester Corporation*, 75 L. J. Ch. 330; [1906] 1 Ch. 643; 54 W. R. 307; 70 J. P. 201; 4 L. G. R. 365; 22 T. L. R. 261—Farwell, J.

— Exercise of—Injury to Private Property — Compensation.]—If a public body acting in the execution of a public trust and for the public benefit do an act which they are authorised by law to do, and do it in a proper manner, though the act so done works a special injury to a person, such person cannot maintain an action, and is without remedy unless a remedy is provided by the statute. *East Fremantle Corporation v. Annots*, 71 L. J. P.C. 89; [1902] A.C. 213; 85 L. T. 732; 67 J. P. 103—P.C.

The appellant corporation, in exercise of powers conferred by a statute which provided no remedy for persons whose property was thereby injured, altered the gradient of a street in a manner which injured the plaintiff's house:—*Held*, that the plaintiff was not entitled to compensation. *Ib.*

Proceedings of Council — Non-compliance with Standing Orders—Action to Restrain Proceedings—Right of Individuals to Sue—Concurrence of Attorney-General.]—The circumstance that a Burgess of a borough is himself as such a member of the corporation does not enable him, in the absence of damage to himself, to sustain, without the concurrence of the Attorney-General, an action based on the allegation that a resolution of the council was invalid as having been passed in breach of the standing orders made by the council for the regulation of their proceedings, and seeking to restrain the corporation, on that ground, from carrying it out. *Watson v. Hythe Borough Council*, 4 L. G. R. 340; 70 J. P. 153; 22 T. L. R. 245—Warrington, J.

Lease of Foreshore—Right of Corporation to take.]—A municipal corporation empowered by a local Act, confirming an order of the Board of Trade pursuant to the Sea Fisheries Act, 1868, to regulate an oyster fishery, is entitled to take a lease of the foreshore for fourteen years, where its doing so will facilitate the carrying out of the purposes of the local Act. *Truro Corporation v. Rowe*, 70 L. J. K.B. 1026; [1901] 2 K.B. 870; 85 L. T. 422; 50 W. R. 151; 65 J. P. 806—Wills, J. See s.c. in C.A., *post*, FISHERY.

Powers—Creation by Statute.]—See STATUTE.

Purchase of Electric Lighting Undertaking.]—See LOCAL GOVERNMENT.

3. BY-LAWS.

Publication—Evidence of—Production of Copy of By-law under Corporate Seal.]—The production of a copy of a by-law for a borough made under the provisions of the Municipal Corporations Act, 1882, authenticated by the corporate seal, is, until the contrary is proved, sufficient evidence of the publication of the by-law and of compliance with the requirements of section 23, sub-sections 2 and 3 of the Act. *Robinson v. Gregory*, 74 L. J. K.B. 367; [1905] 1 K.B. 534; 92 L. T. 171; 69 J. P. 161; 3 L. G. R. 308; 20 Cox C.C. 781—D.

4. OFFICERS.

Borough Funds—Banker as Borough Treasurer—Overdrafts on Treasurer—Payment of Interest—Validity—Procedure—Certiorari—Audit of Accounts.]—A borough corporation appointed as their treasurer under the Municipal Corporations Act, 1882, the local manager of the bank at which the borough kept an account. At the time of this appointment the borough had exhausted its various statutory borrowing powers, and had, in addition, an overdraft at the bank, which continued to exist, and fluctuated in amount from time to time. It was the custom for the treasurer, with the direct authority of the borough, to credit himself, or the bank of which he was manager, with interest on this overdraft at the rate of $\frac{1}{2}$ per cent., and to debit these amounts against the borough in his accounts as treasurer. The accounts of the borough were duly audited from time to time under section 27 of the Municipal Corporations Act, 1882, and no objection to the payment of this interest was ever raised by the auditors. In an action against the treasurer by the Attorney-General (on the relation of a ratepayer) to impeach the accounts of the defendant so far as they related to this payment of interest,—*Held*, that it was not necessary that the borough should be joined as a defendant. *Held*, also, that the overdrafts in question constituted an illegal method of raising money on the part of the borough. *Held*, further, that the treasurer under the Municipal Corporations Act, 1882, was not a mere servant to the corporation, but that he owed a duty, and stood in a fiduciary relation, to the burgesses of the borough. Since, therefore, he knew that the money which he had credited to himself, or to his bank, was of the nature of trust money, he was clearly amenable to the jurisdiction of the Court for its wrongful application, and could not escape by pleading the wrongful orders of his employers. *Held*, again, that, although the Municipal Corporations Act, 1882, provided, by section 141, sub-section 2, that acts of this kind on the part of the borough might be tested by *certiorari*, yet it was not thereby intended that this should be the sole remedy, and that there was nothing in the statute to prevent the Attorney-General (on the relation of a party interested) from coming to the Court for an injunction. *Held*, lastly, that the audit provided by section 27 of the Municipal Corporations Act, 1882, was no bar to the present proceedings. *Att.-Gen. v. De Winton*, 75 L. J. Ch. 612; [1906] 2 Ch. 106; 54 W. R. 499; 70 J. P. 368; 4 L. G. R. 549; 22 T. L. R. 446—Farwell, J.

Elective Auditor of Borough—Remuneration.]

—An elective auditor of a borough under the Municipal Corporations Act, 1882, is not entitled to any remuneration for his services in auditing the accounts of the borough. *Thomas v. Devonport Corporation*, 69 L. J. Q.B. 51; [1900] 1 Q.B. 16; 81 L. T. 427; 48 W. R. 89; 63 J. P. 740—C.A.

Councillor—Right of to see Document Read at Council Meeting.]—A town council is not entitled to pass a resolution directing their clerk not to shew a document, which has been read at a meeting of the council, to one of the councillors who *bona fide* desires to see it, merely because he may make some use of the information he may obtain from the document in a way antagonistic to the policy of the council. *Rev v. Southwold Corporation*; *Wrightson, ex parte*, 97 L. T. 431; 71 J. P. 351; 5 L. G. R. 888.—D.

Election of.]—See ELECTION, *infra*.

Mayor—Precedence of at Sessions.]—See JUSTICE OF THE PEACE, col. 1178.

Recorder—Jurisdiction—Appeal from Renewal of Licence.]—See INTOXICATING LIQUORS.

5. EXPENDITURE.

Borough Fund—Costs Incurred by Chief Constable in Appearing on Appeal to Quarter Sessions against a Refusal by Licensing Justices to Renew Licence for Sale of Intoxicating Liquors.]—The borough fund of a municipal corporation cannot lawfully be applied, either under the provisions of the Municipal Corporations Act, 1882, or of the Borough Funds Act, 1872, to indemnifying the chief constable of the borough against costs incurred by him in appearing by counsel as a party upon an appeal to quarter sessions by the holder of a licence for the sale of intoxicating liquors from the refusal of licensing justices to grant a renewal of the licence. *Tynemouth Corporation v. Att.-Gen.*, 68 L. J. Q.B. 752; [1899] A.C. 293; 80 L. T. 633; 63 J. P. 404—H.L. (E.)

— Opposing Bill in Parliament, Expenses of—Alleged Interference with Corporate Rights and Privileges.]—A municipal corporation opposed before Parliament a bill promoted by a gas company (which would or might effect an alteration in the price of gas to consumers in the borough) without obtaining the consent required by section 4 of the Borough Funds Act, 1872. There was no surplus of the borough fund within the Municipal Corporations Act, 1835, s. 92:—*Held*, that the corporation could not pay the expenses of opposing the bill out of the borough fund, as the bill did not propose to interfere with the price to be paid by the corporation for gas, which was a subject-matter for arbitration under the Gasworks Clauses Act, 1871, s. 24. *Att.-Gen. v. Brecon Corporation* (48 L. J. Ch. 153; 10 Ch. D. 204) distinguished. *Att.-Gen. v. Swansea Corporation*, 67 L. J. Ch. 356; [1898] 1 Ch. 602; 78 L. T. 412; 46 W. R. 534; 62 J. P. 408—North, J.

— Costs of Opposition—Preservation of Corporation's Separate Existence.]—A municipal

corporation is not entitled to charge upon the rates the costs incurred in opposition to a private bill, although such opposition be successful and the bill opposed would, if passed, have put an end to the separate existence of the corporation and merged it in another corporation. *Att.-Gen. v. Brecon Corporation* (48 L. J. Ch. 153; 10 Ch. D. 204) distinguished. *Leith Corporation v. Leith Harbour Commissioners*, 68 L. J. P.C. 109; [1899] A.C. 508; 81 L. T. 98; 64 J. P. 180—H.L. (Sc.)

6. CONTRACTS.

Contract Binding Corporation to Exercise Powers in Particular Way at Future Time.]—

An agreement entered into between a municipal corporation and a tramway company for the construction of certain tramways contained a provision that in the event of the corporation at any subsequent time desiring that further tramways should be constructed along a certain route, along which the company had no power to construct tramways, the corporation should call upon the company to apply for powers to construct the same; that if such powers were obtained, the company should pay the corporation a certain fixed annual rent or wayleave in respect of those tramways; and that the corporation would not give their consent to the construction of such tramways by others without first calling upon the company to apply for powers:—*Held*, that such an agreement was not *ultra vires* although it bound the corporation to exercise their powers in the future in a particular way. *Held* also, that the agreement was not inconsistent with the provisions of section 82 of the Hastings Tramways Act, 1900, which authorised the corporation and the company to make agreements with each other for various specified purposes in relation to the tramways the company were given powers to construct by that Act. *Att.-Gen. v. Hastings Corporation*, 67 J. P. 165; 1 L. G. R. 41—Buckley, J.

Act Authorising Commissioners of Sewers to do Works—Contract between Commissioners and a Company—Commissioner Shareholder in Company—“Interested or concerned in any contract”—Avoidance of Contract.]—Section 42 of the City of London Sewers Act, 1848, which prohibits, under pain of avoidance of the contract, any Commissioner of Sewers or member of the Corporation from being “directly or indirectly interested or concerned in any contract” entered into by or on behalf of the Commissioners, is not confined to construction contracts, but applies to every contract. But such a contract is not avoided by a Commissioner or member of the Corporation subsequently becoming a shareholder in such company. *City of London Electric Lighting Co. v. London Corporation*, 72 L. J. Ch. 737; [1903] A.C. 434; 89 L. T. 310; 52 W. R. 158; 67 J. P. 437; 2 L. G. R. 93—H.L. (E.)

Disqualification—Borough Council—Interest in Contract with Council—Acting for “after becoming disqualified”—Penalty—Interest in Contract at End.]—Where a borough council, as the local education authority, have agreed with the trustees of a voluntary school to repay to them money expended by them on the purchase

of goods for the school, a member of the council who supplies such goods to the trustees, knowing that they will be ultimately paid for by the council, becomes disqualified for his office, under section 12 (1, c) of the Municipal Corporations Act, 1882, as being interested in the contract between the council and the trustees. His disqualification, however, ceases as soon as he has supplied the goods, though he may not have been paid for them. And he incurs no penalty for acting as a member of the council after his disqualification has thus ceased; for he does not in such case act “after becoming disqualified” within the meaning of section 41 of the Act. *Cox v. Truscott*, 92 L. T. 650; 3 L. G. R. 431; 69 J. P. 174; 21 T. L. R. 319—Darling, J.

— Illegality — Interest of Member.]—The fact that a Commissioner of Sewers, or a member of the Court of Aldermen, or of the Common Council of the City of London, is interested or concerned in a contract made by the Commissioners of Sewers with a company, by reason simply of his being a shareholder in such company, does not invalidate the contract. *City of London Electric Lighting Co. v. London Corporation*, 82 L. T. 530—Farwell, J. *And see* ELECTIONS, *infra*.

Seal—Contract not under—Purchase of Land—Non-performance of Condition Precedent to Exercise of Corporation’s Powers—Effect of Subsequent Performance.]—The doctrine that a corporation may contract without seal for the purchase or sale of property, necessary for carrying on the business for which the corporation has been created, does not apply to a case where the power of the corporation to do the act is not to come into existence unless or until a certain prescribed condition has been performed by them which has not been performed; therefore where a corporation had negotiated for the purchase of certain lands for the purpose of carrying out their duties, it was held that the subsequent obtaining of an Order in Council (which was required to be obtained to authorise the purchase of land by them) empowering them to purchase the lands could not relate back so as to ratify the previous negotiations, which therefore were, under the circumstances, a mere nullity. *Holmes v. Trench*, [1898] 1 Ir. R. 319—V.C.

— Sealed Acceptance of Tender—Formal Contract not Executed.]—A tender by a contractor for the execution of sewage works was accepted by an urban authority under seal. The conditions on which the tender was made provided for the execution of a formal contract, for the execution of a bond with sureties for the performance of the contract, and for the completion of the works within a given time from the execution of the formal contract:—*Held*, that the acceptance of the tender did not conclude a contract between the parties, and that the authority were consequently free to break off the negotiations. *Bozson v. Altrincham Urban Council* (No. 2), 1 L. G. R. 639; 67 J. P. 397—C.A.

— Employment of Engineer on Sewerage Works—Acceptance of Work Done—Local Government—Rural District Council.]—A rural district council under the powers of section 56,

sub-section 1 of the Local Government Act, 1894, referred an application for the execution of sewerage works within a portion of their district to a committee. The committee requested an engineer to report what works were necessary and to give an estimate of the cost. On his report and estimate the committee recommended the council to carry out certain works. The council adopted the recommendation and confirmed the minutes of the committee:—*Held*, that, although there was no contract under seal between the council and the engineer, yet, the work performed by him being necessary for the purposes for which the council was created, an implied contract arose, upon the performance of the work by him and the acceptance of its benefit by the council, for the council to pay for the work. *Clarke v. Cuckfield Union* (21 L. J. Q.B. 349, 354) approved and followed. *Lawford v. Billericay Rural Council*, 72 L. J. K.B. 554; [1903] 1 K.B. 772; 88 L. T. 317; 51 W. R. 630; 67 J. P. 245; 1 L. G. R. 535—C.A.

Contract not under Seal—Ratification under Seal.—See *Brooks v. Torquay Corporation*, *post*, LOCAL GOVERNMENT.

7. LIABILITY FOR ACTS OF AGENT.

Agent Acting within the Scope of his Employment—Libel—Liability of Corporation for its Agent's Tort.—The ordinary doctrines of agency and of master and servant are as applicable to corporations as to private persons, whether they arise in questions of contracts or of torts and frauds. A corporation is therefore liable for the publication by its agent of a libel when the agent is acting in the course and within the scope of his employment. *Dicta* to the contrary effect of LORD CRANWORTH in *Western Bank of Scotland v. Addie* (L. R. 1 H.L. Sc. 145, 167) and of LORD BRAMWELL in *Abrath v. North-Eastern Railway* (55 L. J. Q.B. 457, 458; 11 App. Cas. 247, 250) disapproved. *Citizens Life Assurance Co. v. Brown*, 73 L. J. P.C. 102; [1904] A.C. 423; 90 L. T. 739; 53 W. R. 176; 20 T. L. R. 497—P.C.

8. ELECTIONS.

Election of Borough Auditor—Relief—Illegal Expense.—A candidate for the office of elective auditor of a borough was granted relief in respect of having, contrary to section 5 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, incurred expense in the circulation of postcards soliciting the support of the electors, where it appeared that he had acted in ignorance of the fact that a candidate for the office of borough auditor is prohibited by that section from incurring any expense in furtherance of his candidature. *Gale, Ex parte*, 3 L. G. R. 421; 69 J. P. 281—D.

Illegal Practices—Relief—Expenditure by Candidates for Office of Elective Auditor.—The Court will not grant relief under section 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, in the case of a successful candidate at an election to which that Act applies, unless he satisfies the Court that the illegal practice cannot have affected the result of the election; since to grant relief in such a

case would not be just to the unsuccessful candidate or candidates. *Droitwich Borough (Election of Auditors)*, *In re*, 5 L. G. R. 473; 71 J. P. 236; 23 T. L. R. 372—D.

Accordingly, where the two successful candidates at a closely contested election of elective auditors for a borough, being unaware that at such elections it is an illegal practice for a candidate to incur any expense whatever in connection with the election, had incurred expenses amounting to a few shillings, the Court, though granting relief to one of the candidates whose only expenditure had been on polling cards the issue of which he stopped immediately on becoming aware that the expense incurred in their issue was illegitimate, refused relief in the case of the other candidate who had not only issued polling cards, but also inserted an address in the form of an advertisement in a newspaper. *Ib.*

Mayor—Vote of Disqualified Person—Original Vote of Outgoing Mayor—Contingent Casting Vote of Chairman.—Where the election of a person to the office of town councillor is void upon the ground that he has an interest in a contract with the corporation of a municipal borough, he cannot give a valid vote at the election of a mayor, notwithstanding sections 42 (sub-section 1) and 102 of the Municipal Corporations Act, 1882. *Bland v. Buchanan*, 70 L. J. K.B. 466; [1901] 2 K.B. 75; 84 L. T. 390; 49 W. R. 601; 65 J. P. 404—D.

Article IX. of the Local Government Board's Provisional Order Confirmation Act, 1900, does not deprive a mayor of the right which he has under the Municipal Corporations Act, 1882, to give an original vote at the election of his successor. *Ib.*

The expression "equality of votes" in section 61, sub-section 4 of the Municipal Corporations Act, 1882, means "equality of valid votes." Therefore, at a municipal election the chairman may give a contingent casting vote which is to operate only in the event of there being an equality of valid votes. *Ib.*

Nell v. Longbottom (63 L. J. Q.B. 490; [1894] 1 Q.B. 767) followed. *Per* CHANNELL, J.: The reasoning in that case is not conclusive. *Ib.*

Alderman—Resignation—Vacancy—Voting at Annual Election—Disqualification—Outgoing Alderman.—An alderman of a borough whose turn it is to go out of office on November 9 and who resigns office on the previous day, but whose office has not been declared vacant by the council in accordance with section 36, sub-section 2 of the Municipal Corporations Act, 1882, is in the position of one who has resigned office but whose office is not vacant, and being an "outgoing alderman" within the meaning of section 60, sub-section 3, is disqualified to vote at the annual election of aldermen on November 9. *Pease v. Lowden*, 68 L. J. Q.B. 239; [1899] 1 Q.B. 386; 79 L. T. 672; 63 J. P. 56—D.

Councillor—Disqualification of Candidate—No Notice Given to Electors—Right to Claim Seat.—The petitioner and the respondent were the

only candidates for the office of councillor for a borough. Both were nominated, but the respondent at the time of his nomination was absent from the United Kingdom and no written consent by him to such nomination given one month before such nomination was ever produced. The petitioner was not aware of this fact until the day of the poll, when it was too late to print and circulate in the constituency a notice of the objection to the respondent's nomination. The respondent was elected. On a petition against the respondent, —*Held*, that the Court could only declare the election void, and not that the petitioner was elected. *Boyce v. White*, 92 L. T. 240; 53 W. R. 430; 3 L. G. R. 787; 21 T. L. R. 244—D.

— **Disqualified Person duly Nominated—Candidate—Right to Petition.**—A person who has been duly nominated in point of form for the office of councillor, although he may in fact be disqualified for election, is nevertheless a "candidate," and is entitled to maintain a petition under section 88 of the Municipal Corporations Act, 1882. *Harford v. Lynskey*, 63 L. J. Q.B. 599; [1899] 1 Q.B. 852; 80 L. T. 417; 47 W. R. 653; 63 J. P. 263—D.

A person who at the time of nomination is disqualified for election to the office of councillor by reason of his being interested in a contract with the corporation, is also disqualified for nomination. *Ib.*

— **Disqualification for Election—Contract—"Valid nomination"—Notice of Disqualification—Validity of Votes.**—There may be a valid nomination within the meaning of section 56, sub-section 2 of the Municipal Corporations Act, 1882, of a candidate for the office of councillor in a municipal corporation, notwithstanding that the candidate is, by virtue of section 12, sub-section 1 (c), disqualified for being elected and for being a councillor. *Hobbs v. Morey*, 73 L. J. K.B. 47; [1904] 1 K.B. 74; 89 L. T. 531; 52 W. R. 348; 2 L. G. R. 7; 68 J. P. 132; 20 T. L. R. 50—D.

Votes given in favour of a candidate before the voters have notice of any facts disqualifying him for election cannot be treated by the returning officer as thrown away. *Ib.*

— **Interest in Existing Contracts—Disqualification.**—On October 24, 1900, a candidate was nominated and on November 1 elected to the office of town councillor. He had in December, 1899, tendered to supply certain goods to the corporation for a year. His tender had been accepted, and he had supplied and been paid for goods. Being anxious to stand as a candidate at the then forthcoming election of councillors in November, 1900, he on October 19 applied to a committee of the council to be released from his tender or contract, and on the same day a resolution was passed that he be released, subject to the approval of the resolution by the council. This approval was obtained, and the resolution confirmed on October 30:—*Held*, that the candidate was disqualified for being nominated and elected and for being a councillor, because there was an existing contract between him and the corporation which had not been rescinded before October 24, 1900; and that the ratification on

October 30, by the council, of the resolution of October 19, purporting to release the candidate, did not put an end to the contract so as to affect the rights of electors and of other candidates. *Ford v. Newth*, 70 L. J. K.B. 459; [1901] 1 K.B. 683; 84 L. T. 354; 49 W. R. 345; 65 J. P. 391—D.

— **Disqualification—Bankruptcy—Holding or Exercising Office—Quo Warranto.**—By section 32 of the Bankruptcy Act, 1883, a bankrupt is disqualified not only for election to, but also for holding or exercising, the office of a borough councillor. Notwithstanding section 87 of the Municipal Corporations Act, 1882, a bankrupt may still by an information in the nature of a *quo warranto* be ousted from holding or exercising the office. *Rea v. Beer*, 72 L. J. K.B. 608; [1903] 2 K.B. 693; 89 L. T. 412; 52 W. R. 221; 67 J. P. 326; 10 Manson, 263; 1 L. G. R. 634—D.

— **Unopposed Candidate—Return of Expenses—No Expenses Incurred.**—P. was returned unopposed at a municipal election for the county borough of H., and believing that, as he had incurred no expenses of any kind, no return and declaration was required, omitted to return his expenses as "nil" until after the statutory period for making such return and declaration had expired:—*Held*, that there was sufficient evidence before the Court that the omission had been under such circumstances as to amount to an authorised excuse under the Act, and that the relief sought ought therefore to be granted. *Pennington, Ex parte*, 46 W. R. 415—D.

— **Corrupt Practices—Bribery—Indictment.**—In an indictment for an offence under section 2, sub-section 1 of the Corrupt Practices Prevention Act, 1854, for having given money to a voter for having voted at a municipal election, it is sufficient to state the date when the offence was committed—that is, when the money was given to the voter; the date of the election in which the vote was given need not also be alleged in the indictment. *Rea v. Yeoman*, 20 T. L. R. 266—Lord Alverstone, C.J.

— **Illegal Practice—"Bill, placard or poster"—"Having reference to a municipal election"—Name and Address of Printer and Publisher.**—In August, 1903, the appellant caused to be printed a circular headed with the respondent's name and the words "Shall he be our new Mayor?" and sent six copies thereof in sealed envelopes, marked "Private," to the respondent, to the town clerk, and to four councillors of the city. In the previous July the name of the respondent, who was an alderman on the city council, had been informally mentioned, and it was a matter of common knowledge that he was going to stand as a candidate for the office of mayor for the next year, the election taking place on November 9. The respondent laid an information against the appellant for causing to be printed and published a bill having reference to a municipal election contrary to section 14 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, and the magistrate convicted him:—*Held*, that the circular was a "bill" within the meaning of section 14, that in the circumstances the magistrate was entitled to find that it was published with reference to an election,

and that therefore the conviction must stand. *Alcott v. Emder*, 68 J. P. 434; 2 L. G. R. 1313; 20 T. L. R. 487—D.

— **Illegal Hiring—Inadvertence—Application for Relief by Several Candidates—Practice—Affidavit.**—Where an application for relief from an illegal hiring is made under section 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, by several candidates at a municipal election, a joint affidavit of the facts upon which the application is based ought to be made by all the applicants. *Andrews, In re; Streatham Vestry Election, In re*, 68 L. J. Q.B. 683—D.

— **Relief—Petition Pending.**—A successful candidate at an election to which the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, applies, who has been guilty of an illegal practice, may obtain relief against the consequences thereof on application to the High Court under section 20 of that Act, notwithstanding that a petition against his election is pending, if there is no real dispute as to the facts, and the subject-matter of the application for relief is the sole ground of the petition. *Forster, Ex parte*, 89 L. T. 18; 67 J. P. 322; 1 L. G. R. 632—D.

9. OTHER MATTERS.

Mandamus to.—See MANDAMUS.

Stock—Forged Transfer of—Liability.—See *Sheffield Corporation v. Barclay*, ante.

Surplus Land—Power to Charge.—See *Stagg v. Medway Navigation Co., ante*, COMPANY.

COST BOOK COMPANIES.

See MINES AND MINERALS.

COSTS.

1. *Jurisdiction*, 567.
2. *Discretion of Judge*, 568.
3. *Security for*, 571.
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6. *Indemnity*, 577.
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8. *Taxation*, 579.
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11. *Costs in Particular Cases*, 590.

1. JURISDICTION.

Alternative Claims against Two Defendants—Success of Claim against one Defendant and Failure of Claim against other Defendant—Power

of Court to Order Defendant who Fails to Pay Costs to be Paid by Plaintiff to Defendant who Succeeds.—Where in an action claiming relief in the alternative against two defendants the plaintiff succeeds against one defendant and fails against the other, the Court has jurisdiction, both in the Chancery and the King's Bench Divisions, to order the plaintiff to pay the costs of the defendant against whom the action fails and to add those costs to his own to be paid by the defendant against whom the action succeeds. The modern practice has been, where the trial has been without a jury, to order the unsuccessful defendant to pay direct to the successful defendant his costs—*Rudow v. Great Britain Mutual Life Assurance Society* (50 L. J. Ch. 504, 505; 17 Ch. D. 600, 608, 610). But the Judge has jurisdiction to follow the old practice, and ought to do so where the trial has been with a jury and the Judge does not consider that there is good cause for depriving the successful defendant of his costs under Order LXV. rule 1. *Sanderson v. Blyth Theatre Co.*, 72 L. J. K.B. 761; [1903] 2 K.B. 533; 89 L. T. 159; 52 W. R. 33—C.A.

In exercising the jurisdiction the Judge should have regard to the circumstances of the case, and be satisfied that it is just that the unsuccessful defendant should either directly or indirectly pay the costs of the successful defendant. *Ib.*

Per VAUGHAN WILLIAMS, L.J.—The jurisdiction should only be exercised in exceptional cases. *Ib.*

2. DISCRETION OF JUDGE.

Supreme Court of Judicature Act, 1890, s. 5—Payment out of Court—Costs of Petition—Appeal.—Where property has been taken under the powers of the Lands Clauses Consolidation Act, 1845, and the purchase-money paid into Court under section 76 of the Act by reason of the neglect of the owner of the property to make out a title thereto, the costs of and incidental to a petition presented by a person interested in the money to obtain payment out of Court are within the discretion of the Court under section 5 of the Supreme Court of Judicature Act, 1890, and no appeal will lie from the order made in exercise of that discretion. *Schmarr, In re*, 71 L. J. Ch. 219; [1902] 1 Ch. 326; 86 L. T. 71; 50 W. R. 245—C.A.

Assuming that the Court has no jurisdiction to deal with the costs in such a case under section 80 of the Lands Clauses Act, 1845, there is nothing in that section which amounts to a direction that in no circumstances are any costs whatever to be given in such a case, so as to be an express statutory provision taking the case out of section 5 of the Act of 1890. *Fisher, In re* (63 L. J. Ch. 235; [1894] 1 Ch. 450), applied. *Ib.*

“Good cause”—Depriving Successful Plaintiff of Costs.—In an action for breach of promise of marriage, the jury, who were invited by counsel for the plaintiff and by the Judge to award moderate damages, found a verdict for the plaintiff for 10*l.* The Judge deprived the plaintiff of costs. There was no suggestion of

any oppression or misconduct on the part of the plaintiff in bringing the action or in the conduct of it:—*Held*, that there was “no good cause” for depriving the plaintiff of costs. *Tipping v. Jepson*, 22 T. L. R. 743—C.A.

— **Setting up Gaming Acts — Whether “good cause” for Depriving him of Costs.**—In an action tried with a jury the mere fact that the successful defendant has set up the Gaming Acts as an answer to the plaintiff’s claim is not “good cause,” within the meaning of Order L.XV. rule 1, for depriving him of costs. *Granville v. Firth*, 72 L. J. K.B. 152; 88 L. T. 9—C.A.

Depriving Successful Party of Costs — Trial without Jury.—In a case tried without a jury the Judge cannot deprive the successful party of his costs unless there are materials before him justifying such an exercise of his discretion. The fact that the successful party elects to stand upon his legal rights, and refuses to leave the subject-matter of the litigation to the arbitration of the Judge, does not justify the Judge in making an order depriving such party of his costs. *Civil Service Co-operative Society v. General Steam Navigation Co.*, 72 L. J. K.B. 933; [1903] 2 K.B. 756; 89 L. T. 429; 52 W. R. 181; 9 Asp. M.C. 477; 20 T. L. R. 10—C.A.

— **Conduct having no Connection with the Plaintiff’s Case—Appeal without Leave.**—Where a Judge exercises his discretion so as to deprive a successful party of costs upon a stated ground which is untenable, an appeal lies without leave. *Civil Service Co-operative Society v. General Steam Navigation Co.* (72 L. J. K.B. 933; [1903] 2 K.B. 756) followed. *King v. Gillard*, 74 L. J. Ch. 421; [1905] 2 Ch. 7; 92 L. T. 605; 53 W. R. 598; 21 T. L. R. 398—C.A.

In an action to restrain the defendant from passing off his goods as those of the plaintiff, it is no ground for depriving the successful defendant of his costs of the action, that the defendant, in the sale of his goods, makes representations calculated to mislead the public as to the nature of certain awards and medals, those representations having nothing to do with the plaintiff’s case which fails. *Id.*

— **Exaggerated Evidence.**—In the absence of misconduct a successful plaintiff who has not failed wholly on one issue in the action will not, subject to the large discretion of the Court, be deprived of costs because some of his witnesses have been guilty of exaggeration in their evidence. *Lipman v. Pulman*, 91 L. T. 132—Kekewich, J.

Order on Successful Party to Pay Costs.—Where a Metropolitan vestry, acting on the reports of its officers, had passed resolutions recorded on its minutes, and in accordance with such resolutions, but without obtaining the leave of the County Council, entered upon the plaintiff’s premises and inserted a new system of drainage:—*Held*, that on the proper construction of the Metropolis Management Act, 1855, the vestry had committed a trespass, and had done an illegal act, for which it was liable in damages; but the plaintiff not having suffered injury, and having consented to the work,

judgment was given for the defendant vestry with costs. *Long v. Fulham Vestry*, 47 W. R. 556—Kekewich, J.

Payment into Court—Admission of Part and Denial of Part of Liability—Recovery by Plaintiff of Less than Sum Paid in—Costs of Issues on which Defendant Failed—Issue not going to Whole Cause of Action.—The plaintiff entered into the service of the defendants in July, 1901, under an agreement under which he was to be allowed to take three months’ vacation leave, and, as he contended, nine months’ leave on half pay, in November, 1902. He obtained leave in October, 1902, and in February, 1903, while he was on leave, the defendants dismissed him from their service. He brought an action claiming three months’ full pay, nine months’ half pay, certain travelling expenses, six months’ pay in lieu of notice, and damages for wrongful dismissal. The defendants by their statement of defence admitted that the plaintiff was entitled to full pay for the first three months of his leave, and alleged that before action they had tendered him a sum equivalent to that, which was refused, and stated that they were willing for the purposes of the action to admit liability to pay the plaintiff a further sum equal to six months’ half pay; and whilst denying any liability to pay to the plaintiff any money beyond these sums, they for the sake of peace brought 500*l.* into Court, and said that that sum was sufficient to satisfy the whole of the plaintiff’s claim in the action. At the trial the jury gave a verdict for the plaintiff for 781*l.*, and judgment was entered for him. On the appeal the plaintiff succeeded in his claim for nine months’ half pay instead of six, but as regards practically all the other matters in dispute the defendants succeeded, with the result that the amount which the plaintiff recovered was less than the 500*l.* paid into Court, and judgment was entered for the defendants:—*Held*, that the defendants must pay the costs of the issues upon which they failed. *Held*, also, that the rules appeared not to sanction a payment into Court with a defence such as that made use of, the effect of which was to prevent the plaintiff from taking the money out of Court, as he would be entitled to do if it were paid in in respect of a particular liability, with an admission. *Hubback v. British North Borneo Co.*, 73 L. J. K.B. 654; [1904] 2 K.B. 473; 91 L. T. 672; 53 W. R. 70—C.A.

Costs Unnecessarily Incurred—Action to Recover Possession of Premises — Assignee of Leases—Weekly Tenants in Occupation—Weekly Tenants made Defendants.—The plaintiff was the owner of the reversion of four leases which by assignment had become, to the plaintiff’s knowledge, vested in H., who had sub-let the houses comprised in the four leases to a large number of weekly tenants. The plaintiff brought four actions, one in respect of each of the four leases, to recover possession of the houses upon the ground of forfeiture for breach of covenants to repair contained in each lease, and made the whole of the weekly tenants defendants. H., as landlord of these weekly tenants, obtained leave to appear and defend, and eventually, he having put the houses into a state of repair, an order relieving him from the forfeiture was made by consent

in each action on the terms that he should pay the plaintiff's costs as between solicitor and client:—*Held*, that as the real object of the action was to secure the repairs being done, and that as the plaintiff knew that H. was the assignee of the leases, he should have been made sole defendant, and therefore that the costs of copies of the writ and serving the weekly tenants with same or notice thereof should be disallowed as having been unnecessarily incurred; and *semble*, there should only have been one action and not four. *Geen v. Herring*, 74 L. J. K.B. 62; [1905] 1 K.B. 152; 92 L. T. 37; 53 W. R. 326; 21 T. L. R. 93—C.A.

3. SECURITY FOR.

Order for Security for Costs—Stay of Proceedings until Security—Costs Incurred in Preparing Evidence.—The plaintiff company brought this action for infringement of patent, and gave notice of motion for an injunction for June 18, 1897. The motion stood over for a fortnight, and on the same day an order was made that the plaintiffs should give security for costs, and, until security was given, should take no further proceedings against the defendant. No security was ever in fact given, and on August 5 the action was dismissed with costs for want of prosecution, the costs of the motion for the injunction to be costs in the action. On the taxation of costs under this order the Master disallowed costs of preparing evidence after the date of the order for security for use on the hearing of the motion, on the ground that the defendant was not justified in incurring any expense after the order until the plaintiff had given security. The defendant took in objections; the Taxing Master's answers were given on January 28, 1898, and on February 4, 1898, the defendant took out a summons to review the taxation. Owing to the block in business this summons did not come on for hearing until July 16. The plaintiff company had been dissolved on April 14, a resolution for voluntary winding-up having been passed in May, 1897, the final meeting for passing liquidator's accounts held on January 8, and the return to the Registrar made on January 14, 1898, as required by sections 142 and 143 of the Companies Act, 1862:—*Held*, that the Taxing Master was wrong in disallowing all costs incurred by the defendant in preparation of evidence for the motion after the order for security, and the bill must be referred back to him. *Whiteley Exerciser, Lim. v. Gamage*, 67 L. J. Ch. 560; [1898] 2 Ch. 405; 79 L. T. 20; 5 Manson, 249—North, J. *And see* PRACTICE, BANKRUPTCY, col. 152; and COLONY, col. 306.

4. SCALE.

County Courts Act, s. 116—Action "which could have been commenced in a County Court"—Amount—Test as to Amount.—"Any action . . . which could have been commenced in a County Court" means in section 116 of the County Courts Act, 1888, any action of a kind and for an amount within the jurisdiction of the County Court. *Solomon v. Mulliner*, 70 L. J. K.B. 165; [1901] 1 K.B. 76; 83 L. T. 493; 49 W. R. 364—C.A.

In determining whether the action was for

an amount within the jurisdiction of the County Court, the test is not the amount claimed, but the amount recovered in the action. *Chatfield v. Sedgwick*, (4 C.P. D. 459) followed. *Lovejoy v. Cole* (64 L. J. Q.B. 120; [1894] 2 Q.B. 861) approved. *Goldhill v. Clark* (68 L. T. 414) disapproved. *Id.*

— **Action for more than 20l.—Payment of Part of Claim—Action Remitted to County Court—Judgment in County Court for 19l.—Plaintiffs' Right to Costs.**—An action was brought by the plaintiffs against the defendants in the High Court claiming 27l., the balance due upon a promissory note. The defendants paid the plaintiffs a sum of 8l. on account, and the action was then remitted to the County Court, where the plaintiffs filed particulars of demand, giving credit for the sum paid on account, and claiming the balance of 19l. Judgment was given for the plaintiffs for that amount:—*Held* (DARLING, J., dissenting), that the plaintiffs had recovered more than 20l. "in the action," and were therefore entitled to costs under section 116 of the County Courts Act, 1888. *Pearce v. Bolton*, 71 L. J. K.B. 558; [1902] 2 K.B. 111; 86 L. T. 530—D.

— **Action on Contract—Recovery of Sum not Exceeding 50l.—Two Defendants—Different Causes of Action.**—In an action against two defendants on a joint and several bond for 50l., and further and alternatively against one of the defendants for 90l. money had and received, the plaintiff obtained judgment for 50l. against both defendants, and for 90l. against the defendant sued for that amount, with such costs against the defendant against whom judgment was entered for 50l. as the plaintiff was entitled to:—*Held*, that on the true construction of Order LXV. rule 12, the plaintiff was only entitled as against that defendant to costs on the County Court scale. *Duxbury v. Barlow*, 70 L. J. K.B. 478; [1901] 2 K.B. 23; 84 L. T. 518; 49 W. R. 450—C.A.

— **Action on Contract in High Court for more than 20l. and less than 50l.—Application for Judgment under Order XIV.—Leave to Defend on Payment into Court—Order Remitting Action to County Court, and that Order XIV. Costs be Costs in Cause.**—In an action on contract commenced in the High Court for more than 20l. and less than 50l., the plaintiff having applied for judgment under Order XIV., leave was given to defend on payment into Court. After payment in, the defendant applied that the action should be remitted to the County Court, and the Master in granting the application further ordered that the Order XIV. costs should be costs in the cause in the County Court. On appeal from an order of the Judge affirming the Master,—*Held*, following *Harris v. Judge* (61 L. J. Q.B. 577) and *White v. Cohen* (62 L. J. Q.B. 274), that as the provision of section 116 of the County Courts Act, 1888, empowering the High Court or a Judge thereof at chambers to allow more than County Court costs, only operates when an action is tried in the High Court, the order as to costs must be set aside. *Dunn v. Appleton*, 67 L. J. Q.B. 428; [1898] 1 Q.B. 564; 78 L. T. 246—C.A.

— **Action Commenced in High Court—Undivided Claim—Application for Judgment under Order XIV.—Order for Payment of Part**

of Claim and Action Remitted to County Court as to Residue—Successful Defence to Residue—Costs to Abide Event.]—Where an action for 22*l.* 2*s.* for goods sold and delivered has been commenced in the High Court, and an order has been made under Order XIV. for payment of 8*l.* 14*s.* within seven days and remitting the action as to the residue to a County Court for trial, and the defendant, having paid the 8*l.* 14*s.*, succeeds as to the residue, he is not entitled to the costs of his successful defence; nor can the County Court Judge treat them as the costs of a separate "event," because, the action being one and undivided, the plaintiff has recovered 8*l.* 14*s.*, which is the only event, and therefore, though not entitled to costs himself, inasmuch as he has recovered less than 20*l.* in an action of contract, is not liable to pay the costs of the defendant's successful defence to the residue of the claim. *Wright v. Bull*, 69 L. J. Q.B. 529; [1900] 2 Q.B. 124; 82 L. T. 568—D.

— Judgment under Order XIV. as to Part of Claim—Action Remitted to County Court as to Residue—Scale Applicable to Taxation of Costs in County Court.]—In an action of contract to recover 73*l.* 8*s.* 3*d.* the plaintiff upon an application under Order XIV. obtained leave to enter final judgment for 53*l.* 8*s.* 3*d.*, and the action as to the balance of 20*l.* was remitted to the County Court. In the County Court the plaintiff recovered judgment for 20*l.*, the balance of his claim.—*Held*, that the plaintiff had recovered in the action a sum exceeding 50*l.*, and therefore was entitled to have his costs of the proceedings in the County Court taxed upon Scale C, applicable where the amount recovered exceeds 50*l.*, and not upon Scale A, which applies only where the amount recovered does not exceed 20*l.* *Keeble v. Bennett* (63 L. J. Q. B. 694; [1894] 2 Q.B. 329) approved and followed. *Bailey v. Watson* (67 L. J. Q.B. 802; [1898] 2 Q.B. 270) overruled. *White v. Headland's Patent Electric Storage Battery Co.*, 68 L. J. Q.B. 354; [1899] 1 Q.B. 507; 80 L. T. 442; 47 W. R. 273—C.A.

— Action of Detinue of Specific Goods whether Founded on Tort.]—The orders and rules limiting a plaintiff's right to costs where he recovers a sum not exceeding 5*l.* in actions of tort do not apply to an action of detinue in which the goods are recovered in specie. *Bradley v. Archibald*, [1899] 2 Ir. R. 108—Q.B. D.

— Action Founded on Tort—Bailor and Bailee—Injury to Subject of Bailment—Negligence.]—An action by a bailor against a bailee for reward for a breach of his common-law duty to keep safely the thing entrusted to his care is an action founded on tort within the meaning of section 116 of the County Courts Act, 1888, and a plaintiff in such an action who recovers not less than 20*l.* is entitled to his full costs of the action. *Turner v. Stallibrass*, 67 L. J. Q.B. 52; [1898] 1 Q.B. 56; 77 L. T. 482; 46 W. R. 81—C.A.

— Recovery of Sum less than 10*l.*—Judgment for Injunction and Nominal Damages.]—Section 116 of the County Courts Act, 1888, which provides that if in an action founded on tort brought in the High Court, which

could have been commenced in the County Court, the plaintiff "shall recover a sum less than 10*l.*," he shall not be entitled to any costs of the action, does not apply to the case of an action in which the plaintiff claims and recovers substantial relief—for instance, an injunction—beyond mere pecuniary compensation. *Danby v. Lamb* (31 L. J. C.P. 17; 11 C. B. (n.s.) 423) followed. *St. John's College, Cambridge v. Pierrepont* (61 L. J. Q.B. 19) overruled. *Keates v. Woodward*, 71 L. J. K.B. 325; [1902] 1 K.B. 532; 86 L. T. 369; 50 W. R. 258—C.A.

— Reference to Contract to Shew Relationship of Parties—High Court or County Court Scale.]—Where the substance of an action is an act of negligence or breach of duty, the action is one founded upon tort within the meaning of section 116 of the County Courts Act, 1888, and this is so although the obligation on the person sued to exercise due care or perform the duty which has not been performed arises by reason of a relationship existing by virtue of a contract between the parties, and although it may be necessary to refer to such contract in order to establish that relationship. *Sachs v. Henderson*, 71 L. J. K.B. 392; [1902] 1 K.B. 612; 86 L. T. 437; 50 W. R. 418—C.A.

— Detinue—Recovery of Goods in Specie.]—Section 116 of the County Courts Act, 1888, does not apply to an action of detinue in which the goods claimed are recovered in specie. *Du Pasquier v. Cadbury, Jones & Co.*, [1903] 1 K.B. 104; 87 L. T. 519; 51 W. R. 113—C.A.

— High Court Scale—Action against Agent for Return of Goods Unsold and Proceeds of Goods Sold—Offer by Defence to Return Unsold Goods—Acceptance by Plaintiff—Judgment for the Proceeds of Goods Sold exceeding 20*l.* and less than 50*l.*]—In an action against an agent for sale to recover goods unsold and damages for their detention, and also the proceeds of goods sold, the defendant admitted the sale of goods to the value of 33*l.*, against which he pleaded a set-off, and as to the remainder of the goods, which exceeded 50*l.* in value, pleaded that he had always been ready and still was ready and willing to return them forthwith. The plaintiff accepted this offer. At the trial the defendant abandoned his set-off, and judgment was entered for the plaintiff for the 33*l.*:—*Held*, that the plaintiff had recovered the unsold goods in the action by the exigency of a writ which disclosed a substantial claim in tort, and that in these circumstances section 116 of the County Courts Act, 1888, did not apply, and the plaintiff was entitled to costs on the High Court scale. *Du Pasquier v. Cadbury, Jones & Co.*, 72 L. J. K.B. 73; [1903] 1 K.B. 104; 87 L. T. 519; 51 W. R. 113—C.A.

— Recovery of Less than 10*l.*—Action "which could have been commenced in a County Court."]—The words "which could have been commenced in a County Court" in section 116 of the County Courts Act, 1888, have reference to the class of actions which a County Court has jurisdiction to entertain, and not to the amount of the claim on the plaintiff's writ. Therefore in an action for conversion of a motor

car valued at 500*l.*, where the plaintiff accepted in satisfaction of his claim the sum of 2*l.* which the defendant had paid into Court with a denial of liability,—*Held*, that the plaintiff was not entitled to any costs of the action. *Goldhill v. Clarke* (68 L. T. 414) overruled. *Solomon v. Mulliner*, [1901] 1 Q.B. 76; 83 L. T. 493—C.A.

Higher Scale—Special Grounds.—The fact that a case of difficulty and importance has been conducted with extreme ability and diligence on the part of the solicitors does not constitute a special ground for allowing costs on the higher scale within Order LXV. rule 9. *Williamson v. North Staffordshire Railway* (55 L. J. Ch. 938; 32 Ch. D. 399) followed. *Davies Brothers v. Davies* (56 L. J. Ch. 481), *Leeuw, In re*; *Rein v. Wrathall* (93 L. T. J. 333), and *Marriott v. Cobbett* (38 S. J. 620) not followed. *Rivington v. Garden*, 70 L. J. Ch. 282; [1901] 1 Ch. 561; 84 L. T. 197; 49 W. R. 279—Buckley, J.

Allegations of Fraud and Misrepresentation.—An allegation in a pleading of fraud and misrepresentation which the plaintiff fails to substantiate is not a special ground for allowing the defendant costs on the higher scale under Order LXV. rule 9, even although the amount in dispute is large and the questions of fact and law difficult. *Assets Development Co. v. Close*, 69 L. J. Ch. 715; [1900] 2 Ch. 717; 83 L. T. 162; 48 W. R. 699—Buckley, J.

The meaning of rule 9 is that costs on the higher scale may be allowed where the nature and importance of the case necessitate the expenditure of more money in the sense that a more expensive class of witnesses has to be called, as in the case of patent actions. *Ib.*

In an action brought to set aside an agreement on the ground of misrepresentation and suppression of material facts, duress, and fraud, involving the investigation of a large mass of correspondence and documents, the hearing occupied the Court nine days, when the action was dismissed,—*Held*, that there were no special grounds for allowing the defendant costs on the higher scale. *Ib.*

Williamson v. North Staffordshire Railway (55 L. J. Ch. 938; 32 Ch. D. 399) and *Paine v. Chisholm* (60 L. J. Q.B. 413; [1891] 1 Q.B. 531) followed. *Ib.*

Claim for Injunction and Damages—Satisfaction of Claim for Injunction during Progress of Action—Judgment at Trial for 10*l.* Damages—Plaintiff's Right to Costs.—The plaintiff claimed damages for breach of a covenant contained in a lease not to make any alteration in the demised premises, and also an injunction restraining the breach. During the progress of the action the defendant restored the premises to their former condition. At the trial the plaintiff recovered 10*l.* damages with costs to be taxed, but did not ask for an injunction as the defendant stated that he did not intend to interfere again with the premises.—*Held*, that section 116 of the County Courts Act, 1888, did not apply, and that the plaintiff was entitled to costs upon the High Court scale. *Doherty v. Thompson*, 94 L. T. 626—C.A.

Payment into Court of Amount previously Tendered with further Sum—Severable Items.—Where the defendant pleads tender before action brought and lodges the amount tendered in Court, and also pleads payment into Court of a further sum, in full discharge of the plaintiff's claim, the plaintiff on taking the two sums out of Court in satisfaction of his claim has "recovered in the action" only the excess above the tender, where the defendant's tender was made in respect of specific items in the claim, severable in themselves; and is only entitled to costs accordingly. *Scott's Pneumatic Tyre Co. v. Northern Wheeleries Cycle Co.*, [1899] 2 Ir. R. 34—Q.B. D.

Reference to Master under Order XIV. rule 7—Power to Give Costs on High Court Scale.—Upon an application under Order XIV. rule 1, for leave to sign final judgment, the action was referred to a Master in accordance with rule 7. After the expiration of twenty-one days from the service of the writ, the Master made an order giving the plaintiffs liberty to sign judgment for 23*l.* 15*s.* with 7*l.* costs of action, and costs of the reference to the Master and his award, to be taxed on the High Court scale, together with a certificate that the action was a fit one to be brought in the High Court. Upon appeal to the Judge sitting in chambers,—*Held*, that the plaintiffs were only entitled to the costs of the action upon the County Court scale under the provisions of section 116 of the County Courts Act, 1888, there having been no order of a Judge extending the period of twenty-one days under the proviso to that section; but that with regard to the costs of the reference and award the order was correct, inasmuch as the Master must be deemed to be an arbitrator with the same discretion as to costs as that possessed by an arbitrator. *Haycocks, Lim. v. Mulholland*, 73 L. J. K.B. 125; [1904] 1 K.B. 145; 90 L. T. 88; 52 W. R. 400—Phillimore, J.

Repair of Highway—Damage Caused by Excessive Weight and Extraordinary Traffic—Expenses not Exceeding 250*l.*—Action Maintainable either in High Court or in County Court—Trial of Action by Jury in High Court—Recovery of Less than 250*l.*—Costs Following Event—Action Founded on Tort—Grant of Certificate for Costs on High Court Scale.—By section 12, sub-section 1 (a) of the Locomotives Act, 1893, "Expenses under" section 23 of the Highways and Locomotives (Amendment) Act, 1878, "shall cease to be recoverable in a summary manner, but may be recovered if not exceeding 250*l.* in the County Court," and if exceeding that sum in the High Court. In an action brought in the High Court by a local authority to recover a sum exceeding 250*l.* from a defendant in respect of expenses incurred by such authority in repairing certain roads over which locomotives belonging to the defendant and others had travelled, the jury found that the weight was excessive and the traffic extraordinary, and assessed the damages at 120*l.* Judgment was entered for the authority for 60*l.*, the amount of damage agreed by the parties to be attributable to the defendant, with costs, the Judge stating that if necessary, and if he had power to do so, he would certify for costs on the High Court scale.—*Held*, first, that under section 12, sub-section 1 (a) of the Act of 1893, the action might be brought either

in the High Court or in the County Court, and that, apart from special legislation, the mere fact that it might have been brought in the County Court did not affect the right of the local authority to costs, and the action having been tried by a jury, the costs would, under Order LXV. rule 1, follow the event unless otherwise ordered for good cause shewn; secondly, that, assuming the action to be founded on tort within the meaning of section 116 of the County Courts Act, 1888, then the only special legislation was that section, and the Judge, having a discretion under that section to certify for costs on the High Court scale, had exercised that discretion by granting a certificate in favour of the local authority. *Chesterfield Rural Council v. Newton*, 73 L. J. K.B. 24; [1904] 1 K.B. 62; 89 L. T. 466; 52 W. R. 129; 68 J. P. 33; 2 L. G. R. 45; 20 T. L. R. 6—C.A.

5. INTEREST ON.

Interest on Costs Paid by Litigant Unsuccessful in the Court of Appeal, but Successful in the House of Lords.—An action for infringement of letters patent was dismissed with costs, and the plaintiff paid the defendants' costs, with interest to date. Upon the plaintiff successfully appealing to the Court of Appeal, the defendants repaid the amount so received, with interest to date. The House of Lords restored the original order, and the plaintiff repaid the original amount of costs and interest, but refused to satisfy the defendants' claim for interest at 4 per cent. on the amount from the date of the repayment after the Court of Appeal decision to the date of the return after the House of Lords decision:—*Held*, that the defendants were entitled to this further sum in respect of interest just as if there had been no intermediate payments in respect of costs. *Ashworth v. English Card Clothing Co. (No. 2)*, 73 L. J. Ch. 282; [1904] 1 Ch. 704; 90 L. T. 263—Joyce, J.

6. INDEMNITY.

Indemnity against Costs—Costs of Action—Costs of Appeal.—A person who has agreed to indemnify another from a liability is not *prima facie* liable to pay to the person indemnified the costs incurred by him in an unsuccessful appeal from the judgment of a Court of first instance establishing his liability. *Maxwell v. British Thomson Houston Co.*, 73 L. J. K.B. 644; [1904] 2 K.B. 342—Kennedy, J.

In the absence of special circumstances, a person indemnifying another against the costs of an action must pay them as between party and party, and is not bound to pay them as between solicitor and client. *Id.*

Repayment or Indemnity.—The London County Council, for the purpose of widening a street, purchased part of the plaintiff's property under an agreement which contained the following clause: "The council will repay to the vendor (the plaintiff) any sum paid by way of compensation for damage to the ventilators in the building on the east side of the vendor's premises on account of or by reason of the

erection of the wall . . . or any other building or erection . . . to be erected by the vendor on land belonging to him in rear of the land hereby agreed to be sold":—*Held*, that this was not a contract of indemnity, and that the plaintiff was only entitled to recover from the council the amount of compensation he had to pay to the adjoining owner, and not the costs of an action which, at the time of the agreement above set out, was pending between him and the adjoining owner, who claimed damages in respect of the interference with his ventilators. *Potter v. London County Council*, 70 J. P. 35; 4 L. G. R. 346—Lord Alverstone, C.J.

7. SET-OFF.

Specific Performance—Debts Due in Different Capacities—Beneficial Interest in Purchase-Money.—A purchaser who in an action for specific performance against an administratrix recovers costs against her personally cannot retain such costs out of the defendant's beneficial interest in the purchase-money. *Green v. Sevin* (13 Ch. D. 589) distinguished. *Phillips v. Howell*, 71 L. J. Ch. 13; [1901] 2 Ch. 773; 85 L. T. 777; 50 W. R. 73—Byrne, J.

Between same Parties—In same Action—Garnishee Proceedings—Equitable Jurisdiction—Party in Different Capacities—Order LXV. rules 14 and 27 (21).—In an action in the High Court against the treasurer, secretary, and other members of a club upon their joint and several agreements to repay money advanced to the club, the plaintiff signed judgment for the debt and costs amounting to 84*l.* 6*s.* against the treasurer in default of appearance, and afterwards obtained judgment with costs against the secretary in a County Court to which the action was remitted. There was a debt of 48*l.* due to the treasurer from the club, which had a sum of money exceeding that amount deposited in a bank in the names of the secretary, the treasurer, and another person. The plaintiff obtained a garnishee order at chambers for the payment of 48*l.* of this sum to him, but on the appeal of the secretary the Court of Appeal discharged the garnishee order so far as it purported to attach the fund, and directed the plaintiff to pay the secretary's costs of the garnishee proceedings. The plaintiff claimed to set off a proportionate amount of his judgment against the secretary in the County Court against the costs of the garnishee proceedings due from him to the secretary:—*Held*, that he was not entitled to do so under Order LXV. rules 14 and 27 (21), since those rules only applied to a set-off as between the same parties in the same action; nor was he entitled to do so under the equitable jurisdiction of the Court, since that jurisdiction was never exercised where the judgments, although between the same parties, were between them in different capacities. *David v. Rees*, 73 L. J. K.B. 729; [1904] 2 K.B. 435; 91 L. T. 244; 52 W. R. 579; 20 T. L. R. 577—C.A.

Order Consolidating Actions for Foreclosure—Effect of Solicitor's Lien.—A mortgagor charged her property with the repayment of a certain sum, and subsequently gave five other supplementary charges to the same mortgagee. The mortgagee brought an action on the first five

charges, but accidentally omitted the sixth. An order for foreclosure *nisi* was made on these five charges. He then commenced a fresh action for foreclosure on all six charges. An order was subsequently made in chambers, by consent, for the consolidation of the two actions, which directed that the proceedings in the first action should be adopted in the consolidated actions, that the two actions should thenceforth proceed as one action, and that the costs of both actions should be taxed. On a motion by the plaintiff to have costs payable by him in the first action set off against costs payable to him in the second action,—*Held*, that, notwithstanding the consolidation order, the two actions must for the purpose of set-off be treated as independent proceedings, and that set-off could only be allowed subject to the lien for costs of the defendant's solicitors in the first action. *Bake v. French* (No. 1), 76 L. J. Ch. 299; [1907] 1 Ch. 428; 96 L. T. 496—Parker, J.

Appeal—House of Lords.—Order LXV. rule 14, by which set-off for damages or costs is allowed, notwithstanding the solicitor's lien, in the particular cause in which the set-off is sought, does not apply to the House of Lords, and the Appeal Committee, after final judgment in the appeal, will not set off costs due by an appellant in the House of Lords against costs due to the appellant in the Court of Appeal. *Russell v. Russell*, 67 L. J. P. 69; [1898] A. C. 307—H.L. (E.)

Set-off of Costs in Bankruptcy Proceedings.—*See* BANKRUPTCY.

8. TAXATION.

"Costs of the action"—Costs of the Application not Dealt with in Order.—It is the duty of a Taxing Master to include in the "costs of the action" all costs expressly disposed of in that way, and the costs of applications the costs of which are not expressly reserved by the order. *How v. Winterton (Earl)*, 91 L. T. 763—Kekewich, J.

"Costs reserved."—Where costs are expressly reserved by any order (whether costs of a trustee or beneficiary or both), such costs must be expressly dealt with by the Judge, and the effect is that the incidence of those costs, not only as between the plaintiff and defendant, is reserved, and it is the duty of the Taxing Master to see they are not included in the bill without further direction from the Court. *Id.*

Costs "in any event"—"Costs, charges, and expenses of trustee."—A trustee who makes an unsuccessful application which is dismissed with costs to the other party "in any event" cannot obtain reimbursement of his own costs under the order giving him costs, charges, and expenses properly incurred; the result being that the trustee must pay personally not only his opponent's costs, but his own. *Id.*

Claim and Counterclaim—Judgment for Defendant on Claim, and for Plaintiff on Counterclaim.—Where there is a claim and counterclaim, in taxing the costs of the action the

counterclaim, as distinguished from the defence, ought to be disregarded, and a plaintiff who is to pay or be paid the costs of his action must pay or be paid the whole of such costs as if there were no counterclaim; whether both parties fail or both succeed, or one fails and the other succeeds, in principle, makes no difference in this respect. *Atlas Metal Co. v. Miller*, 67 L. J. Q.B. 815; [1898] 2 Q.B. 500; 79 L. T. 5; 46 W. R. 657—C.A.

The costs of the counterclaim are only the costs occasioned by the counterclaim as a counterclaim, and costs which would have been incurred if a cross-action had been brought, but saved by reason of there being a counterclaim instead of a cross-action, ought not to be included. *Dictum* of LORD ESHER, M.R., in *Shrapnel v. Laing* (57 L. J. Q.B. 195, 197; 20 Q.B. D. 334, 338), if intended to be to the contrary effect, dissented from. *Id.*

Where there are costs common to the defence and the counterclaim they must be apportioned, and the costs attributable to the defence will be costs in the action, and those attributable to the counterclaim will be costs of the counterclaim. *Id.*

—Carrying in Objections—Right to Dispense with.—In taxing a bill of costs in an action where judgment on a counterclaim had been given for the plaintiff with costs, the Master disallowed the whole of the costs incurred by the plaintiff in meeting the counterclaim upon the merits and in detail. The plaintiff took out a summons to discharge the certificate of the Master on the ground of misconstruction of principle, without having previously carried in objections to the taxation:—*Held*, that there was nothing in this case to prevent the ordinary rule as to carrying in objections from applying. *Craske v. Wade*, 80 L. T. 380—C.A.

Country Solicitor—Attendance of as Witness at Trial.—A country solicitor, being solicitor on the record for one of the parties, was examined at the trial of the action in Dublin, he being a material witness and his attendance at the trial having been directed by counsel. The solicitor claimed in his costs as between party and party his expenses of such attendance as a witness:—*Held*, that the right to such expenses depends in every case on a question of fact—namely, was the solicitor's attendance at the trial attributable to his character as a solicitor or as witness? If the former, the claim should be disallowed; if the latter, allowed. *Hamilton v. Colhoun*, [1906] 2 Ir. R. 104—K.B. D.

—At Examination of Witness in London—Allowance within Discretion of Taxing Master.—Under rule 10 of the Rules of the Supreme Court, January, 1902, the Taxing Master may, in his discretion, allow, in a proper case on a taxation between party and party, sums beyond those specified in the scale provided by Appendix N to the Rules of the Supreme Court, 1883. *McIver v. Tate Steamers, Lim.*, 71 L. J. K.B. 717; [1902] 2 K.B. 184; 87 L. T. 320; 50 W. R. 642—C.A.

The Taxing Master having, in the exercise of his discretion, allowed, on a taxation between

party and party, a sum of 12l. 12s. in respect of the attendance of a Liverpool solicitor at the examination in London, before trial, of an important witness,—*Held*, that the allowance was within the discretion of the Taxing Master. *Ib.*

— **Attendance in London.**—There is no inflexible rule as to the allowance or disallowance of the costs of a country solicitor for attending personally at the trial in London of a case in which he is engaged. In any case, whether the evidence is oral or by affidavit, special circumstances must be shown to justify the attendance, but the fact that the evidence is by affidavit would *prima facie* make it more difficult to justify. *Dixon, In re; Tousey v. Sheffield*, 67 L. J. Ch. 537; [1898] 2 Ch. 443; 79 L. T. 163; 46 W. R. 677—C.A.

Proceedings were taken to remove trustees from their trust on the ground of misconduct, and charges of a serious nature were made against them. The case was tried in London, and the evidence was taken by affidavit. The charges were not proved:—*Held*, that the circumstances were such as to justify the attendance at the trial of the country solicitors who had acted for the trustees, and the costs of their attendance should be allowed. *Ib.*

Liverpool District Registry—Chancery Division.—*Per* BYRNE, J.—So far as the Chancery Division is concerned, the rules and practice in respect of the taxation of party and party costs are the same in the London Taxing Masters' offices and in the district Registries of Liverpool and Manchester, and such rules and practice apply in respect of cases heard in London exactly as if proceedings had been instituted in any other district Registry than those of Liverpool and Manchester. *Ib.* And see SHIPPING (SALVAGE).

Counsel's Fees—Non-attendance.—A brought an action against B, which was dismissed with costs. A appealed, and the Court of Appeal, without calling on counsel for the respondent, dismissed the appeal with costs. A objected to pay the fee of B's leading counsel in the Court of Appeal on the ground that he was not present at the hearing of the appeal:—*Held*, that the Court would not disturb the uniform practice in party-and-party taxation extending over forty years, and disallowed the objection. *Charman v. Brandon*, 82 L. T. 369—Kekewich, J.

— **Three Counsel—Discretion of Judge.**—On the taxation of the costs of the co-respondent to a petition for divorce which was dismissed with costs, the trial having lasted fourteen days, the Registrar only allowed the costs of two counsel. The Judge allowed the costs of three counsel on account of the complexity of the case, and the Court of Appeal refused to interfere with his discretion. *Hartopp v. Hartopp*, 20 L. T. R. 216—C.A.

— **Leading Counsel—Special Fee—Disallowance.**—In a proceeding in the Chancery Division, a special fee of fifty guineas, in addition to an ordinary fee upon the brief, paid to a leading counsel practising within the Bar but not usually in that Court where the proceeding takes place, cannot under ordinary circumstances

be allowed on a taxation of costs between party and party. *Parson, In re; Parson v. Parson*, 70 L. J. Ch. 563; [1901] 2 Ch. 176; 84 L. T. 709—Joyce, J.

Semble, such a fee cannot be allowed under any circumstances. *Ib.*

— **Fees to View after Trial and before Appeal.**—Upon a taxation as between party and party the Master may allow fees paid to counsel to view after trial, for the purpose of an appeal to the Court of Appeal. *Leeds Forge Co. v. Deighton's Patent Flue and Tube Co.*, 72 L. J. Ch. 294; [1903] 1 Ch. 475; 87 L. T. 711; 51 W. R. 380—Farwell, J.

— **Evidence in the Court of Appeal.**—Upon a taxation as between party and party of costs of an appeal to the Court of Appeal, a Taxing Master has no jurisdiction to allow the costs of a witness in Court but not called, where leave to adduce further evidence upon the point upon which he would be called has not been obtained from the Court of Appeal. *Ib.*

— **Administration Action—Hostile Order sought against One of Two Trustees—Separate Counsel—Solicitor and Client Costs—Second Counsel.**—Where in an administration action a trustee is attacked and sought to be rendered liable for a considerable sum of money, but the attack fails, and the Judge directs taxation of the trustee's costs as between solicitor and client, it is reasonable to allow him the costs of employing two counsel. *Maddock, In re; Butt v. Wright*, 68 L. J. Ch. 655; [1899] 2 Ch. 588; 81 L. T. 320; 47 W. R. 684—Cozens-Hardy, J.

— **Three Counsel—Taxing Master's Discretion.**—The alteration which took place in 1902 of the rules relating to taxation, consisting in part of the introduction of sub-rule 29 of Order LXV. rule 27, did not alter the practice of the Court with reference to a review of the Taxing Master's decision on a question such as the allowing or disallowing of the fees of three counsel employed in a case. *Peel v. London and North Western Railway (No. 2)*, 76 L. J. Ch. 379; [1907] 1 Ch. 607; 96 L. T. 498—Parker, J.

In order to allow the costs of three counsel there ought to be some special matter of complication, and in judging whether there is such complication the Court can consider the length of the documents that have to be examined, the length of time the case is likely to last, the fact that large sums are involved, and that the case is of commercial importance. But the mere commercial importance of the case, and the importance of the issues and of the interests involved do not of themselves justify the employment of three counsel. *Ib.*

In an action against a trade union and the officials of the union, in which a large amount of damages was claimed and which lasted several days both at the trial and in the Court of Appeal, and in which the defendants were successful, the Court refused to interfere with the discretion exercised by the Taxing Master, and affirmed by the Judge in chambers, in allowing the officials of the union the costs of only two counsel both at the trial and in the Court of Appeal. The Taxing Master having allowed the union the costs of only two counsel

in the Court of Appeal (though the costs of three counsel at the trial were allowed to them), the majority of the Court (VAUGHAN WILLIAMS, L.J., and BUCKLEY, L.J.) refused to interfere with the exercise of discretion, affirmed as it was by the Judge at chambers—*FLETCHER MOULTON, L.J.*, dissenting upon the ground that the case was of such importance and difficulty that the costs of three counsel for the union in the Court of Appeal should have been allowed. *Denaby and Cadeby Main Collieries v. Yorkshire Miners' Association*, 23 T. L. R. 635—C.A.

Drawing Bills of Costs of.]—The N. bank sold to the M. bank certain claims. The liquidator in the voluntary winding-up of the N. bank incurred costs to the amount of 3,754*l.* in recovering the claims. The M. bank, before paying the 3,754*l.*, required bills of the costs, the costs of drawing which amounted to 801*l.*:—*Held*, on taxation of the liquidator's solicitor's bills of costs in the winding-up, that the 801*l.* ought to be disallowed. *National Bank of Wales, In re*, 71 L. J. Ch. 679; [1902] 2 Ch. 412; 87 L. T. 436; 50 W. R. 541—Buckley, J.

Costs of drawing bills are allowed where there is litigation or *quasi*-litigation, but not where bills already delivered are ordered to be taxed or the order is one between a solicitor and his own client for delivery and taxation. *Id.*

Directions—Summons for—Subsequent Notices—Costs of Copies.]—In all ordinary cases the fee of five shillings allowed by the Taxing Office for a notice following upon a summons for directions, a copy for chambers, and a copy and service on the other side, is a reasonable and proper allowance. Such notices are not analogous to the summonses necessary before the introduction of the summons for directions, and fees in respect of such notices will not be allowed under the scale prevailing in respect of summonses under the old practice before the introduction of the summons for directions. The scale in item 51 of Appendix N of the Rules of the Supreme Court, 1883, applied. *MacGuare v. Milligan*, 72 L. J. Ch. 87; [1903] 1 Ch. 145; 51 W. R. 74—Swinfen Eady, J.

General Costs—Costs of Particular Issue.]—In an action for damages for the obstruction of a right of way, claimed alternatively as a public and as a private right of way, the jury found in favour of the plaintiffs in respect of the claim founded on the public right of way, judgment being directed for the defendant in respect of the claim founded on the alleged private right of way:—*Held*, that the plaintiffs were entitled to the general costs of the action, and the defendant only to the costs of the issue on which he succeeded. *Smyth v. Wilson*, [1904] 2 Ir. R. 40—K.B. D.

Gross Sum Assessed by Taxing Master—Reasons.]—Where a Taxing Master, instead of taxing, assesses costs at a gross sum under Order LXV. rule 27 (38*a*), he must state plainly on his certificate that he is so doing, and must further give his reasons for adopting this course of procedure. The facts that induce him to adopt this procedure ought to be proved by evidence. *Johnston, In re; Mills v. Johnston*, 73 L. J. Ch. 17; [1904] 1 Ch. 132; 89 L. T. 497—Farwell, J.

Semble, that the "other circumstances" that entitle a Taxing Master to proceed under this sub-rule must be circumstances of weight and moment. It is not sufficient that such circumstances should be special to the case: they must also be matters of weight and moment. *Id.*

Injunction Refused—Damages Obtained—Apportionment of Costs.]—The plaintiffs in an action claimed an injunction to restrain the defendants from altering the level of a road so as to interrupt an approach to the plaintiffs' premises and from entering on the plaintiffs' premises. They also claimed damages against the defendants for having entered upon the plaintiffs' premises and pulled down a wall. The defendants having paid 60*l.* into Court in respect of the plaintiffs' claim for damages, the plaintiffs accepted that amount in full satisfaction of their claim. At the trial of the action the Court ordered that the 60*l.* should be paid out of Court to the plaintiffs in satisfaction of the cause of action arising out of the entry; and that the defendants should pay to the plaintiffs their costs of the action so far as related to that claim, such costs to be taxed by the Taxing Master; and further, that the rest of the plaintiffs' action should be dismissed without costs. In taxing the costs under this order the Taxing Master allowed the plaintiffs all the general costs of the action. Thereupon the defendants took out a summons to vary the Taxing Master's certificate by directing an apportionment of such general costs:—*Held*, that the defendants' objections to the taxation were well founded, and that the Taxing Master ought to have made an apportionment of the general costs. *Todd v. North-Eastern Railway*, 88 L. T. 112—C.A. Affirming, 51 W. R. 333—Farwell, J.

Instructions for Originating Summons—Maximum Fee Prescribed—Discretion to Exceed.]—The Taxing Masters possess a discretion under Order LXV. rule 27, sub-rule 29, to exceed, in proper cases, the maximum fees prescribed by Order LXV. rule 8 and Appendix N of the Rules of the Supreme Court, and accordingly may allow where reasonable a larger fee than 1*l.* 1*s.* for preparing instructions for an originating summons. *Eymen, In re; Tatham v. Eymen*, 72 L. J. Ch. 492; [1903] 2 Ch. 156; 88 L. T. 352; 51 W. R. 475—Farwell, J.

Power of Taxing Masters to Regularise Practice.]—It is not competent under Order LXV. rule 27, sub-rule 37, for the Taxing Masters as a body to draw up regulations, binding upon individual Masters, which shall have the effect of abrogating the discretion reposed in the individual Master by Order LXV. rule 27, sub-rule 29. *Id.*

Issues of—Certain Disallowed—Affidavit relating both to General and to Excepted Issues.]—The Registrar of Trade Marks having granted an application by W. & Co. for the registration of their trade mark, an appeal was brought by the R. Co., which was allowed, the costs of the appeal being allowed to the R. Co. except so far as they had been increased by certain issues, the costs of which were to be paid to W. & Co. Upon taxation of the costs, the Taxing Master disallowed the costs of a witness who had filed

an affidavit upon which he had been cross-examined. The R. Co. appealed upon the ground that this evidence did not relate solely to the excepted issues; and that consequently the whole costs of the witness went to the appellants, the successful parties, on the principle of *Brown v. Houston* (70 L. J. K.B. 902; [1901] 2 K.B. 855):—*Held*, that the decision of the Taxing Master was right; and that that case did not apply, because that was a common-law action, and the order in no way separated the issues, whereas in the present case the learned Judge had distinctly separated the issues. *Wright, Crossley & Co., In re*, 86 L. T. 280—C.A.

— **Verdict for Plaintiff except on One Issue—Judgment for Plaintiff with General Costs—No Order as to Remaining Issue—“Event”**—**Right of Defendant to Enter Judgment on that Issue and to Costs Thereof.**—Where in an action there are several issues, and the jury find for the plaintiff on all the issues except one, and the Judge directs judgment to be entered for the plaintiff, and for the general costs of the action, and makes no order on the remaining issue or as to the costs of that issue, the defendant is entitled to have judgment entered for him on that issue and to an order for the costs of that issue, without making any further application to the Judge or appealing against his judgment to the Court of Appeal. Form of order in such a case. *Hoyes v. Tate (Lady)*, 76 L. J. K.B. 408; [1907] 1 K.B. 656; 96 L. T. 419; 23 T. L. R. 291—C.A.

— **Issues Found in Plaintiff's Favour of—Payment into Court—Denial of Liability—Verdict for Plaintiff for Less than Amount paid into Court.**—In an action for damages for personal injuries caused by the defendants' negligence the defendants by their defence denied that they were guilty of negligence, alleged that the injuries were caused by the contributory negligence of the plaintiffs, and, while denying liability, pleaded payment of a sum of money into Court. The plaintiffs by their reply joined issue, and alleged that the sum paid into Court was not sufficient to satisfy their claim. At the trial the jury found a verdict for the plaintiffs, but for a less amount than the sum paid into Court. Judgment was entered for the defendants, and it was ordered that the plaintiffs should have the costs of the action up to the time of the payment into Court, that the defendants should have the general costs of the action from that time, and that the plaintiffs should have the costs of the issues found in their favour. Upon an application to review the Master's taxation of the costs,—*Held*, that the negligence of the defendants and the contributory negligence of the plaintiffs were issues in the action which were found in the plaintiffs' favour, and consequently that they were entitled in accordance with the judgment to the costs of those issues. *Wagstaffe v. Bentley*, 71 L. J. K.B. 55; [1902] 1 K.B. 124; 85 L. T. 744—C.A.

Refresher Fees—Amount—Discretion of Taxing Master.—On a taxation of costs as between party and party, the Taxing Master has under Order LXV. rule 27, sub-rule (29) of the Rules of the Supreme Court, 1883, a discretion to allow refresher fees to counsel of greater amount

than the maximum allowed by rule 27, sub-rule (48) of the same order. *Ermen, In re; Tatham v. Ermen* (72 L. J. Ch. 492; [1903] 2 Ch. 156), and *Stewart & Co. v. Weber* (19 Times L. R. 722) followed. *Cavendish v. Strutt*, 73 L. J. Ch. 247; [1904] 1 Ch. 524; 90 L. T. 500; 52 W. R. 333; 20 T. L. R. 99—Buckley, J.

On a party-and-party taxation refresher fees to counsel may be allowed in excess of the maximum set out in Order LXV. rule 27, sub-rule 48. *Stewart v. Weber*, 89 L. T. 559—Kennedy J.

Land—Compensation for Taking—Chancery Taxing Master—Jurisdiction.—A Chancery Taxing Master has jurisdiction to tax the costs of an enquiry to assess compensation under the Lands Clauses Act, 1845. *Covington v. Metropolitan District Railway*, 72 L. J. K.B. 93; [1903] 1 K.B. 231; 87 L. T. 649; 51 W. R. 428—D.

Patent Action—Inspection of Machinery by Agreement of Parties without Order—Discretion of Taxing Master—Erection of Machinery at Time of Trial without Order.—In an unsuccessful action for infringement of letters patent, where a mutual inspection by counsel and experts of elaborate and heavy machinery was arranged between the solicitors without the expense of obtaining an order for the purpose under rule 3 of Order L. of the Rules of the Supreme Court, the costs of such inspection were allowed, but not the defendants' costs of erecting machinery in London at the time of the trial, when it was not seen by either the Judge or the plaintiff. *Ashworth v. English Card Clothing Co. (No. 1)*, 73 L. J. Ch. 274; [1904] 1 Ch. 702; 90 L. T. 262; 52 W. R. 507—Joyce, J.

— **Questions of Infringement and Validity.**—Where an action for infringement of patent, in which the defendant succeeds upon the question whether the patent is valid but fails upon the question whether, assuming it to be valid, he has infringed, is dismissed and the plaintiff ordered to pay the defendant's costs, the defendant is entitled on taxation to his costs as well on the question of infringement as on the question of validity. *Haskell Golf-ball Co. v. Hutchison*, 75 L. J. Ch. 270; [1906] 1 Ch. 518; 94 L. T. 731; 54 W. R. 330—Warrington, J.

“Professional Charges”—What are.—The words “professional charges” in the Irish Order LXV. rule 64 (40) [which corresponds to the English Order LXV. rule 27 (38b)], mean professional charges properly so-called, and do not include disbursements of any kind. *Cunningham v. M'Donagh*, [1904] 2 Ir. R. 417—Andrews, J.

Remuneration of Receiver—Costs to be Set off and Balance Certified—Power to make Separate Certificate as to Costs only.—An order was made that the Taxing Master should tax the costs of the plaintiffs of the action, including the costs and remuneration of certain receivers, and should tax the costs of the defendants of certain motions, and deduct those costs of the defendants from the plaintiffs' costs and certify the balance, and the defendants were ordered to pay to the

plaintiffs the balance so to be certified. The Master certified that he had taxed the plaintiffs' costs, but had not included the costs and remuneration of the receivers, and had taxed the defendants' costs and deducted the amount from the amount of the plaintiffs' costs, and he certified the balance due to the plaintiffs in respect of their costs not including the costs and remuneration of the receivers, which, when ascertained, he proposed thereafter to certify in addition to the said balance:—*Held*, that the Taxing Master had no power under the order for taxation to tax the plaintiffs' costs of the action and the costs and remuneration of the receivers separately. *Silkstone and Haigh Moor Coal Co. v. Edey*, 70 L. J. Ch. 774; [1901] 2 Ch. 652; 85 L. T. 300—C.A.

Per BYRNE, J.—A Taxing Master has in a proper case power to make a separate certificate, but he cannot do so without special directions under a judgment directing a particular balance to be certified and paid. *Ib.*

Several Actions against Same Defendant—Same Solicitor for all the Plaintiffs—Separate Fees for Entering Appearance—Discretion of Taxing Master—Rules of the Supreme Court, Order LXV, rules 8 and 27, sub-rule 29, Appendix N, Nos. 59 and 60.—A Taxing Master has no power, under Order LXV, rules 8 and 27, sub-rule 29, to allow a smaller sum than the amounts specified in Appendix N. Where, therefore, there are many actions against the same defendant, the allowance for entering appearance in each of the actions, though entered at one and the same time, is 6s. 8d., and the Taxing Master has no discretion, even under the special circumstances, to allow a smaller sum. *Price v. Clinton*, 75 L. J. Ch. 658; [1906] 2 Ch. 487; 95 L. T. 710—Joyce, J.

Settlement of Action—"Record withdrawn. No costs on either side"—Costs of Interlocutory Proceedings ordered to be Paid by Plaintiff—Right of Defendant to Tax after Settlement of Action.—During the progress of an action several orders were made, upon interlocutory applications, that the plaintiff should pay the defendants' costs, in some cases "in any event." The action was subsequently settled upon the terms, indorsed on the briefs of counsel, "Record withdrawn. No costs on either side," the question of the costs of the interlocutory proceedings not being present to their minds:—*Held*, that after the settlement of the action the defendants were entitled to taxation and payment of their costs of the interlocutory proceedings which the plaintiff had been ordered to pay. *Walter v. Bewicke, Moreing & Co.*, 90 L. T. 409—C.A.

Treasury Solicitor—Appearance of for Party to Litigation—Right to Recover Costs Incurred.—Where costs are ordered to be paid to or by one of the parties to a litigation for whom the Treasury Solicitor has by the directions of the Crown appeared as solicitor, the costs must be taxed and paid in the same way as if the party had been represented in the litigation by an ordinary solicitor. *Re v. Canterbury (Archbishop)* (No. 3), 72 L. J. K.B. 188; [1903] 1 K.B. 289; 88 L. T. 150; 51 W. R. 277—C.A.

Writ—Costs Incurred before issue of—Costs

"necessary or proper for the attainment of justice or for defending the rights of any party."

—On February 28, 1903, the plaintiff recovered judgment in an action brought to set aside certain transfers of shares as a fraud upon creditors within 13 Eliz. c. 5. On March 3, 1903, the plaintiff's solicitors wrote threatening to bring an action for damages against the defendant for complicity in the fraud. The defendant on March 26 obtained a transcript of a shorthand note of the proceedings in the first action. The writ in the present action, which claimed damages for the fraud, was subsequently issued, and the action was afterwards dismissed with costs for want of prosecution:—*Held*, that the defendant should under Order LXV, rule 27, sub-rule (29) be allowed as part of his costs of action the cost of so much only of the transcript of the evidence and judgment as related to the question whether he was or was not party or privy to the fraud, and two consequential items of a fee to his solicitor for perusing such part of the transcript and making notes of it for counsel, and of a fee to counsel to peruse the same with a view to settle the defence. *Bright's Trustee v. Sellar* (No. 2), 73 L. J. Ch. 245; [1904] 1 Ch. 369; 90 L. T. 155; 20 T. L. R. 210—Swinfen Eady, J.

Action against Local Authority—Several Issues.—*See infra*, COSTS IN PARTICULAR CASES (PUBLIC AUTHORITIES PROTECTION), col. 595.

Between Solicitor and Client.—*See* SOLICITOR.

By Co-trustee.—*See* TRUST AND TRUSTEE.

9. APPEAL FOR.

Discretion of Court or Judge—Costs, Charges, and Expenses—Rules of Supreme Court, Order LXV, rule 1.—An appeal lies without leave under the Judicature Act, 1873, s. 49, from an order as to costs only which by law are left to the discretion of the Court, if the Court of Appeal is satisfied that the Court or Judge in lieu of exercising a discretion has applied some general rule which in fact excluded the exercise of a discretion. *The City of Manchester* (49 L. J. P. 81; 5 P. D. 221) followed on this point in preference to *Charles v. Jones* (56 L. J. Ch. 161; 33 Ch. D. 80). *Bew v. Bew*, 68 L. J. Ch. 657; [1899] 2 Ch. 467; 81 L. T. 284; 48 W. R. 124—C.A.

An appeal does not lie without leave from an order as to costs only which by law are left to the discretion of the Court merely because the order also includes trustees' costs, charges, and expenses. *Charles v. Jones* (*supra*) approved on this point in preference to *Chennell, In re*; *Jones v. Chennell* (47 L. J. Ch. 583; 3 Ch. D. 492). *Ib.*

Reference—Discretion of Official Referee—Leave to Appeal.—Where an official referee in an action, the whole of which has been referred to him by the Court, in the proper exercise of his discretion makes an order as to costs which by law are left to his discretion, such order cannot be appealed against except by his leave. *Minister v. Apperly*, 71 L. J. K. B. 452; [1902] 1 K.B. 643; 86 L. T. 625; 50 W. R. 510—D.

Action against Local Authority—Public Authorities Protection Act—Discretion of Judge.]—The discretion as to costs given by Order LXV. rule 1 to the Judge at the trial is not affected by section 1 (b) of the Public Authorities Protection Act, 1893, except so far as therein stated; and where the Judge at the trial of an action brought against a local authority in respect of one of its statutory duties has exercised his discretion as regards costs, awarding them according as he considered the parties had substantially succeeded or failed, and has so exercised his discretion upon materials brought before him at the trial, the Court of Appeal will not entertain an appeal against his decision. *Leckhampton Quarries Co. v. Ballinger*, 93 L. T. 93; 3 L. G. R. 940; 69 J. P. 377; 21 T. L. R. 632—C.A.

Examination of Debtor as to Means—Garnishee Order.]—The costs incident to an application for the examination of a judgment debtor as to means, under the Rules of the Supreme Court, 1883, Order XLII. rule 32, and the costs incident to an application for a garnishee order under the Rules of the Supreme Court, 1883, Order XLV., are in each case in the discretion of the Judge who hears the application, and in neither case does an appeal lie to the Court of Appeal from a refusal of the judge to allow costs, except by leave of the Judge. The Court of Appeal cannot give such leave. *Adlington v. Coningham*, 67 L. J. Q.B. 926; [1898] 2 Q.B. 492; 79 L. T. 232—C.A.

10. ACTION FOR.

Order for, in County Court—Action on, in High Court.]—An action cannot be maintained in the High Court upon an order of a County Court for the payment of costs. *Furber v. Taylor*, 69 L. J. Q.B. 898; [1900] 2 Q.B. 719; 83 L. T. 308; 48 W. R. 689—C.A.

11. COSTS IN PARTICULAR CASES.

(a) ACTIONS WHERE SEVERAL DEFENDANTS.

Action against Two Defendants—One ordered to Pay Plaintiffs' Costs—No Order against Other—Liability to Pay Costs of Plaintiffs' Unsuccessful Claim against Other Defendant.]—Where, in an action against two defendants, no order being made against one, the other is ordered to pay the plaintiffs' costs, such costs include the plaintiffs' costs of his unsuccessful claim against the co-defendant. *Kelly's Directories v. Gavin and Lloyd's* (No. 2), 70 L. J. Ch. 786; [1901] 2 Ch. 763; 85 L. T. 399—Byrne, J.

Action of Tort against Two Defendants Jointly and Severally—Judgment against First Defendant with Costs—Judgment for Second Defendant with Costs—Order that Unsuccessful Defendant Pay Costs for Plaintiff against Successful Defendant.]—In an action for personal injuries against two defendants jointly and severally a verdict was returned for the plaintiff against one defendant and against the plaintiff and for the other defendant. Judgment was accordingly entered for the plaintiff against the first defendant with costs, and against the plaintiff and for the second defen-

dant with costs. The Judge at the trial ordered that there should be added to the costs which the plaintiff was to recover against the first defendant the costs which he had to pay to the second defendant:—*Held*, that the Judge had jurisdiction to make the order, under section 5 of the Judicature Act, 1890, notwithstanding Order LXV. rule 1 of the Rules of the Supreme Court; for that the action was properly constituted against both defendants by virtue of Order XVI. rules 4 and 7, and that, if there had been any misjoinder of causes of action, it was too late after verdict to apply under Order XVIII. rules 1 and 8, to have the causes of action tried separately. *Bullock v. London General Omnibus Co.*, 76 L. J. K.B. 127; [1907] 1 K.B. 264; 95 L. T. 905; 23 T. L. R. 62—C.A.

Held also, that rules 4 and 7 of Order XVI. apply to actions of tort as well as to actions on contract. *Ib.*

Sanderson v. Blyth Theatre Co. (72 L. J. K.B. 761; [1903] 2 K.B. 533) followed and applied. *Sadler v. Great Western Railway* (65 L. J. Q.B. 462; [1896] A.C. 450) discussed. *Ib.*

Co-defendants—Joint Defence—Judgment for Plaintiff against one Defendant—Judgment for other Defendant—Costs of Successful Defendant.]—Where two defendants join in defending an action brought against them and judgment is entered against one and for the other, the successful defendant is *prima facie* entitled to recover from the plaintiff half the costs incurred in the joint defence. *Cain v. Adams* (5 L. J. K.B. 252) followed. *Beaumont v. Senior*, 72 L. J. K.B. 141; [1903] 1 K.B. 282; 88 L. T. 234—D.

Alternative Defendants—Action of Tort.]—In an action in the High Court to recover damages against two defendants either jointly or severally for personal injuries caused by the alleged negligence of both or either of them the jury found a verdict against one defendant, and in favour of the other:—*Held*, that the Court had jurisdiction to order that the costs of the successful defendant should be added to the costs of the unsuccessful defendant and should be paid by the latter, so as to enable the plaintiff to recover all the costs from the unsuccessful defendant. *Bullock v. London General Omnibus Co.*, 22 T. L. R. 244—Bray, J.

Contribution between Co-defendants.]—Where one of several co-defendants who are decreed to pay the plaintiffs' taxed costs pays the whole of such costs, he is entitled to obtain contribution in respect thereof from the other co-defendants in the action, and without an independent proceeding. *Deursly v. Middleweek* (50 L. J. Ch. 777; 18 Ch. D. 236) considered. *Newry Salt Works Co. v. Macdonnell*, [1908] 2 Ir. R. 454—K.B. D.

Severance—Separate Costs—Probate Action.]—A testator executed wills dated August 10, 1895, March 17, 1898, and April 2, 1898. The plaintiffs were executors of the last two wills. Two of the defendants were executors of the first will and were beneficially interested under both the first and second wills. The other two

defendants were legatees under the first will only. The plaintiffs propounded the third will for probate, and all the defendants alleged that the second and third wills were obtained by undue influence. The Court decreed in favour of the first will with costs:—*Held*, that the legatees were justified in appearing separately and being represented by separate counsel at the trial, and should be allowed a separate set of costs, as their interests under the three wills were divergent from those of the executor defendants, and the latter might have been inclined to accede to a compromise on the terms of the second will which would have defeated the claim of the legatees. *Bagshaw v. Pimm*, 69 L. J. P. 45; [1900] P. 148; 82 L. T. 175; 48 W. R. 422—C.A.

Same Solicitor Appearing for Two Defendants—Judgment for one Defendant with Costs—Disagreement of Jury as to other Defendant.]—Where in an action on a contract two defendants appear and defend by one solicitor, and judgment with costs is entered for one of such defendants, the jury disagreeing as to the other, the successful defendant is only entitled to an aliquot portion of the general costs of the defence, notwithstanding that the action is undetermined as to the remaining defendant. *McGowan v. Hamilton*, [1903] 2 Ir. R. 311—K.B.D.

(b) APPEAL. See APPEAL.

(c) ARBITRATION. See ARBITRATION.

(d) COPIES OF DOCUMENTS.

Copies of Documents for the Judge.]—Where the Court is asked to construe the terms of a document, a copy should be provided for its use, and the costs of such copy should be allowed on taxation. *Houstoun's Settlement, In re*, 89 L. T. 469; 52 W. R. 61—Farwell, J.

Summons for Directions—Subsequent Notices—Costs of Copies.]—In all ordinary cases the fee of five shillings allowed by the Taxing Office for a notice following upon a summons for directions, a copy for chambers, and a copy and service on the other side, is a reasonable and proper allowance. Such notices are not analogous to the summonses necessary before the introduction of the summons for directions, and fees in respect of such notices will not be allowed under the scale prevailing in respect of summonses under the old practice before the introduction of the summons for directions. The scale in item 51 of Appendix N of the Rules of the Supreme Court, 1883, applied. *MacGuire v. Milligan*, 72 L. J. Ch. 87; [1903] 1 Ch. 145; 87 L. T. 676; 51 W. R. 74—Swinfen Eady, J.

(e) CONSTRUCTION.

Construction of Will or Settlement—Application to Court—Hostile Litigation.]—The rule that the costs of an adjourned summons raising a question of construction or administration are generally paid out of the estate as between solicitor and client does not apply where the proceedings are in fact, though not in form, hostile litigation between two beneficiaries, in which case the unsuccessful party has to pay

the costs. But the rule does apply where the proceedings, though in form adverse litigation, are in substance amicable procedure for determining a question which sooner or later must be decided for the benefit of all concerned, including the trustees. *Buckton, In re; Buckton v. Buckton*, 76 L. J. Ch. 584; [1907] 2 Ch. 406; 97 L. T. 332; 23 T. L. R. 692—Kekewich, J. *And see* TRUSTEES, *infra*.

(f) CROWN CONCERNED, WHERE. See CROWN.

(g) COUNSEL OF. See TAXATION, *supra*.

(h) COUNTRY SOLICITOR, ATTENDANCE OF. See TAXATION, *supra*, cols. 580-581.

(i) DEBENTURE-HOLDERS' ACTIONS. See COMPANY.

(j) DIVORCE PROCEEDINGS. See HUSBAND AND WIFE.

(k) EVIDENCE.

Depositions Taken before Trial—Reasonable Prudence.]—When an order is obtained for the examination of a necessary witness before the trial, in the expectation that he will be abroad when the trial takes place, the costs of the examination may be allowed to the successful party, even though the witness has not gone abroad and is present at the trial, if it was reasonable and proper to obtain the order for examination at the time when it was made. The question to be considered in such cases is whether the examination was justified by considerations of ordinary prudence at the time it was taken, not whether it was necessary as events subsequently turned out. *Ridley v. Sutton* (32 L. J. Ex. 122; 1 H. & C. 741) not followed. *Barilett v. Higgins*, 70 L. J. K.B. 621; [1901] 2 K.B. 230; 84 L. T. 509; 49 W. R. 449—C.A.

Costs Incurred in Preparing Evidence.]—The plaintiff company brought this action for infringement of patent, and gave notice of motion for an injunction for June 18, 1897. The motion stood over for a fortnight, and on the same day an order was made that the plaintiffs should give security for costs, and, until security was given, should take no further proceedings against the defendant. No security was ever in fact given, and on August 5 the action was dismissed with costs for want of prosecution, the costs of the motion for the injunction to be costs in the action. On the taxation of costs under this order the Master disallowed costs of preparing evidence after the date of the order for security for use on the hearing of the motion, on the ground that the defendant was not justified in incurring any expense after the order until the plaintiff had given security. The defendant took in objections; the Taxing Master's answers were given on January 28, 1898, and on February 4, 1898, the defendant took out a summons to review the taxation. Owing to the block in business this summons did not come on for hearing until July 16. The plaintiff company had been dissolved on April 14, a resolution for voluntary winding-up having been passed in May, 1897, the final meeting for passing liquidator's accounts held on January 8,

and the return to the Registrar made on January 14, 1898, as required by sections 142 and 143 of the Companies Act, 1862:—*Held*, that the Taxing Master was wrong in disallowing all costs incurred by the defendant in preparation of evidence for the motion after the order for security, and the bill must be referred back to him. *Whiteley Exerciser, Lim. v. Gamage*, 67 L. J. Ch. 560; [1898] 2 Ch. 405; 79 L. T. 20; 47 W. R. 296; 5 Manson, 249—North, J.

(l) GUARDIAN AD LITEM.

Official Solicitor—Party and Party—Mode of Allowance.—In an action for damages brought against an infant defendant the Court, on the plaintiff's application, appointed the official solicitor guardian *ad litem*. The jury returned a verdict in favour of the plaintiff, and the Judge ordered judgment to be entered accordingly, and ordered the plaintiff to pay the costs of the official solicitor, the guardian *ad litem*, and that the question of such costs be referred to one of the Masters to tax the same and certify the amount thereof, the plaintiff to be at liberty to add what he should so pay to his own costs of the action:—*Held* that, under the terms of this order, the costs payable by the plaintiff to the guardian *ad litem* were such costs as the guardian *ad litem*, assuming that he were a successful party in a litigation with the plaintiff, would be entitled to on taxation against the plaintiff. *Eady v. Elsdon*, 70 L. J. K.B. 701; [1901] 2 K.B. 460; 84 L. T. 615; 49 W. R. 595—C.A.

Under Order LXV. rule 13 the Court or a Judge in disposing of the costs has power to order payment of the costs of the guardian *ad litem* as between solicitor and client. *Ib.*

(m) NEW TRIAL.

Application for—Costs of Successful Application—Misdirection.—There is no general rule that where an application for a new trial is granted on the ground of misdirection the Court will order the costs of the application to abide the result of the new trial. The order to that effect made in *Bray v. Ford* (65 L. J. Q.B. 213; [1896] A.C. 44) was an order made in that particular case, and is not to be taken as laying down any general rule. The Court which hears the application has a discretion in the matter. *Hamilton v. Seal*, 73 L. J. K.B. 560; [1904] 2 K.B. 262; 90 L. T. 592; 52 W. R. 581—C.A.

Per VAUGHAN WILLIAMS, L.J.—Where an application for a new trial has been granted, and the other party has opposed the application, then *prima facie*, in the absence of special circumstances, the costs of the successful application ought to be borne by the party that opposed it, irrespective of the results of the trial. *Ib.*

(n) PAYMENT INTO COURT.

Payment into Court—Admission of Part and Denial of Part of Liability—Recovery by Plaintiff of Less than Sum Paid in—Costs of Issues

on which Defendant Failed—Issue not going to Whole Cause of Action.—The plaintiff entered into the service of the defendants in July, 1901, under an agreement under which he was to be allowed to take three months' vacation leave, and, as he contended, nine months' leave on half pay, in November, 1902. He obtained leave in October, 1902, and in February, 1903, while he was on leave, the defendants dismissed him from their service. He brought an action claiming three months' full pay, nine months' half pay, certain travelling expenses, six months' pay in lieu of notice, and damages for wrongful dismissal. The defendants by their statement of defence admitted that the plaintiff was entitled to full pay for the first three months of his leave, and alleged that before action they had tendered him a sum equivalent to that, which was refused, and stated that they were willing for the purposes of the action to admit liability to pay the plaintiff a further sum equal to six months' half pay; and whilst denying any liability to pay to the plaintiff any money beyond these sums, they for the sake of peace brought 500*l.* into Court, and said that that sum was sufficient to satisfy the whole of the plaintiff's claim in the action. At the trial the jury gave a verdict for the plaintiff for 781*l.*, and judgment was entered for him. On the appeal the plaintiff succeeded in his claim for nine months' half pay instead of six, but as regards practically all the other matters in dispute the defendants succeeded, with the result that the amount which the plaintiff recovered was less than the 500*l.* paid into Court, and judgment was entered for the defendants:—*Held*, that the defendants must pay the costs of the issues upon which they failed. *Held*, also, that the rules appeared not to sanction a payment into Court with a defence such as that made use of, the effect of which was to prevent the plaintiff from taking the money out of Court, as he would be entitled to do if it were paid in in respect of a particular liability, with an admission. *Hubback v. British North Borneo Co.*, 73 L. J. K.B. 654; [1904] 2 K.B. 473; 53 W. R. 70—C.A.

Payment into Court—Other Issues Raised.—In an action for trespass and wrongful distraint the defendants, in addition to raising certain defences, paid a certain sum of money into Court with a denial of liability. The jury found a verdict against the defendants for a less sum than that paid in:—*Held* (although the defendants were entitled to the costs of the action), that the plaintiff, in addition to his costs up to the time of payment into Court, was entitled to the costs of the other issues raised by the defendants. *Ridout v. Green*, 87 L. T. 679—Bruce, J.

(o) EXECUTORS PROPOUNDING WILL. *See* WILL.

(p) INFANT, AGAINST. *See* INFANT.

(q) MARRIED WOMAN, AGAINST. *See* HUSBAND AND WIFE.

(r) MAYOR'S COURT, IN. *See* MAYOR'S COURT.

(s) MORTGAGE, REDEMPTION OF. *See* MORTGAGE.

(t) PARLIAMENTARY AGENTS, OF. *See* SOLICITOR.

(u) PARTITION, IN CASES OF. *See* PARTITION.

(v) PROBATE ACTIONS, IN. *See* WILL.

(w) PUBLIC AUTHORITIES PROTECTION ACT.

"Action"—Proceedings in Chancery Division—Injunction.]—The word "action" in the Public Authorities Protection Act, 1893, s. 1, includes all actions in the Chancery Division, whether for an injunction only, or partly for an injunction and partly for damages; therefore, where in any such action against a public authority judgment is given for the defendants, they have, apart from any discretion of the Judge, a statutory right to an order for costs, to be taxed as between solicitor and client. *Harrop v. Ossett Corporation*, 67 L. J. Ch. 347; [1898] 1 Ch. 525; 78 L. T. 387; 46 W. R. 391; 62 J. P. 297—*Romer, J.*

Interlocutory Applications or Appeals.]—Section 1 (b) of the Public Authorities Protection Act, 1893, whereby the costs of an unsuccessful action brought against a public authority in respect of its public duties are to be taxed as between solicitor and client and paid by the plaintiff, applies to all actions, including actions in the Chancery Division. It does not, however, apply to interlocutory applications or appeals. *Fielden v. Morley Corporation*, 69 L. J. Ch. 314; [1900] A.C. 133; 82 L. T. 29; 48 W. R. 545; 64 J. P. 484—*H.L. (E.)* See also *Southwark and Vauxhall Water Co. v. Wandsworth Board of Works*, 67 L. J. Ch. 657—*C.A.*

Action for Declaration against Local Authority.]—The plaintiffs proposed to erect certain buildings on their land, which the defendants (the local authority) maintained could not be lawfully erected without their consent. The defendants intimated to the plaintiffs that if the buildings were proceeded with, legal proceedings would be taken against them under the Public Health (Buildings in Streets) Act, 1838; whereupon the plaintiffs instituted an action against the defendants claiming a declaration that they were entitled to erect such buildings without the defendants' consent:—*Held*, that this was an action to which section 1 of the Public Authorities Protection Act, 1893, applied, and therefore, the action having been dismissed, the defendants were entitled to costs as between solicitor and client. *Grand Junction Waterworks v. Hampton Urban Council*, 63 J. P. 503—*Stirling, J.*

Act Done in Pursuance of Statute or of Public Duty.]—A telephone company entered into an agreement with a local authority for the laying down of underground wires, but that agreement had come to an end under a proviso for determination therein contained. The Postmaster-General subsequently granted to the local authority a new licence, which was silent as to the continuance of the powers of the telephone company. An action by the telephone company against the local authority for the purpose of raising the question whether the duration of the powers conferred by the agreement was extended is not within the Public

Authorities Protection Act, 1893, and consequently the defendants were only entitled to party-and-party costs. *National Telephone Co. v. Kingston-upon-Hull Corporation*, 89 L. T. 291; 52 W. R. 26; 1 L. G. R. 777—*Buckley, J.*

Corporation Acting in Pursuance of Public "Authority"—Supply of Electricity under Provisional Order.]—The defendant corporation were empowered by a provisional order, duly confirmed, to supply electricity within their district, and one of the clauses empowered the corporation to "let for hire any meter for ascertaining the value of the supply of electricity by them to any customer." The corporation hired meters for this purpose, which the plaintiffs alleged were an infringement of their patent, and in respect of such alleged infringement they sought an injunction, but their action was dismissed with costs:—*Held*, that the corporation were entitled to have their costs taxed as between solicitor and client, as they were, in supplying the meters, acting in pursuance of a public "authority" within the meaning of section 1 of the Public Authorities Protection Act, 1893. *Chamberlain v. Bradford Corporation*, 83 L. T. 518; 64 J. P. 806—*Kekewich, J.*

Persons Acting under Direction of Local Authority—Right of Way.]—A public right of way having been obstructed by the owner of the land through which it ran, the county council passed a resolution under section 26 of the Local Government Act, 1894, that the powers and duties of the district council, who had failed to take proceedings to protect the right of way, should be transferred to them. The county council then, under an arrangement with the owner of the land, directed the defendants, two of their officials, to drive along the way, so as to enable the question of the public right to be raised. The landowner brought an action for trespass against the defendants, in which the latter obtained judgment:—*Held*, that the defendants, having acted by the direction of the county council in pursuance of a public duty under the Local Government Act, 1894, were entitled to their costs as between solicitor and client under section 1 of the Public Authorities Protection Act, 1893. *Greenwell v. Howell*, 69 L. J. Q.B. 461; [1900] 1 Q.B. 535; 82 L. T. 183; 48 W. R. 307—*C.A.*

Action against District Council for Injunction—Dismissal of Action—"Act done in pursuance of any Act of Parliament or of any public duty."]—T. brought an action against the C. Urban District Council for an injunction to restrain them from using land as a cemetery except beyond a radius of one hundred yards from his dwelling-house, relying on the prohibition to that effect contained in section 9 of the Burial Act, 1855. It was proved at the trial that T. was in fact merely a nominee of one G. for the purposes of this action, who had already sold the fee-simple in the land to the defendant council for the purposes of a cemetery:—*Held*, that, on the principle that a grantor cannot derogate from his own grant, the action failed, and must be dismissed; and that the action being brought against the defendant council for an "act done in pursuance of public duty," the Public Authorities Protection Act, 1893, applied, and costs must be taxed as between

solicitor and client. *Toms v. Clacton Urban Council*, 78 L. T. 712; 46 W. R. 629; 62 J. P. 505—Romer, J.

Action against Public Authority—Payment into Court with Denial of Liability—Acceptance by Plaintiff.]—Where a public body is sued in respect of several matters, and in respect of one of the causes of action pays money into Court denying liability, the plaintiff upon taking the money out in full satisfaction of the whole causes of action, and giving notice to that effect, is only liable to pay the costs of proceedings subsequent to the payment in as between party and party, and not as between solicitor and client, there being no judgment in the defendants' favour. *Smith v. Northleach Rural Council*, 71 L. J. Ch. 8; [1902] 1 Ch. 197; 85 L. T. 449; 50 W. R. 104; 66 J. P. 88—Farwell, J.

Plaintiff only in Part Successful.]—Where the plaintiff obtains judgment for the costs of the action against a public authority, but is ordered to pay to the defendants the costs so far as they have been increased by an issue on which the plaintiff failed, these latter costs must be taxed as between solicitor and client under the Public Authorities Protection Act, 1893. *Roberts v. Gwyrfaei Rural Council*, 68 L. J. Ch. 233; [1899] 1 Ch. 583; 80 L. T. 107; 47 W. R. 376; 63 J. P. 181—Kekewich, J.

Consent Order Dismissing Action with Costs—"Judgment" for Defendants.]—A consent order made in chambers in an action against a public authority dismissing the action and ordering the plaintiff to pay to the defendants their "costs of the action to be taxed," is a "judgment" obtained by the defendants within the Public Authorities Protection Act, 1893, s. 1 (b), so that the defendants' costs ought to be taxed as between solicitor and client. *Shaw v. Hertfordshire County Council*, 68 L. J. Q.B. 857; [1899] 2 Q.B. 282; 81 L. T. 208; 63 J. P. 659—C.A.

Judgment for Defendants—Jurisdiction to Deprive Defendants of Costs—"Good cause."]—Section 1 (b) of the Public Authorities Protection Act, 1893, which provides that "wherever" in any action within the Act "judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client," does not deprive the Judge in an action tried with a jury of his discretion under Order LXV. rule 1 to deprive a successful defendant of his costs for "good cause." *Bostock v. Ramsey Urban Council*, 69 L. J. Q.B. 945; [1900] 2 Q.B. 616; 83 L. T. 358; 64 J. P. 660—C.A. Affirming, 48 W. R. 254—Lord Russell of Killowen, C.J.

In an action tried with a jury against a district council for malicious prosecution the Judge held that there was no absence of reasonable and probable cause, and no evidence of malice, and directed judgment to be entered for the defendants. There were, however, facts connected with the defendants' conduct in relation to the prosecution which might reasonably have induced the plaintiff to suppose he had a good cause of action against them:—*Held*, that there was "good cause" within the meaning

of Order LXV. rule 1 to entitle the Judge in the exercise of his discretion to deprive the defendants of costs. *Ib.*

As between Solicitor and Client.]—Where a public authority obtains judgment in an action brought against it, such judgment carries costs as between solicitor and client under section 1 of the Public Authorities Protection Act, 1893, without any direction from the Court to that effect. *North Metropolitan Tramways Co. v. London County Council*, 67 L. J. Ch. 449; [1898] 2 Ch. 145; 78 L. T. 711; 46 W. R. 554; 62 J. P. 488—Romer, J.

(x) PAYMENT BY THIRD PARTY. *See PRACTICE.*

(y) PAYMENT INTO COURT, ON. *See PRACTICE.*

(z) RECOVERY—JUDGMENT SET ASIDE. *See PRACTICE.*

(aa) RAISING APPOINTED SUM. *See POWERS.*

(bb) REFERENCE.

Reference by Order—Action of Contract—Costs of Reference in Discretion of Arbitrator—Less than 50% Recovered.]—An action of contract was, upon the hearing of a summons taken out by the plaintiff to refer the matters in dispute therein to an arbitrator or official referee, referred to a lay arbitrator specified by name, the costs of the action to abide the event of his award, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator awarded the plaintiff a sum less than 50%, and adjudged that the defendant should pay to the plaintiff the costs of the reference and award:—*Held*, that, whether the order of reference was made by consent or compulsorily, the plaintiff, although only entitled, by reason of Order LXV. rule 12 of the Rules of the Supreme Court, to have the costs of the action taxed upon the County Court scale, was entitled to have the costs of the reference and award taxed upon the High Court scale. *Moore v. Watson* (36 L. J. C.P. 122; L. R. 2 C.P. 314) overruled. *Street v. Street*, 69 L. J. Q.B. 574; [1900] 2 Q.B. 57; 82 L. T. 648; 48 W. R. 450—C.A.

(cc) REMITTED ACTION, IN. *See COUNTY COURT.*

(dd) SALE OF GOODS—SUB-SALE. *See DAMAGES.*

(ee) SECURITY FOR. *See PRACTICE.*

LIMITED COMPANY, BY. *See COMPANY, col. 441.*

(ff) SEPARATE ESTATE OF MARRIED WOMAN. *See HUSBAND AND WIFE.*

(gg) SHORTHAND NOTES.

Costs of Shorthand-writer's Notes—Time for Application for—Power of Court to Vary its own Order.]—The ordinary order for judgment with costs does not include the cost of a transcript of the shorthand-writer's notes. Such costs must be applied for at the hearing. Where

an order has been made for judgment with costs, and that order has been drawn up, the Court has no power to alter its decree by subsequently allowing special costs. *The Turret Court*, 84 L. T. 331; 9 Asp. M.C. 162—Jeune, P.

(*hh*) SOLICITOR AND CLIENT, BETWEEN. *See* SOLICITOR.

(*ii*) SOLICITOR'S LIEN FOR. *See* SOLICITOR.

(*jj*) SOLICITOR MORTGAGEE, OF. *See* MORTGAGE.

(*kk*) SPECIFIC PERFORMANCE. *See* SPECIFIC PERFORMANCE.

(*ll*) TRUSTEES.

Costs of Appearance of Trustees of Will—Construction of Will—Appeal.—Although it is the settled practice of the Court that trustees, who have been served with notice of an appeal and appear at the hearing, are entitled to their costs, yet the Taxing Master in taxing such costs should have regard to the question of the probability that there was of the trustees being called upon to assist the Court at the hearing. *Carroll v. Graham*, 74 L. J. Ch. 398; [1905] 1 Ch. 478; 92 L. T. 66; 53 W. R. 549—C.A.

Per VAUGHAN WILLIAMS, L.J.—*Semble*, that trustees who are absolutely neutral and do not intend to take any part at the hearing ought not to appear by separate counsel on an appeal.

Trustee — Petition — Service.—Order LXV. rule 27 (19), as to a tender for costs on the service of a petition does not apply to a trustee whose duty it is to appear and protect the fund of which he is the trustee, and which is the subject-matter of the petition. *Lowe v. Moore*, 22 T. L. R. 640—Swinfen Eady, J. *And see* SETTLEMENT.

(*mm*) SUBSTITUTED SERVICE.

Specially Indorsed Writ—Fixed Amount of Costs.—In an action commenced by a specially indorsed writ for which the plaintiff obtained an order for substituted service, the defendant within four days of the service paid the amount claimed for debt and costs, and subsequently obtained an order for taxation of the plaintiff's costs under Order III. rule 7. In accordance with what was the invariable practice of the Masters, the Master who taxed the bill allowed the fixed sum of 1*l.* for the costs of the substituted service without going into the items in the bill:—*Held*, that the Master had no power to do this, and that the bill must be sent back for taxation. *Flatau v. Cullen*, 81 L. T. 402; 48 W. R. 36—C.A.

(*nn*) WINDING-UP CASES, IN. *See* COMPANY.

COUNCILLOR.

See CORPORATION.

COUNSEL.

See BARRISTER.

Fees of.]—*See* COSTS—TAXATION, cols. 581–582.

COUNTERCLAIM.

See PRACTICE.

Costs of.]—*See* COSTS, cols. 579–580.

COUNTY COURT.

1. *Statutes*, 600.
2. *Jurisdiction*, 600.
3. *Deputy Judge*, 602.
4. *Remitted Action*, 603.
5. *Practice*, 604.
6. *Judgment*, 607.
7. *Costs*, 607.
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11. *Other Matters*, 616.

1. STATUTES.

63 & 64 Vict. c. 47 is the *County Courts (Investment) Act*, 1900.

3 Edw. 7 c. 42 is the *County Courts Act*, 1903.

2. JURISDICTION.

Absence of on Face of Proceedings—Waiver—Insufficiency of Affidavit.—A judgment obtained by a plaintiff in an action in a County Court against a defendant residing and carrying on business outside the district of the Court being unsatisfied, the plaintiff applied for and obtained leave to issue a judgment summons outside the jurisdiction upon an affidavit which did not comply with Form 52A of the Appendix to the County Court Rules, 1889, as prescribed by Order XXV. rule 14a of those Rules. On the hearing of the summons an affidavit made by the defendant and sent by him to the Registrar of the Court was read. An order of commitment having been made, the defendant applied for a writ of prohibition to restrain the County Court Judge and the plaintiff from further proceeding upon the order:—*Held*, that a statutory condition precedent to the jurisdiction to make the order was wanting on the face of the proceedings, which the defendant could not waive, and that a writ of prohibition must issue. *Alderson v. Palliser*, 70 L. J. K.B. 935; [1901] 2 K.B. 833; 85 L. T. 210; 49 W. R. 706—C.A.

Jones v. James (19 L. J. Q.B. 257), *Moufflet v. Washburn* (54 L. T. 16), and *Moore v. Gamgee* (59 L. J. Q.B. 505) explained. *Ib.*

Bankruptcy—Order for Arrest of Debtor—Jurisdiction—Certiorari.]—A County Court Judge exercising bankruptcy jurisdiction has all the powers of the High Court, and *certiorari* will not lie to bring up an order made within such jurisdiction into the Queen's Bench Division. *Skinner v. Northallerton County Court Judge*, 68 L. J. Q.B. 896; [1899] A.C. 439; 80 L. T. 814; 63 J. P. 756; 6 Manson, 274—H.L. (E.) Affirming, 47 W. R. 68—C.A.

Judge Exercising Bankruptcy Jurisdiction—Remedy—Certiorari.]—A County Court Judge exercising bankruptcy jurisdiction under the Bankruptcy Acts, and acting within that jurisdiction, has all the powers of a Judge of the High Court exercising his jurisdiction, and so long as such County Court Judge is exercising bankruptcy jurisdiction the remedy by which to question an order made by such Judge when exercising such jurisdiction, if such order requires alteration or amendment, is by application to the Judge himself, sitting in bankruptcy, and not by *certiorari* to bring up the order into the Queen's Bench Division. *Reg. v. Northallerton County Court Judge*, 68 L. J. Q.B. 24; [1898] 2 Q.B. 680; 79 L. T. 327; 47 W. R. 68—C.A.

Detinue—Judgment—Order for Delivery of Specific Chattel—Warrant of Delivery—Wilful Disobedience to Order—Jurisdiction to Commit.]—A County Court Judge has jurisdiction under the Judicature Act, 1873, s. 89, and the County Court Rules, 1903, Order XXV. rule 57, to make an order of committal against a defendant for wilful disobedience to an order for the delivery of a specific chattel, notwithstanding that a warrant of delivery containing a direction to the bailiff to distrain all the lands and chattels of the defendant within the district of the County Court had been issued to enforce the order, but had remained unexecuted. *Hymas v. Ogden*, 74 L. J. K.B. 101; [1905] 1 K.B. 246; 91 L. T. 832; 53 W. R. 209; 21 T. L. R. 85—C.A.

Assessment of Value of Chattel—Condition Precedent to Order for Delivery.]—It is not now necessary, by reason of Order XLVIII. rule 1 of the Rules of the Supreme Court, 1883, for the value of a chattel to be first assessed, as a condition precedent to the making of an order by a County Court Judge for the delivery of a specific chattel. *Ib.*

Equitable—Foreclosure Action—Amount Originally Advanced over 500%.—Amount Actually Due when Action Brought under 500%.—Transfer to Chancery Division—Retransfer.]—On a motion for an order retransferring to the County Court of Durham an action commenced in that Court for payment of the amount due on a mortgage of freehold property and in default foreclosure and possession of the property, it appeared that, although the mortgage debt of 575*l.* had by various payments been reduced to 461*l.* before action brought, the County Court Judge was of opinion that, as the amount of the advance had exceeded 500*l.*, the matter was beyond the jurisdiction of the County Court, and ordered the action to be transferred to the Chancery Division of the High Court of Justice:—*Held*, that by virtue of section 67 (3) and section 68 of the County Courts Act, 1888, the action might be retransferred to the County Court of Durham.

Shields, Whitley, &c., Building Society v. Richards, 84 L. T. 587—Cozens-Hardy, J.

Specific Performance—Sale of Equity of Redemption—Value of Property more than 500*l.*—“Purchase-Money.”]—By a contract of sale the purchaser agreed to purchase for a sum of 75*l.* certain property subject to a mortgage. The total value of the property, apart from the mortgage, was 1,500*l.* In an action brought in the County Court for specific performance:—*Held*, that the subject of the purchase was the equity of redemption of the property for the agreed sum of 75*l.*, which must be taken to be the “purchase-money” within the meaning of section 67, sub-section 4 of the County Courts Act, 1888, and that the County Court had therefore jurisdiction to try the action. *Rea v. Birmingham County Court Judge*, 73 L. J. K.B. 344; [1904] 1 K.B. 827; 90 L. T. 514; 52 W. R. 524; 20 T. L. R. 311—D.

Injunction to Restrain Breach of Agreement—No Claim for Damages—Liquidated Damages within Limits of Jurisdiction.]—A County Court has jurisdiction to grant an injunction to restrain the breach of an agreement, notwithstanding that no damages are claimed in the action, provided the damages which might be recovered under the agreement are fixed by the agreement at a sum within the jurisdiction of the Court. *Stiles v. Ecclestone*, 72 L. J. K.B. 256; [1903] 1 K.B. 544; 88 L. T. 294; 51 W. R. 411—D.

Interpleader—Service out of the Jurisdiction.]—The County Court has no jurisdiction to pronounce a decree upon an interpleader process, the service of which has been effected out of the jurisdiction. *Spence v. Parkes*, [1900] 2 Ir. R. 619—Q.B. D.

Land—Title to Incidentally Coming in Question—Remitting Action to County Court—Effect of Order.]—*Semble*, where an action in the High Court for money had and received has been remitted to the County Court, and when in the County Court it is ascertained that the title to land will incidentally come in question, the County Court Judge has no jurisdiction to entertain the action in the absence of a written consent of the parties or their solicitors. *Toon v. Stanbury-Eardley*, 22 T. L. R. 536—D.

Trade Mark—Retention on Register—Injunction to Restrain Infringement.]—A County Court has no jurisdiction to entertain an action for infringement of a registered trade mark. *Bow v. Hart*, 74 L. J. K.B. 341; [1905] 1 K.B. 592; 92 L. T. 181; 53 W. R. 372; 21 T. L. R. 251—C.A.

A trade mark, however, is not a “franchise” within the meaning of section 56 of the County Courts Act, 1888. *Ib.*

3. DEPUTY JUDGE.

Appointment of Several Deputies to Act in Particular Courts—Validity of Appointment.]—A County Court Judge, being Judge of several Courts, has power, under section 18 of the County Courts Act, 1888, to appoint a deputy to act in some of those Courts. It is not necessary that a deputy appointed by

a County Court Judge should be appointed to act in all the Courts of which he is Judge. *Rea v. Lloyd*, 75 L. J. K.B. 406; [1906] 1 K.B. 552; 94 L. T. 498; 54 W. R. 464; 22 T. L. R. 390—C.A.

4. REMITTED ACTION.

Action brought in High Court for Sum exceeding 100*l.*—Amendment of Writ by Substituting Sum under 100*l.*—Jurisdiction to Remit Action to County Court for Trial.—Where in an action brought in the High Court for a sum exceeding 100*l.* an amendment of the writ is allowed, by which, in substitution for the amount originally indorsed, a sum not exceeding 100*l.* is claimed, the Court has jurisdiction under section 65 of the County Courts Act, 1888, to remit the action to the County Court for trial. *Sneade v. Wotherton Barytes and Lead Mining Co.*, 73 L. J. K.B. 170; [1904] 1 K.B. 295; 90 L. T. 53; 52 W. R. 225; 20 T. L. R. 183—C.A.

Claim on Writ Reduced to 100*l.* by Abandonment—Jurisdiction of County Court Judge to Try Action—Prohibition.—There is no jurisdiction under section 65 of the County Courts Act, 1888, to remit an action, commenced in the High Court, for trial in the County Court, in which more than 100*l.* is claimed, upon abandonment by the plaintiff, otherwise than by consent, of the excess. But where the plaintiff has abandoned the claim on his writ reducing it to 100*l.*, and the Master at chambers has remitted the action for trial, and the defendant has allowed the time for appealing against the order to expire, it is not an excess of jurisdiction on the part of the County Court Judge to try the action, notwithstanding the defendants' objection that the Master's order was made without jurisdiction; nor can the defendant afterwards raise the point by prohibition, for the County Court Judge ought not, in cases of remitted actions, to be called upon to try preliminary questions as to whether he should or should not obey an order against which there has not only been no appeal, but the time for appealing has expired. *Dierken v. Philpot*, 70 L. J. K.B. 675; [1901] 2 K. B. 380; 85 L. T. 246; 49 W. R. 703—D.

Liquidated Claim—Power to Amend—Claim for Unliquidated Damages.—An action commenced in the High Court by a specially indorsed writ to recover a liquidated sum less than 50*l.* was remitted to a County Court under section 65 of the County Courts Act, 1888:—*Held*, that the County Court Judge had power under section 87 to amend the claim by converting it into a claim for unliquidated damages, although the action, if originally brought to recover unliquidated damages, could not have been remitted. *Spencer v. Forster*, 74 L. J. K.B. 288; [1905] 1 K.B. 434; 92 L. T. 163; 21 T. L. R. 224—D.

Trustee in Bankruptcy—Security for Costs.—Where an action of contract brought in the High Court has been ordered to be tried in a County Court under section 65 of the County Courts Act, 1888, and subsequently, upon the bankruptcy of the plaintiff, but prior to the writ and order remitting the action having been lodged with the Registrar of the County Court,

the trustee of the bankrupt's estate is added as a plaintiff by the High Court, the County Court Judge has no jurisdiction under section 94 of the Act to order the trustee to give security for costs of the action. *Hemming v. Davies*, 67 L. J. Q.B. 458; [1898] 1 Q.B. 660; 78 L. T. 500; 5 Manson, 73—D.

Costs—Payment into Court of Part of Claim—Judgment for Defendant in County Court for Balance—Right of Defendant to Costs—Scale of Taxation.—The plaintiffs brought an action in the High Court to recover 71*l.* 5*s.* 10*d.* for goods sold and delivered. By an order made under Order XIV. leave was given to the defendants to defend the action on paying into Court 23*l.* 18*s.* 10*d.* within seven days, otherwise final judgment for the plaintiffs for that amount and costs, with liberty to defend as to the residue of the claim, and it was directed that the action should be tried in the County Court. The defendants duly paid into Court the sum specified in the order, and gave the plaintiffs notice that they consented to judgment for that amount, and the action was entered for trial in the County Court. The County Court Judge gave judgment for the defendants, but directed that the plaintiffs should have the sum in Court and costs thereon down to the date of payment into Court, the defendants to have costs after that date. The plaintiffs' costs were duly paid by the defendants. The Judge, on a review of taxation, directed that the defendants' costs must be taxed on the scale which applies where the sum claimed does not exceed 50*l.*:—*Held*, that, assuming the defendants were entitled to costs, their costs should be taxed on the scale which applies where the amount claimed exceeds 50*l.* *Held* also, that the defendants, having succeeded since the date of the payment into Court, where entitled to the costs awarded them since that date, notwithstanding that the proceedings constituted one action in which the plaintiffs had recovered judgment for the amount paid into Court. *Aston Tube Works, Lim. v. Dumbell*, 73 L. J. K.B. 208; [1904] 1 K.B. 535; 90 L. T. 315; 52 W. R. 444; 20 T. L. R. 165—D.

White v. Headland's Patent Electric Storage Battery Co. (68 L. J. Q.B. 354; [1899] 1 Q.B. 507) applied. *Dicta in Wright v. Bull* (69 L. J. Q.B. 529; [1900] 2 Q.B. 124) dissented from. *Id.*

Costs of.—See COSTS, *infra*.

5. PRACTICE.

Summons—Order for Service out of Jurisdiction—Breach of Contract—Defendant Domiciled or Ordinarily Resident in Scotland—Prohibition.—Where service of a summons out of the jurisdiction on a defendant domiciled or ordinarily resident in Scotland or Ireland has been ordered by a County Court Judge in spite of the provisions of Order VII. rule 41 (e) of the County Court Rules, the High Court may order a writ of prohibition to issue prohibiting further proceedings, notwithstanding that rule 49 of the above Order provides an alternative remedy by application to the County Court

Judge. *Channell Coaling Co. v. Ross*, 76 L. J. K.B. 145; [1907] 1 K.B. 145; 95 L. T. 728—D.

Special Defence—Statute of Limitations—Notice.—The general direction contained in Order X. rule 14a of the County Court Rules, 1889, as to notice of the defence of any Statute of Limitations, supersedes the specific direction of rule 18a of the same Order that notice of any statutory defence, or defence of which the defendant is required to give notice, must set out the year, date, and section of the statute. Accordingly a notice, following form 95a, that the claim of the plaintiff is barred by a Statute of Limitation, is good, notwithstanding that it does not set forth the statute and the date from which it began to run. *Eaton v. Tapley*, 68 L. J. Q.B. 638; [1899] 1 Q.B. 953; 80 L. T. 797; 47 W. R. 463—D.

Gaming Act.—By Order X. rule 18 of the County Court Rules, where a defendant relies on a statutory defence he shall in his statement set forth the year, chapter, and section of the statute in the short title, and the particular matter on which he relies, "or otherwise sufficiently indicate the nature of the defence on which he relies." In an action the defendant pleaded that the action was "null and void, and the defendant relies on section 18 of the Gaming Act, 1845." As a matter of fact he should have pleaded the Gaming Act, 1892:—*Held*, that there had been a sufficient indication of the defence within the rule. *Renton v. King*, 93 L. T. 10; 21 T. L. R. 577—D.

Statutory Defence—Gaming Transaction—Agreement to Withdraw Defence—Validity.—

In an action in a County Court on a cheque given for bets lost by the defendant to the plaintiff the defendant gave notice of a defence under the Gaming Acts. Before the hearing the parties entered into "terms of settlement," whereby the defendant agreed to give to the plaintiff two bills payable at a future date, and the hearing of the action was adjourned; and the defendant also agreed to withdraw his plea of the Gaming Act, and not to set up such plea in respect of either of the two bills. The defendant accordingly withdrew the notice of defence. He did not pay the first bill, and he gave notice withdrawing his notice of withdrawal of the defence. At the adjourned hearing the County Court Judge gave judgment for the plaintiff for the amount of the cheque upon the ground that the defendant could not, by reason of the agreement, avail himself of the statutory defence:—*Held*, that the agreement not to set up the statutory defence was invalid, and as the defendant had withdrawn his notice of withdrawal of that defence, the defence was before the Court, and the County Court Judge ought to have given effect to it. *Cooper v. Willis*, 22 T. L. R. 532—D.

Gaming Act.—The defence to an action for commission, brought in the County Court, that the agreement sued upon is void under section 1 of the Gaming Act, 1892, is a "statutory defence," and the defendant is not therefore entitled to rely upon it unless he has given notice of his intention to do so in accordance with Order X. rules 10 and 18a of the County Court Rules, 1889. *Willis v. Lovick*, 70 L. J.

K.B. 656; [1901] 2 K.B. 195; 84 L. T. 713; 49 W. R. 540—D.

Sale of Goods—Statute of Frauds.—In an action of contract the defence that there is no memorandum in writing to satisfy section 4 of the Sale of Goods Act, 1893, is a "statutory defence," and the defendant is not therefore entitled to rely upon it unless he has filed a notice of his intention to do so in accordance with Order X. rules 10 and 18a of the County Court Rules, 1889. *Brutton v. Branson*, 67 L. J. Q.B. 827; [1898] 2 Q.B. 219; 79 L. T. 247—D.

Solicitor's Bill of Costs—No Signed Bill.—

The defence to an action brought by a solicitor to recover a bill of costs, that the solicitor had not delivered a signed bill of costs one month before action brought, as required by section 37 of the Solicitors Act, 1843, is a statutory defence within the meaning of Order X. rules 10 and 18 of the County Court Rules, 1889; and when the action is brought in a County Court notice of such defence ought to be given in pursuance of those rules. *Lewis v. Burrell*, 77 L. T. 626—D.

Judgment Summons—Application for Leave to Issue—Contents of Affidavit—Circumstances Shewing Means to Pay.—

The affidavit upon which an application is made under Order XXV. rule 14a of the County Court Rules, 1889, for leave to issue a judgment summons against a judgment debtor, who is a master and does not dwell or carry on business within the district of the Court in which the judgment was obtained, does not comply with the requirements of the rule and the form in the appendix to the rules if it merely states that the judgment debtor lives at a specified house apparently of a specified yearly rent or value, and that he carries on a specified business. The affidavit must state circumstances shewing that the judgment debtor has means to pay. *McIntosh v. Simkins*, 70 L. J. K.B. 268; [1901] 1 K.B. 487; 84 L. T. 21; 49 W. R. 241—C.A.

Per ROMER, L.J.—The affidavit may be sufficient, although the deponent is unable to state whether the judgment debtor has children or is married. But in that case the County Court Judge ought to infer that the judgment debtor probably has a family to support. *Id.*

Payment of Money into Court with Denial of Liability—Verdict for Amount Paid in—Costs of Issues on which Defendant Fails.—

Where the defendant in an action in the County Court pays money into Court with a denial of liability, and the plaintiff recovers no more than the amount paid in, the defendant is entitled to the general costs of the action, but the County Court Judge has a discretionary power to allow the plaintiff the costs of any issues upon which he may have succeeded. *Dunn v. South Eastern and Chatham Railway*, 72 L. J. 127; [1903] 1 K.B. 358; 88 L. T. 60; 51 W. R. 27—D.

Right to Reply.—In the County Court, as in the High Court, the rule is that when the defendant has called evidence the plaintiff has an absolute right of general reply. *Clack v. Clack*, 75 L. J. K.B. 274; [1906] 1 K.B. 483; 94 L. T. 516; 54 W. R. 375; 22 T. L. R. 313—D.

6. JUDGMENT.

Cross-judgments—Satisfaction—Separate Actions—Payment into Court—Solicitor's Lien.]—Where cross-judgments for different amounts have been recovered in the County Court, section 150 of the County Courts Act, 1888, applies to prevent the party who has recovered judgment for the larger amount from enforcing payment of more than the balance remaining after deduction of the smaller amount, notwithstanding that—first, the cross-judgments have been recovered in two distinct actions and not in the same action; secondly, the larger sum has been paid into Court by the opposite party; and thirdly, the solicitor of the party who has recovered the larger amount has a lien thereon for costs. *Ward v. Haddrill*, 73 L. J. K.B. 277; [1904] 1 K.B. 399; 90 L. T. 232; 52 W. R. 398—D.

Judgment Summons—Judgment against Several Jointly—Service on one Defendant only—Committal Order in Force against that Defendant—Jurisdiction to Issue Judgment Summons against another Defendant.]—Where judgment has been recovered in the County Court against several defendants jointly and a judgment summons has issued against them in respect of the unpaid balance of the debt, but has been served upon one only, and a committal order has been made against that one, to which there has been no return, the Judge has jurisdiction to allow a judgment summons to issue against another defendant, but it is in his discretion whether it ought to issue. *Rez v. Birmingham County Court Judge*, 71 L. J. K.B. 881; [1902] 2 K.B. 283; 87 L. T. 296; 51 W. R. 75—D.

7. COSTS.

Nothing Recovered by Plaintiff—Jurisdiction to Order Defendant to Pay Plaintiff's Costs.]—A County Court Judge has no jurisdiction under section 113 of the County Courts Act, 1888, to order a successful defendant to pay the plaintiff's costs. *Andrew v. Grove*, 71 L. J. K.B. 439; [1902] 1 K.B. 625; 86 L. T. 720; 50 W. R. 524—D.

Depriving Successful Defendant of Costs—Discretion.]—A County Court Judge has no jurisdiction to deprive a successful defendant of costs merely on the ground that he has succeeded on the defence of the Statute of Limitations. *Elms v. Hedges*, 95 L. T. 145; 22 T. L. R. 575—D.

Power to Award Costs against Defendant—Absence of Jurisdiction—Cause Struck Out.]—Where an action commenced in a County Court is struck out for want of jurisdiction, the County Court Judge has power under the County Courts Act, 1888, to award costs against the defendant. *Watson v. Petts (No. 2)*, 68 L. J. Q.B. 249; [1899] 1 Q.B. 430; 80 L. T. 21—D.

Action Founded on Tort—Detinue—Value of Goods Less than 10l.—Recovery of Goods in Specie.]—The plaintiff in an action of detinue recovered judgment for the return of the goods

claimed or 6l. 10s., their value; and the goods were returned to him:—*Held*, that section 116, sub-section 2 of the County Courts Act, 1888, did not apply, and the plaintiff was entitled to costs. *Trotter v. Windham*, 23 T. L. R. 676—C.A.

Action Commenced in High Court—Judgment for Part of Claim under Order XIV.—Action Remitted as to Residue to County Court—Judgment for Residue in County Court—Scale Applicable to Taxation of Costs.]—In an action of contract commenced in the High Court the plaintiff obtained leave to sign final judgment under Order XIV. for a sum of 27l. and costs, and the defendant obtained leave to defend as to the residue of the plaintiff's claim, amounting to 2l. 0s. 6d., the action being remitted to the County Court. The defendant paid the 27l. and costs under the judgment, and the plaintiff subsequently entered the claim for 2l. 0s. 6d. in the County Court and recovered judgment for that amount:—*Held*, that the action remitted to the County Court was an action for 2l. 0s. 6d., that the plaintiff had only recovered that sum in the County Court, and that consequently his costs in the County Court must be taxed upon the scale applicable where the amount recovered is between 2l. and 5l., and not upon the scale applicable to amounts between 20l. and 50l. *Keeble v. Bennett* (63 L. J. Q.B. 694; [1894] 2 Q.B. 329) distinguished. *Bailey v. Watson*, 67 L. J. Q.B. 802; [1898] 2 Q.B. 270; 78 L. T. 720—D.

Remitted Action—Discretion of Judge.]—Where an action has been remitted from the High Court to the County Court under section 65 of the County Courts Act, 1888, the County Court Judge has, under section 113, and notwithstanding section 65 of the Act, a full discretion as to the costs. *Dicta in Aston Tube Works v. Dumbell* (73 L. J. K.B. 203; [1904] 1 K.B. 535) approved. *Dicta in Wright v. Bull* (69 L. J. Q.B. 529; [1900] 2 Q.B. 124) disapproved. *Everall v. Brown*, 75 L. J. K.B. 960; [1906] 2 K.B. 884; 95 L. T. 231; 22 T. L. R. 767—C.A.

Judgment under Order XIV. as to Part of Claim—Action remitted to County Court as to Residue—Scale Applicable to Taxation of Costs in County Court.]—In an action of contract to recover 73l. 8s. 3d. the plaintiff upon an application under Order XIV. obtained leave to enter final judgment for 53l. 8s. 3d., and the action as to the balance of 20l. was remitted to the County Court. In the County Court the plaintiff recovered judgment for 20l., the balance of his claim:—*Held*, that the plaintiff had recovered in the action a sum exceeding 50l., and therefore was entitled to have his costs of the proceedings in the County Court taxed upon Scale C, applicable where the amount recovered exceeds 50l., and not upon Scale A, which applies only where the amount recovered does not exceed 20l. *Keeble v. Bennett* (63 L. J. Q.B. 694; [1894] 2 Q.B. 329) approved and followed. *Bailey v. Watson* (67 L. J. Q.B. 802; [1898] 2 Q.B. 270) overruled. *White v. Headland's Patent Electric Storage Battery Co.*, 68 L. J. Q.B. 354; [1899] 1 Q.B. 507; 80 L. T. 442; 47 W. R. 273—C.A.

Payment into Court—Nothing Paid in for

Costs—Recovery of Exact Amount Paid in—Order on Plaintiff to Pay Defendants' Costs Subsequent to Payment in—Discretion of Judge.]

—In an action in the County Court the defendants paid a sum of money into Court in satisfaction of the claim, with a denial of liability, but paid in nothing in respect of costs. The Judge found that the plaintiff was entitled only to the sum paid in, and accordingly gave judgment for the defendants, giving the plaintiff the costs up to the time of payment in, and the subsequent costs to the defendants:—*Held*, that the Judge had discretion to make the order under section 113 of the County Courts Act, 1888, and Order IX. rule 12, sub-rule 4 of the County Court Rules, 1903 and 1904, the costs in these circumstances not being "herein otherwise provided for" within the meaning of section 113. *Sykes v. Wesleyan and General Assurance Society*, 76 L. J. K.B. 626; 96 L. T. 782—D.

—Successful Defendant—Costs before Date of Payment in—Discretion of Judge.]

—In an action remitted to the County Court where the defendant paid a sum of money into Court, and the plaintiff recovered no further sum,—*Held*, that the defendant's costs in the High Court prior to the date of the payment into Court, being a matter not otherwise provided for in the Act, are in the discretion of the Judge under section 113 of the County Courts Act, 1888. *Bennett v. Drake*, 97 L. T. 132; 23 T. L. R. 533—D.

Counsel's Fees—Application for Certificate not made at Trial—Right to make Application under "Liberty to apply."]—Order LIII. rule 7 of the County Court Rules, 1903, provides that the application for the allowance by the Judge of certain items of costs therein specified, including amongst others counsel's fees in certain cases, shall be made "at or immediately after the trial or hearing; and if not so made shall not afterwards be entertained, unless the Judge for good cause otherwise orders":—*Held*, that the mere neglect or omission to ask for the allowance of these costs at or immediately after the trial is not "good cause" within the meaning of the rule; and if the successful party merely through forgetfulness omits to ask for such costs at the time, the Judge has no jurisdiction afterwards to entertain an application for the allowance of such costs. *Held*, further, that there is no power to make a subsequent application for the allowance of such costs under a general liberty to apply given to the parties at the time of the trial. *Morley v. Bevington*, 93 L. T. 768; 22 T. L. R. 28—D.

Varying Order as to Costs—Appeal or Prohibition.]—On December 9 an order was made by a County Court Judge giving judgment for the defendants with costs. On December 22, upon the application of the plaintiff, he reviewed his decision and made an order for no costs. The defendants appealed:—*Held*, that he had no power to review the former decision. *Held* further, that, although the defendants might have applied for a prohibition, it did not preclude them from bringing the case before the Court by way of appeal. *Dictum* of GROVE, J., in *Barker v. Palmer* (8 Q.B. D. 9) followed. *Sweetland v. Turkish Cigarette Co.*, 80 L. T. 472; 47 W. R. 511—D.

VOL. I.

Taxation—Costs of Successful Local Authority

—Costs to be Taxed as between Solicitor and Client.]—The costs which a successful local authority in an action in a County Court is entitled to under section 1 of the Public Authorities Protection Act, 1893, must be taxed according to the scale in the County Courts applicable in a taxation between solicitor and client; and section 118 of the County Courts Act, 1888, is not, for this purpose, repealed by section 2 of the Public Authorities Protection Act, 1893. *Tory v. Dorchester Corporation*, 76 L. J. K.B. 273; [1907] 1 K.B. 393; 96 L. T. 121; 71 J. P. 88; 5 L. G. R. 132—D.

Order for Costs—Action on Order in the High Court.]

—An action cannot be maintained in the High Court upon an order of a County Court for the payment of costs. *Furber v. Taylor*, 69 L. J. Q.B. 898; [1900] 2 Q.B. 719; 83 L. T. 308; 48 W. R. 689—C.A.

County Court Scale of Costs.]—See COSTS, cols. 571-574.

8. EXECUTIONS.

Bill of Sale—Præcipe for Writ Applied for before Bill of Sale Registered—Writ Issued after Registration—Priority.]—A writ of execution issuing out of the County Court, being sent direct by the Registrar—who was also high bailiff—to the bailiff, must be held to be delivered to the bailiff immediately after the application for the *præcipe* for execution by the creditor, which is the last act required to be done by him. The writ therefore binds the goods of the debtor under section 26 of the Sale of Goods Act, 1893, as from that time. *Murgatroyd v. Wright*, 76 L. J. K.B. 747; [1907] 2 K.B. 333; 97 L. T. 108; 14 Manson, 201; 23 T. L. R. 517—D.

A creditor who had obtained judgment in the County Court applied for a *præcipe* for execution at 2.45 p.m. on November 13. The warrant of execution reached the bailiff's office on November 14. In the meantime a bill of sale over the furniture of the debtor had been registered on November 13 between 5 and 6 p.m.:—*Held*, that the holder of the bill of sale was postponed to the execution by the judgment creditor unless he brought himself within the proviso of section 26 of the Sale of Goods Act, 1893. *Ib.*

—Goods Claimed under—Withdrawal of Bailiff on Payment of Judgment Debt and Costs into Court—Jurisdiction to Order Sale of Goods—"Dispute."]

—A County Court Judge, if he is satisfied that the value of goods, which have been seized in execution and which are also claimed by a bill of sale holder, is greater than the bill of sale holder's claim, has jurisdiction, if applied to before the determination of an interpleader issue, to make an order for their sale under Order XXVII. rule 13 of the County Court Rules, 1903 and 1904, notwithstanding the fact that the execution creditor may not be able to contest the title of the bill of sale holder, and notwithstanding also that the bailiff who levied the execution has wrongfully gone out of possession on receiving, without the knowledge and assent of the execution creditor, from the bill of sale holder, and paying into Court to

abide the result of the interpleader issue, the amount of the judgment debt and costs, instead of receiving, as directed by section 156 of the County Courts Act, 1888, either the value of the goods or security for their value. *Miller v. Solomon*, 75 L. J. K.B. 671; [1906] 2 K.B. 91—D.

The word "dispute" in section 156 of the County Courts Act, 1888, does not mean a dispute between the bailiff and the claimant, but a dispute between the parties interested—for example, the claimant and the execution creditor. *Ib.*

Claim to Goods Seized—Payment into Court of Amount of Value of Goods—Withdrawal of Claim to Part of Goods—Admission by Claimant of Title of Third Party—Claimant Unsuccessful in Interpleader Issue—Right of Execution Creditor to Whole of Sum in Court.]—Goods seized in execution by the high bailiff of a County Court were claimed by the holders of a bill of sale, and, in accordance with section 156 of the County Courts Act, 1888, a sum of money equal to the judgment debt and costs and expenses—namely, 25*l.* 10*s.*—was paid into Court by the claimants as being the value of the goods. The high bailiff, who was also the Registrar, withdrew from possession, and issued an interpleader summons under section 157 of the County Courts Act. Subsequently, part of the goods seized, of the value of 17*l.* 14*s.* 7*d.*, were claimed by third parties, who were the real owners of those goods and had let them to the judgment debtor on hire. The claimants, who had paid the money into Court, admitted the claim of the third parties, and filed in Court notice of withdrawal of their claim as to those goods. The execution creditor also gave notice to the high bailiff that he admitted the title of the third parties to those goods. The high bailiff issued another interpleader summons, adding the third parties as claimants. On the hearing of the two summonses, the third parties not appearing, the County Court Judge found that the bill of sale was invalid; but he was of opinion that the execution creditor was only entitled to 7*l.* 15*s.* 5*d.* out of the money in Court, and that the claimants who had made the payment into Court were entitled to have the balance of 17*l.* 14*s.* 7*d.* paid back to them:—*Held*, that the execution creditor, having succeeded in the issue, was entitled to the whole of the sum in Court. *Wells v. Hughes*, 76 L. J. K.B. 1125; [1907] 2 K.B. 845; 97 L. T. 469; 23 T. L. R. 733—C.A.

Plurality of Executions—Possession-money.]—The high bailiff of a County Court is entitled to possession money in respect of each separate seizure of different goods under separate warrants of execution against a judgment debtor, although the goods are all at the same place and the same man is left in possession of all the goods. *Morgan, In re; Official Receiver, ex parte*, 72 L. J. K.B. 948; [1904] 1 K.B. 68; 89 L. T. 452; 52 W. R. 79; 10 Manson, 358; 20 T. L. R. 2—Wright, J.

Seizure of Goods not the Property of Judgment Debtor—Sale of Goods—Title of Purchaser.]—Where, under an execution in the County Court, goods which are not the property of the judgment debtor are seized and sold by the

bailiff, the true owner having made no claim to them, the purchaser acquires no title to the goods as against the owner. *Goodlock v. Cousins* (66 L. J. Q.B. 360; [1897] 1 Q.B. 558) distinguished. *Crane v. Ormerod*, 72 L. J. K.B. 507; [1903] 2 K.B. 37; 89 L. T. 45; 52 W. R. 11—D.

Execution by Bailiff—Sale of Goods—Property of Third Person—Liability of High Bailiff.]—Where, under an execution in the County Court, goods of which the owner is entitled to take possession are seized and sold by the bailiff, the bailiff is liable in trover at the suit of the owner. *Jelks v. Hayward*, 74 L. J. K.B. 717; [1905] 2 K.B. 460; 92 L. T. 692; 53 W. R. 686; 21 T. L. R. 527—D.

Goods were seized by the high bailiff in execution of a judgment recovered in the County Court, which were not the property of the judgment debtor, but had been let to him by the claimants under a hire-purchase agreement. The goods were sold by the high bailiff and possession delivered to the purchasers. The hire-purchase agreement provided that if the goods were taken in execution the claimants might without previous notice terminate the hiring and re-take possession. The claimants did not know of the seizure until after the goods had been sold and possession delivered to the purchasers, when they served notice upon the high bailiff that the goods belonged to them, and claimed damages from him for conversion:—*Held*, that as at the time of the sale the claimants were entitled under the agreement to re-take possession of the goods, the sale was an act of conversion as against them for which they could maintain trover against the high bailiff. *Ib.*

Proceeds of Execution—Payment out of Court—Bankruptcy of Defendants—Right of Trustee.]—Upon an application under Order IX. rule 21 of the County Court Rules, 1903, by a successful plaintiff for the payment out of Court to him of money paid into Court under section 105 of the County Courts Act, 1888, in satisfaction of a judgment debt, the trustee in bankruptcy of the defendants is not entitled to set up a claim to the money in question, on behalf of the bankrupts' estate. *London Fancy Box Co. v. Berkeley*, 95 L. T. 727—D.

Judgment of High Court against Firm—Affidavit for Leave to Issue Judgment Summons against Partner—Order of Commitment of County Court.]—Where judgment has been recovered in the High Court against a firm, the County Court has jurisdiction to issue a judgment summons thereon against a person alleged to be a partner in the firm; inasmuch as rules 14*b* and 17 of Order XXV. of the County Court Rules, 1889, so far as they provide for the issuing of such a summons, are not *ultra vires*. *Lumley v. Osborne*, 70 L. J. K.B. 416; [1901] 1 K.B. 532; 84 L. T. 461; 49 W. R. 374—D.

It is essential that the affidavit in support of an application for such a summons should state the sources of information and grounds of belief of the deponent in accordance with Form 52*c* under the Rules. *Ib.*

Judgment Summons—Order of Commitment—

Minute of Order, Book H—"Month."—A County Court Judge having made an order upon a judgment summons, the Registrar entered the following minute in Book H, for payment of "10s. in 28 days or 14 days, then 10s. a month, present ability":—*Held*, that the word "month" in the minute meant lunar month, and therefore that a commitment order was properly issued on default being made in the payment of an instalment within a succeeding period of twenty-eight days. *Saunders v. Swansea Finance Co.*, 21 T. L. R. 317—C.A.

Committal Order—Action against High Bailiff for Non-service of Judgment Summons.—So long as a committal order stands, an action will not lie at the suit of a judgment debtor against the high bailiff of the County Court for not having served him, the debtor, with the judgment summons upon which the order is made. *Turley v. Daw*, 94 L. T. 216—Bray, J.

Attachment of Debts—Judgment in High Court against Judgment Creditor in Proceedings in County Court—Right of Judgment Creditor in High Court Proceedings to Money in Hands of County Court Registrar—"Judgment or order."—The words "judgment or order" in Order XXVI. rule 16 of the County Court Rules, 1903, mean a judgment or order obtained in the County Court. Therefore when A has obtained judgment in the High Court against B he is not entitled to an order to have paid out to him, in satisfaction of that judgment, money in the hands of the Registrar of a County Court as the result of proceedings in that Court by B against C. *Quare*, whether the words "judgment or order" in Order XXVI. rule 16 do not refer to a judgment or order in the same County Court. *Llewellyn v. Rowland*, 97 L. T. 433; 23 T. L. R. 589—D.

Attachment of Part of Debt—Right of Assignee of Judgment Debtor to Recover Balance.—A garnishee summons of the County Court in the prescribed form was served upon the garnishee, who was indebted to the judgment debtor in a sum exceeding the amount of the judgment debt. The judgment debtor subsequently assigned to another of his creditors part of the sum due to him from the garnishee:—*Held*, that the summons attached the whole sum due from the garnishee to the judgment debtor, and that the garnishee was bound to retain the whole sum in his hands as against the assignee. *Rogers v. Whiteley* (61 L. J. Q.B. 512; [1892] A.C. 118) held applicable. *Yates v. Terry*, 70 L. J. K.B. 24; [1901] 1 K.B. 102; 83 L. T. 415; 49 W. R. 112—D.

9. NEW TRIAL.

Application for—Misdirection—Objection not Taken at Hearing—Appeal from Refusal.—A party to an action tried in the County Court may apply to the County Court Judge for a new trial on the ground of misdirection although he may not have taken any objection in the course of the summing-up, and if the application is refused, may appeal from such refusal to a Divisional Court. *Handley v. London, Edinburgh, and Glasgow Assurance Co.*, 71 L. J. K.B. 39; [1902] 1 K.B. 350—D.

Per CHANNELL, J.—If the misdirection was upon a point which could not have been remedied at the trial if the objection had then been taken, it is immaterial, for the purposes of a motion in the County Court for a new trial, whether it was taken or not; but if it relates to a matter which could have been remedied if the point had been taken at the hearing, it cannot be raised upon a motion for a new trial. *Ib.*

Motion for—Jurisdiction—Entry of Judgment.]—A County Court Judge has no jurisdiction, upon an application for a new trial, to enter judgment for the applicant in lieu of granting a new trial. *Robinson v. Fawcett*, 70 L. J. K.B. 639; [1901] 2 K.B. 325; 84 L. T. 629—D.

10. APPEAL.

Discretion of Judge—No Leave to Appeal Given by Judge—Death of Judge.]—Section 120 of the County Courts Act, 1888, provides that "There shall be no appeal in any action of contract or tort . . . where the debt or damage claimed does not exceed 20l. . . . unless the Judge shall think it reasonable and proper that such appeal should be allowed and shall grant leave to appeal." In an action tried in the County Court the plaintiff claimed the sum of 9l. from the defendants. The learned Judge gave judgment for the defendants. No application was made by the plaintiff for leave to appeal, and before the time within which such leave might be applied for the learned Judge died:—*Held*, that the Court had no jurisdiction to hear the appeal. *Fell v. Lancashire and Yorkshire Railway*, 96 L. T. 785—D.

Judge's Note—Request for Note.]—Neither a request to the Judge at the trial of an action in the County Court to make a note of any question of law and of the facts in evidence in relation thereto, and of his decision, nor the production of such a note, is under the County Courts Act, 1888, or otherwise a condition precedent to the hearing of an appeal against such decision. *Wohlgemuth v. Coste*, 68 L. J. Q.B. 373; [1899] 1 Q.B. 501; 80 L. T. 529—D.

Practice—Written Statement by County Court Judge that no Point of Law Raised at Trial—Right of Appeal where Point could have been Raised.]—Where no point of law is raised at the trial of a County Court action, the Judge is justified in adding a statement to that effect to his note of the evidence taken by him at the trial; and in such a case, if the point of law could have been then raised, there is no right of appeal. *Clifford v. Thames Ironworks Co.*, 67 L. J. Q.B. 244; [1898] 1 Q.B. 314; 78 L. T. 164; 46 W. R. 222—D.

In order that the High Court may exercise the power, under the Rules of the Supreme Court, 1883, Order LIX. rule 8, of hearing such an appeal when a note is not produced upon such other evidence or statement as it may deem sufficient, it is not necessary that such a request should have been made, and it is sufficient that reasonable evidence be forthcoming that the appeal is one which the Court can hear. *Ib.*

Security for Costs of Appeal—Poverty of Appellant—Appellant Disposing of his Property in order to Evade Payment of Costs.—The High Court will order security to be given for the costs of an appeal from the County Court where it appears that the appellant has disposed of his goods for the purpose of avoiding payment of the respondent's costs. *Moore v. Pinnick*, 70 L. J. K.B. 471—D.

Action for Damages for Trespass and an Injunction—Right to Appeal without Leave.—Where, in an action in a County Court in which the plaintiff claimed 2*l.* damages for trespass to land and an injunction restraining the defendant from repeating the trespass, the defendant paid money into Court in respect of the claim for damages, which sum the plaintiff at the trial accepted in satisfaction thereof, so that the only question before the County Court Judge was whether the injunction should be granted or not, an appeal lies without leave from the decision of the County Court Judge on that question, notwithstanding the provisions of section 120 of the County Courts Act, 1888. *Brune v. James*, 67 L. J. Q.B. 283; [1898] 1 Q.B. 417; 77 L. T. 802; 46 W. R. 257—D.

Leave to Appeal—Ejectment—Annual Rent or Value of Premises below 20*l.*—Under section 120 of the County Courts Act, 1888, an appeal lies from the County Court to the High Court, without the leave of the County Court Judge, in all actions of ejectment (other than actions brought for the recovery of tenements under sections 138 and 139 of the Act), although the yearly rent or value of the premises is below 20*l.* *Shrewsbury (Earl) v. Garfield* (60 L. J. Q.B. 765) overruled. *Millett v. Ballard*, 73 L. J. K.B. 989; [1904] 2 K.B. 593; 91 L. T. 23; 52 W. R. 675; 20 T. L. R. 693—C.A.

Refusal of Judge to Withdraw Case from Jury—Practice.—On September 14, 1898, at 1.30 p.m., twelve cows were loaded at M. station on a truck of the respondent company. The cows were consigned to C., another station twenty-five miles distant, and at the time of loading were in good condition. The appellant had on other occasions sent cattle from M. to C., and they had usually arrived by 8 p.m. On this occasion they did not arrive till after midnight, and were then found to be in a damaged and exhausted condition. G. sued the respondent company in the County Court for damages. Evidence was given by the company to the effect that the delay in the arrival of the cattle was due solely to shunting operations to avoid passenger trains. The Judge thereupon withdrew the case from the jury, and gave judgment for the company:—*Held*, that though the County Court Judge was wrong in withdrawing the case from the jury, and should have left it to them with a strong direction to find a verdict for the defendants, yet that it would be useless to send the case back for trial, as the only verdict that could be found on the evidence must be a verdict for the defendants. *Goddard v. Midland Railway*, 80 L. T. 624—D.

Workmen's Compensation—Subrogation of Workman to Rights of Employer.—An appeal lies under section 120 of the County Courts Act, 1888, to the Divisional Court from an order by a County Court Judge under the pro-

visions of section 5 of the Workmen's Compensation Act, 1897, directing payment by insurers of the compensation awarded to a workman into the Post-Office Savings Bank. *Morris v. Northern Employers' Mutual Indemnity Co.*, 71 L. J. K.B. 733; [1902] 2 K.B. 165; 86 L. T. 748; 50 W. R. 545; 66 J. P. 644—C.A.

The effect of section 5 of the Workmen's Compensation Act, 1897, is to subrogate the workman to the rights of the employer against his insurers; the workman has no larger rights against the insurers than the employer has. *Ib.*

— **Order by County Court Judge for Payment of Compensation into Post-Office Savings Bank—“Direction in an action or matter.”**—An appeal lies to the Divisional Court from an order made by a County Court Judge, under section 5 of the Workmen's Compensation Act, 1897, directing payment by insurers of the compensation awarded to a workman into the Post-Office Savings Bank, such an order being a “direction in an action or matter” within the meaning of section 120 of the County Courts Act, 1888. *Kniveton v. Northern Employers' Mutual Indemnity Co.*, 71 L. J. K.B. 588; [1902] 1 K.B. 880; 86 L. T. 721; 50 W. R. 704—D. *And see* MASTER AND SERVANT.

Evidence—Admission of Unstamped Document as Evidence—No Penalty.—An appeal does not lie from the admission in evidence by a County Court Judge of an unstamped document without exacting any penalty under the Stamp Act, 1891. *Lowe v. Dorling*, 74 L. J. K.B. 794; 93 L. T. 398; 21 T. L. R. 616—D.

— **Sufficiency of Stamp on Document—Ruling of Judge at Trial.**—The ruling of a County Court Judge at the trial that a document is sufficiently stamped, and is therefore admissible in evidence, is final, and no appeal lies to the High Court from such ruling. *Mander v. Ridgway*, 67 L. J. Q.B. 335; [1898] 1 Q.B. 501; 78 L. T. 118; 46 W. R. 366—D.

11. OTHER MATTERS.

Administration Order—Disqualification of Guardians.—*See* POOR LAW.

Admiralty Jurisdiction.—*See* SHIPPING.

Bankruptcy Matters, in.—*See* BANKRUPTCY.

Debtors Act, under.—*See* DEBTORS ACT.

High Bailiff—Liability.—*See* INTERPLEADER.

Winding-up, in.—*See* COMPANY.

Workmen's Compensation.—*See* MASTER AND SERVANT.

COURT.

City of London Court—Jurisdiction—Defendant Dwelling beyond Jurisdiction—Cause of Action Arising Wholly or in Part within Jurisdiction—Summons Issued without Leave of Judge or Registrar.—In order that a summons may

issue from the City of London Court, where the cause of action wholly or in part arises within the jurisdiction, but the defendant does not dwell or carry on business therein, it is unnecessary to obtain the leave of the Judge or Registrar; section 39 of the London (City) Small Debts Extension Act, 1852, in so far as it authorises the issue of a summons in these circumstances without such leave, not having been impliedly repealed by section 74 of the County Courts Act, 1888. *Felten v. Bower*, 69 L. J. Q.B. 851; [1900] 1 Q.B. 598; 82 L. T. 419; 48 W. R. 349—D.

Lancaster Palatine Court—Enforcing Order—Defendant out of Jurisdiction.—In order to enforce against a defendant an order for leave to issue a writ of attachment made by the Court of the County Palatine of Lancaster, the defendant having submitted to the jurisdiction, but being out of the jurisdiction of that Court, application should be made to the High Court under the Court of Chancery of Lancaster Act, 1850, s. 15. *Dunmore v. Wharham*, 67 L. J. Ch. 221; 78 L. T. 88; 46 W. R. 366—Byrne, J.

Costs—Scale.—The order of the Palatine Court of Lancaster of November 28, 1884, prescribing the scale of costs where the case is under the amount or value of 300*l.*, only applies to cases under that amount or value, to which, but for that order, the lower scale would have applied under the order of November 27, 1884, and not, for instance, to proceedings by a shareholder to remove his name from the register of shareholders in respect of two hundred *l.* shares, the costs of which are properly taxed on the higher scale. *Manchester Real Ice Skating and Supply Co., In re*, 69 L. J. Ch. 421; [1900] 1 Ch. 573; 82 L. T. 513; 48 W. R. 490—C.A.

Court of Passage—Removal of Action from Inferior Court.—At common law a writ of *certiorari* issues as of right to remove an action from an inferior Court to the High Court. The Act 5 Vict. c. lii. s. 2, and the Liverpool Court of Passage Act, 1893, s. 5, do not take away this right, but the former Act merely imposes on its exercise the condition that recognisances shall be given unless the Judge dispenses with them. The application for the writ is in time, within section 3 of the former Act, if it be made within one month of the delivery of the statement of claim. *Edwards v. Liverpool Corporation*, 86 L. T. 627—D.

Appeal.—Under sections 6 and 10 of the Liverpool Court of Passage Act, 1893, the presiding Judge has power to give leave to appeal to the Court of Appeal from an interlocutory order made by him; and that power is not cut down by section 9 of the same statute. *Hunter v. Jacobson*, 80 L. T. 641—C.A.

Interpleader Issue—Ruling of Judge at Trial—Appeal.—An appeal lies to the Court of Appeal from the ruling of the Judge of the Liverpool Court of Passage at the trial of an interpleader issue. *Coates v. Moore*, 72 L. J. K. B. 539; [1903] 2 K.B. 140; 89 L. T. 8; 51 W. R. 648—C.A.

Preston Borough Court of Record—Right of Appeal.—An appeal lies to the High Court

from a decision of the Borough Court of Record at Preston. *Darlow v. Shuttleworth*, 71 L. J. K.B. 460; [1902] 1 K.B. 721; 86 L. T. 524; 50 W. R. 668; 66 J. P. 516—D.

Salford Hundred Court—Prohibition—Jurisdiction.—Section 7 of the Salford Hundred Court of Record Act, 1868, which provides that "no defendant shall be permitted to object to the jurisdiction of the Court otherwise than by special plea, and, if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes," confers jurisdiction upon that Court to enter judgment against a defendant in default of appearance, although the defendant might have successfully pleaded to the jurisdiction if he had appeared and pleaded. *Chadwick v. Ball* (54 L. J. Q.B. 396; 14 Q.B. D. 855) followed. *Payne v. Hogg*, 69 L. J. Q.B. 579; [1900] 2 Q.B. 43; 82 L. T. 584; 48 W. R. 417—C.A.

The "cause of action" in section 6 of the Salford Hundred Court of Record Act, 1868, means the whole cause of action. *Ib.*

Jurisdiction—Patent—Article made Abroad.—The Court has no jurisdiction to restrain a foreigner abroad as regards transactions carried on by him in his own country. *Badische Anilin und Soda-Fabrik v. Basle Chemical Works Bind-schedler*, 67 L. J. Ch. 141; [1898] A.C. 200; 77 L. T. 573; 46 W. R. 255—H.L. (E.)

Statutory Rules.—The power of the Court to frame rules is limited to rules "for the purpose of regulating any matter under" the principal Act. The 51st rule, which purports to confer a power to annul an act of bankruptcy, is no such "regulation," and is *ultra vires*. *King v. Henderson* [1898] A.C. 720; 67 L. J. P.C. 134—P.C.

Mayor's Court.—See MAYOR'S COURT.

COVENANT.

Sale of Medical Practice—Not to "set up in practice"—Attending Former Patients within Prohibited Area.—A covenant entered into by the vendor on the sale of a medical practice not to "set up in practice" within a two-mile radius of the house in which the practice was being carried on, is not so stringent as a covenant not to "carry on" a similar practice, and is not broken by the vendor attending for remuneration two or three of his former patients within the prohibited area at their own invitation; but it is not essential to the breach of such a covenant that the vendor should reside or have a place of business within the prohibited area. He may reside outside and yet commit a breach of the covenant by his personal acts. *Robertson v. Buchanan*, 73 L. J. Ch. 408; 90 L. T. 390—C.A.

Joint and Several.—See CONTRACT.

Leases, in.—See LANDLORD AND TENANT.

Sale of Land, on.—See VENDOR AND PURCHASER.

Wayleave, for.—See EASEMENT.

CRIMINAL INFORMATION.

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CRIMINAL LAW.

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1. STATUTES.

Appeal.—7 Edw. 7 c. 23 is the *Criminal Appeal Act*, 1907.

Cruelty to Children.—4 Edw. 7 c. 15 is the *Prevention of Cruelty to Children Act*, 1904.

Evidence.—61 & 62 Vict. c. 36 is the *Criminal Evidence Act*, 1898.

Extradition.—6 Edw. 7 c. 15 is the *Extradition Act*, 1906.

Poor Prisoners.—3 Edw. 7 c. 38 is the *Poor Prisoners' Defence Act*, 1903.

Probation of Offenders.—7 Edw. 7 c. 17 is the *Probation of Offenders Act*, 1907.

2. OFFENCES.

(a) Abduction.

Girl under Sixteen—"Taking" out of Possession of Parents—Girl Voluntarily Leaving Home—No Inducements Held out by Prisoner.—In order to support a charge of taking an unmarried girl under the age of sixteen out of the possession and against the will of her parents or guardians, it must be shewn that the prisoner took some active step, by persuasion or otherwise, to cause the girl to leave her home; if the suggestion to go away with the prisoner came from the girl only, and he took the merely passive part of yielding to such suggestion, he is entitled to an acquittal. *Re v. Jarvis*, 20 Cox C.C. 249—Jelf, J.

(b) Abortion.

Attempt to Procure—Belief of Woman that Drug is Noxious.—If a woman, believing she is taking a noxious thing, does, with intent to procure abortion, take a thing that is in fact harmless, she is guilty of an attempt to procure abortion. *Reg. v. Brown*, 63 J. P. 790—Darling, J.

Inciting to Commit Offence—Belief of Person Supplying Drug as to its Noxiousness.—*Semble*, if a person, himself believing a thing to be a noxious drug, incites a woman to take it, he is guilty of a misdemeanour, although the commission of the offence by the woman in the manner proposed is impossible. But if the thing supplied is to his knowledge not capable of procuring abortion, he is not guilty of inciting the woman to whom he supplies it to commit the offence of attempting to procure abortion, although he knows that she will take it in the belief that it is a noxious thing. *Ib.*

Evidence—Relevance and Admissibility—Procuring Abortion by Use of Instruments—Proof of Intent by Similar Acts by Prisoner on other Occasions.—The prisoner, a qualified surgeon, but not in regular practice, was indicted under section 58 of the Offences against the Person Act, 1861, for feloniously using instruments upon a woman, who was his servant and had become pregnant by him, with intent to procure her miscarriage. The defence set up was that the prisoner had used the instruments for a lawful purpose in order to examine the girl, who it was suggested was suffering from leucorrhœa. In order to rebut this evidence and

to prove intent, the prosecution tendered the evidence of another woman, who nine months before had also become pregnant by the prisoner, and upon whom the prisoner had also used instruments, saying he would put her all right, and that the instrument would fetch the child away. Her evidence also contained a statement by the prisoner that he had put dozens of girls right, and a statement by another servant of the prisoner that he had put her all right:—*Held* (LORD ALVERSTONE, C.J., and RIDLEY, J., dissenting), that the evidence was admissible, on the ground that it tended to prove a systematic course of conduct on the part of the prisoner. *Held*, further (*per* DARLING, J., JELF, J., and A. T. LAWRENCE, J.), that the evidence also tended to prove the intent with which the prisoner used the instruments. *Reg. v. Bond*, 75 L. J. K.B. 693; [1906] 2 K.B. 389; 95 L. T. 296; 54 W. R. 586; 70 J. P. 424; 21 Cox C.C. 252; 22 T. L. R. 633—C.C.R.

(c) *Adulteration.*

Fraudulent Dilution of Milk—Intention to Damage Owner.—In order to constitute the offence of wilfully committing damage, injury, or spoil to property within the meaning of section 52 of the Malicious Damage Act, 1861, it is not necessary that there should be malice towards, or intention to damage, the owner of the property, or that loss should in fact be caused to him. It is sufficient if the act which causes damage to the property is done with the intention of causing the damage, or with the knowledge that the consequences of the act would be to cause the damage. *Roper v. Knott*, 67 L. J. Q.B. 574; [1898] 1 Q.B. 868; 78 L. T. 594; 46 W. R. 636; 62 J. P. 375; 19 Cox C.C. 69—D.

Therefore if a person fraudulently adds water to milk which he is employed to sell, in order to increase the bulk and to appropriate the surplus price, and the milk is thereby damaged, but he has no malice towards or intention to injure his employer, the owner of the milk, he commits the offence of wilfully committing damage to property within the meaning of the section. *Hall v. Richardson* (54 J. P. 345) overruled. *Ib.* And see LOCAL GOVERNMENT, cols. 1332-1356.

(d) *Assault.*

Assault—Person Assaulted Incapable of Instituting Proceedings—Information by Third Person—Absence of Authority—“Complaint by or on behalf of the party aggrieved.”—Where an assault is committed upon a person who, through age and infirmity, is in such a feeble state of health, and so under the control of the person who commits the assault, as to be incapable of instituting proceedings, an information under section 42 of the Offences against the Person Act, 1861, may be laid by a third person, although he has not, in fact, been authorised by the “party aggrieved” to commence such proceedings. *Nicholson v. Booth* (57 L. J. M.C. 43) distinguished. *Pickering v. Willoughby*, 76 L. J. K.B. 709; [1907] 2 K.B. 296; 97 L. T. 244; 71 J. P. 311; 23 T. L. R. 466—D.

Carnal Knowledge of Girl between Thirteen and Sixteen—Committal for Rape—Indictment

for Misdemeanour Presented after Expiration of Three Months.—A prisoner may be indicted under section 5, sub-section 1 of the Criminal Law Amendment Act, 1889, for the misdemeanour of having carnal knowledge or attempting to have carnal knowledge of a girl being of or above the age of thirteen years and under the age of sixteen years, notwithstanding that he has been committed for trial on a charge of rape, and that the misdemeanour of which he was at the trial found guilty was committed more than three months before the bill for misdemeanour was laid before and found by the grand jury. *Reg. v. West*, 67 L. J. Q.B. 62; [1898] 1 Q.B. 174; 77 L. T. 536; 46 W. R. 316; 18 Cox C.C. 675—C.C.R.

Indecent Assault—Consent Immaterial—Complaint.—On an indictment for indecently assaulting a girl of seven years of age, particulars of a complaint made by her are inadmissible, as the consent of the girl is not material; and the decision in *Reg. v. Lillyman* (65 L. J. M.C. 195; [1896] 2 Q.B. 167) only applies to cases where consent is material. *Reg. v. Kingham*, 66 J. P. 393—Lawrance, J.

Complaint—Statement as to Something Three Weeks before Date of Alleged Assault—Admissibility.—On the trial of the defendant for an indecent assault upon two girls under thirteen years of age, a statement made by one of the girls to her sister on the afternoon of the alleged assault as to something which was alleged to have been done by the defendant three weeks previously was admitted in evidence. The defendant was convicted:—*Held*, that the statement was improperly admitted, and therefore that the conviction must be quashed. *Reg. v. Pantaney*, 71 J. P. 101—C.C.R.

Complaint made in Answer to Question—Particulars of Complaint.—Where a person indecently assaulted makes a complaint, not of her own initiative, but in answer to a question, the particulars of such complaint, though otherwise admissible within the rule in *Reg. v. Lillyman* (65 L. J. M.C. 195; [1896] 2 Q.B. 167), cannot be given in evidence. *Reg. v. Merry*, 19 Cox C.C. 442—Bruce, J.

Particulars of Complaint—Prosecutrix of Tender Years—Complaint not made on First Opportunity.—The decision in *Reg. v. Lillyman* (65 L. J. M.C. 195; [1896] 2 Q.B. 167) applies to cases where the girl on whom the offence is alleged to have been committed is of such tender years that the Court directs her evidence to be taken, but not upon oath, and where the question of her consent to the assault is immaterial. Such a complaint may be admissible, although not made at the earliest opportunity. *Reg. v. Kiddle*, 19 Cox C.C. 77—Ridley, J.

Statement made in Answer to Question—Absence of Prisoner.—In support of a charge of rape or an offence of a similar class, but only in such cases, a statement in the nature of a complaint made by the prosecutrix to a third person, not in the presence of the accused, may be given in evidence, whether proof of non-consent is or is not a material element in the charge under investigation, provided such statement is shewn to have been made at the first opportunity which

reasonably offered itself after the commission of the offence, and has not been elicited by questions of a leading and inducing or intimidating character. The Judge ought, however, to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroboration of the prosecutrix's credibility, and, where consent is an issue, of the absence of consent. *Rev v. Osborne* 74 L. J. K.B. 811; [1905] 1 K.B. 551; 92 L. T. 393; 53 W. R. 494; 69 J. P. 189; 21 T. L. R. 288—C.C.R.

Where the statement has been made in answer to a question—and the fact that it has been so made does not, of itself, render it inadmissible as a complaint—it is for the Judge in each case to determine whether the character of the question put, as well as the other circumstances, such as the relationship of the questioner to the prosecutrix, is such as to render the statement inadmissible. *Reg. v. Lillyman* (65 L. J. M.C. 195; [1896] 2 Q.B. 167) discussed. *Ib.*

Indictment for Attempting to Carnally Know Child—Corroboration—Refusal of Accused to be Medically Examined.—The fact that the accused, when charged with attempting to carnally know a girl under the age of thirteen, refused to be examined by a doctor was held not to be evidence corroborative of the child's testimony within the meaning of section 4 of the Criminal Law Amendment Act, 1885. *Rev v. Gray* (No. 2), 68 J. P. 327—C.C.R.

(e) *Bigamy.*

Offence Committed Abroad — “In England or Ireland or elsewhere” — Jurisdiction.—A person may be tried in this country for bigamy committed abroad, in virtue of the Offences against the Person Act, 1861, s. 57, which enacts: “Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony.” The words “or elsewhere,” cannot be so restricted as to mean “elsewhere within the King's dominions.” *Rev v. Russell (Earl)* or *Russell (Earl)*, *In re*, 70 L. J. K.B. 998; [1901] A.C. 446; 85 L. T. 253; 20 Cox C.C. 51—H.L.

Evidence of Former Marriage.—L. was indicted for bigamy. The evidence tendered by the prosecution relative to L.'s former marriage consisted of, first, a certificate by the priest of a Roman Catholic church by whom the parties were married; secondly, proof that L. was one of the parties named in such certificate; and thirdly, the following statement by L. when the warrant of arrest was read over to him: “That's all right, but I did not know that my former wife was alive.”—*Held*, that this evidence was not sufficient to prove the previous marriage of L. *Rev v. Lindsay*, 66 J. P. 505—Walton, J.

Indictment — Offence Committed Abroad — No Averment that Accused was a British Subject.—An indictment for bigamy under section 57 of the Offences against the Person

Act, 1861—which by a proviso enacts that nothing contained in that section shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of his Majesty—need not, where the second marriage was contracted abroad, contain an averment that the accused is a British subject. *Rev v. Audley*, 76 L. J. K.B. 270; [1907] 1 K.B. 383; 96 L. T. 160; 71 J. P. 101; 23 T. L. R. 211—C.C.R.

(f) *Breach of the Peace.*

Recognisance to Keep the Peace and be of Good Behaviour—Holding Disorderly Meetings in Public Streets—Obstruction of Streets—Using Insulting Language whereby Breach of the Peace may be Occasioned—Conduct not in itself Illegal, but Provoking other Persons to Break the Peace — Jurisdiction of Magistrate.—The appellant, in carrying on a Protestant “crusade,” held meetings in the public streets of a city in which there was a large Roman Catholic population. The meetings were attended by many Roman Catholics as well as by his own supporters. At the meetings he made use of language and gestures insulting and annoying to the Roman Catholics and calculated to provoke them to commit breaches of the peace; and breaches of the peace were in consequence committed by them. The appellant did not himself commit any breach of the peace, and advised his supporters not to do so; but at one of the meetings he said that he had received a letter stating that the Catholics were going to bring sticks to a subsequent meeting, and told his supporters that the police had refused him protection and that he looked to them to protect him. The meetings caused an obstruction of the streets. A local Act imposed a penalty upon every person who in any street used any threatening, abusive, or insulting words, or behaviour whereby a breach of the peace might be occasioned. The appellant threatened and intended to hold similar meetings in the future. The appellant having been bound over by the order of a magistrate to keep the peace and be of good behaviour,—*Held*, that the order was valid. *Wise v. Dunning*, 71 L. J. K.B. 165; [1902] 1 K.B. 167; 85 L. T. 721; 50 W. R. 317; 66 J. P. 212—D.

Though a person's conduct is not in itself illegal, yet, if its natural consequence is to provoke other persons to commit a breach of the peace, he may properly be bound over to be of good behaviour. *Ib.*

(g) *Brothel Keeping.*

Party to Continued Use of Premises as a Brothel—Block of Flats.—The appellant, who was the porter at certain premises, divided internally into eighteen flats, was summoned for being wilfully a party to the continued use of the premises or a part thereof as a brothel contrary to section 13 of the Criminal Law Amendment Act, 1885. Among the tenants of the flats were twelve women who were in the habit of bringing men to them for the purpose of prostitution, but there was no evidence to shew which flat was occupied by which woman nor whether there were other tenants as well as

the twelve women; nor was it proved that any one flat was used by more than one woman. The appellant knew the purpose for which the women used the premises. The magistrate having convicted the appellant,—*Held*, that the conviction was right, as the magistrate might upon the evidence come to the conclusion that the premises as a whole were being used as a brothel. *Singleton v. Ellison* (64 L. J. M.C. 123; [1895] 1 Q.B. 607) distinguished. *Durose v. Wilson*, 96 L. T. 645; 71 J. P. 263—D.

(h) *Common Nuisance.*

Private Nuisance.—Certain counts of an indictment charged the prisoner with having unlawfully, wrongfully, and wilfully omitted and neglected to bury or cause to be buried dead bodies, whereby and by reason of the decomposition of the dead bodies whilst in her care and custody, and whilst remaining unburied in her dwelling-house, “divers noxious injurious and unwholesome smells and stenches did arise and issue from the said dead bodies and thereby the air was greatly infected and corrupted and was rendered and became for several days offensive unwholesome injurious and dangerous to health to the great damage and common nuisance of such of the liege subjects of our Lord the King as inhabited in the said house . . . aforesaid to the evil example of all others in the like case offending and against the peace,” &c.:—*Held*, that these counts were bad, as they did not allege a nuisance to the public, but only a nuisance to certain persons dwelling in a private dwelling-house. *Rea v. Byers*, 71 J. P. 205—Kennedy, J.

Power to Amend.—The prisoner was indicted for having obtained a sum of money from F. W. D. by the false pretence that she had made funeral arrangements with, and had paid the sum in question to, a named undertaker for the burial of a nurse child G. S. who had died under her care. The evidence shewed that the false pretence was made as to the arrangements for the funeral of another nurse child, W. D.:—*Held*, that the Court had power to amend the indictment by substituting the name of W. D. for G. S. *Id.*

(i) *Concealment of Birth.*

Secret Disposition of Body.—To constitute the offence of concealment of birth within section 60 of the Offences against the Person Act, 1861, there must be a concealment of the fact of the birth, and that concealment must be carried out by the secret disposition of the dead body. The secret disposition must be of such a nature that any one coming to the place where the body is would not be likely to see it. *Rea v. Rosenberg*, 70 J. P. 264—Jelf, J.

(j) *Conspiracy.*

Conviction—Description of Offence.—Section 7 of the Conspiracy and Protection of Property Act, 1875, provides that a person who, “with a view to compel any other person to abstain from doing . . . any act which such other person has a legal right to do . . . wrongfully and without

legal authority . . . injures his property” shall be liable to a penalty or imprisonment. A conviction under the section stated that the defendant, with a view to compel the informant “to abstain from working for Messrs. J. B. & Partners Limd. at F. Colliery in the said county (of D.) which he had a legal right to do, unlawfully wrongfully and without legal authority did injure the property” of the informant:—*Held*, that the conviction sufficiently specified an act which the informant had a legal right to do; but, *held*, further, that it was nevertheless bad, as it did not particularly specify the property of the informant which was alleged to have been injured. *Reg. v. McKenzie* (61 L. J. M.C. 181; [1892] 2 Q.B. 519) distinguished. *Wilkins, Ex parte* (64 L. J. M.C. 221), approved. *Smith v. Moody*, 72 L. J. K.B. 43; [1903] 1 K.B. 56; 87 L. T. 682; 51 W. R. 252; 67 J. P. 69; 20 Cox C.C. 369—D.

Section 89 of the Summary Jurisdiction Act, 1879, which provides that in proceedings before Courts of summary jurisdiction the description of any offence in the words of the Act creating the offence shall be sufficient in law, refers only to the general description of the offence, and does not justify the omission to specify the precise circumstances in which the particular defendant is alleged to have committed the offence. *Id.*

Besetting.—A federation of shipowners which was not qualified under section 111 of the Merchant Shipping Act, 1894, by licence or otherwise to engage or supply seamen to be entered on any ship in the United Kingdom, provided a depôt ship for men intending to serve as seamen on ships in the United Kingdom belonging to members of the federation. Certain men were on board the depôt ship, and had entered into engagements with the federation to remain on board until engaged to serve as seamen on such ships, receiving in the meantime certain daily wages and rations from the federation. The respondents, with a view to compel these men to abstain from remaining on board the depôt ship and fulfilling the engagements, wrongfully and without legal authority beset the depôt ship and the approach thereto. An information having been laid against the respondents under section 7, sub-section 4 of the Conspiracy and Protection of Property Act, 1875,—*Held*, that they ought to be convicted, inasmuch as—first, though fulfilling the engagements might not be an act which the men had a legal right to do within that sub-section, remaining on board the depôt ship and receiving the wages and rations were such acts; and secondly, it was immaterial for the purposes of the sub-section that the relationship of master and servant did not exist between the federation and the men. *Farmer v. Wilson*, 69 L. J. Q.B. 496; 82 L. T. 566; 64 J. P. 486; 19 Cox C.C. 502—D.

Interference with Workmen—“Watches or besets”—“Place”—**Interlocutory Injunction.**—There is nothing in the Conspiracy and Protection of Property Act, 1875, defining the duration of the “watching or besetting” which is prohibited by section 7, sub-section 4. It may be for a short time only, and yet be an offence against the statute. *Charnock v. Court*, 68 L. J. Ch. 550; [1899] 2 Ch. 35; 80 L. T.

564; 47 W. R. 633; 63 J. P. 456—Stirling, J. See also *Walters v. Green*, 68 L. J. Ch. 730; [1899] 2 Ch. 696; 81 L. T. 151; 48 W. R. 23; 63 J. P. 742—Stirling, J.

Neither is there anything in the statute limiting its operation to places habitually frequented by workmen. "Place" includes any place where a workman happens to be, however casually. It is not limited to places *ejusdem generis* with places of business or residence, and it includes public places, such as railway stations and landing-stages. *Lyons v. Wilkins* (65 L. J. Ch. 601; 68 L. J. Ch. 146; [1896] 1 Ch. 811; [1899] 1 Ch. 255) followed. *Ib.*

Intimidation—"Seamen"—Meaning of Term—Necessity for Actual Employment.—Persons who follow the sea as a calling are not "seamen" within the exception contained in section 16 of the Conspiracy and Protection of Property Act, 1875, unless they are actually employed or engaged on board ship within the meaning of the definition of "seaman" contained in section 2 of the Merchant Shipping Act, 1854 (re-enacted by section 742 of the Merchant Shipping Act, 1894). An indictment for intimidation under section 7 of the Conspiracy and Protection of Property Act, 1875, will therefore lie against persons not so employed or engaged. *Reg. v. Lynch*, 67 L. J. Q. B. 59; [1898] 1 Q. B. 61; 77 L. T. 568; 46 W. R. 205; 8 Asp. M.C. 363; 18 Cox C.C. 677—C.C.R.

The words "such other person" in subsection 4 mean "any other person," and are not confined to the person sought to be compelled. *Ib.*

The decision in *Allen v. Flood* (67 L. J. Q. B. 119; [1898] A.C. 1) does not affect the decision in *Lyons & Sons v. Wilkins* (65 L. J. Ch. 601; [1896] 1 Ch. 811). *Ib.*

Picketing—"Watches or besets"—"Wrongfully and without legal authority"—Nuisance—Malice—Injunction.—The words "wrongfully and without legal authority" in section 7 of the Conspiracy and Protection of Property Act, 1875, apply to all the five sub-sections of that section, and all the acts mentioned in those sub-sections are wrongful and unlawful. "Watching or besetting" within sub-section 4 is therefore wrongful and unlawful, unless (*per LINDLEY, M.R.*) some reasonable justification is shewn for it, or (*per CHITTY, L.J.*, and *VAUGHAN WILLIAMS, L.J.*) it falls within the proviso at the end of the section. Such conduct would support an action for nuisance at common law, to which proof that the watching or besetting was for the purpose of peaceful persuasion would be no defence. *Lyons v. Wilkins*, 68 L. J. Ch. 146; [1899] 1 Ch. 255; 79 L. T. 709; 47 W. R. 291; 63 J. P. 339—C.A.

Act Tending to Public Mischief—Combination to Obtain Passport—False Representations.—A combination by two or more persons to obtain by false representations from the Foreign Office a passport in the name of one person with the intent that it should be used by another person is an act tending to bring about a public mischief, and is therefore an indictable misdemeanour at common law. *Rex v. Brailsford*,

75 L. J. K.B. 64; [1905] 2 K.B. 730; 93 L. T. 401; 54 W. R. 283; 69 J. P. 370; 21 T. L. R. 727—D.

It is for the Court, and not for the jury, to say whether a particular act tends to the public mischief. It is not an issue of fact upon which evidence can be given. *Ib.*

Joint Indictment against Three—Plea of "Guilty" by one Defendant—Verdict of "Not Guilty" in Favour of the other Defendants—Discretion to Allow Withdrawal of Plea of "Guilty"—Legality of Conviction of Defendant Pleading "Guilty"—Repugnancy.—The appellant and two other persons were jointly charged at quarter sessions upon an indictment which contained five counts for obtaining money by false pretences, and a sixth count for conspiracy. The sixth count did not allege that there were any other or unknown parties to the conspiracy. The three defendants were arraigned together. All pleaded "not guilty" to the first five counts. The appellant pleaded "guilty" to the sixth count, the other defendants pleading "not guilty" to that count. A verdict of "not guilty" was returned in favour of the appellant on the first five counts. The trial of the other defendants proceeded, and the jury found them "not guilty" upon all the six counts. The appellant then applied for leave to withdraw his plea of "guilty" and enter a plea of "not guilty." The Court of quarter sessions refused the application on the ground that they had no power to grant it, and convicted the appellant. On a Case stated for the Court for Crown Cases Reserved, *Held*, that the conviction must be quashed, inasmuch as the appellant's plea of "guilty" to the charge of conspiracy was inconsistent with the verdict of "not guilty" in favour of the other defendants on that charge. *Held*, also, that the Court of quarter sessions had a discretion to allow the appellant to withdraw his plea of "guilty" and enter a plea of "not guilty," and that their omission to exercise that discretion, as it deprived the appellant of the chance of being tried and possibly acquitted, was of itself a ground for quashing the conviction. *Rex v. Plummer*, 71 L. J. K.B. 805; [1902] 2 K.B. 339; 86 L. T. 836; 51 W. R. 137; 66 J. P. 647; 20 Cox C.C. 269—C.C.R.

Prisoners Indicted Together in One Count—Some Found Guilty and some Acquitted—Repugnance.—Railway officials were indicted for conspiring to defraud the railway company by stealing and selling uncanceled but used tickets;—*Held*, that persons to whom they sold these tickets could be indicted together in the same count with the railway officials. Where several persons are charged with having conspired together, a finding that some, but not all, did so conspire is not upon the face of it bad for repugnance. *Reg. v. Quinn*, 19 Cox C.C. 78—FitzGibbon, L.J.

Immunity from Punishment of One Party Prosecuted—Liability of Other Party to Conviction.—Assuming that immunity from prosecution is given to the mother of a child by the proviso contained in section 56 of the Offences against the Person Act, 1861, such immunity has no bearing upon the question whether a conspiracy between her and another person to

do an act which is unlawful under the section is an offence against the criminal law; and the other person may therefore be convicted for conspiring with the mother to commit an offence under the section. *Re v. Duguid*, 75 L. J. K.B. 470; 94 L. T. 887; 70 J. P. 294; 21 Cox C.C. 200; 22 T. L. R. 506—C.C.R.

(k) *Cremation.*

Burning Bodies in Private Houses.—The prisoner was indicted, under section 8, sub-section 3 of the Cremation Act, 1902, for having, with intent to conceal the commission of certain specified offences, procured the cremation of certain dead bodies. It appeared that the prisoner burnt certain dead bodies of children in a stove in her own house:—*Held*, that that was not evidence to go to the jury of having "procured the cremation of any body" within the meaning of the sub-section in question. *Re v. Byers*, 71 J. P. 205—Kennedy, J.

(l) *Cruelty.*

Cruelty to Children.—4 Edw. 7 c. 15 is *the Prevention of Cruelty to Children Act*, 1904.

Prevention of—Statute Dealing with Procedure—Retrospective Operation.—Section 27 of the Prevention of Cruelty to Children Act, 1904, which substitutes a limit of six months for the three months mentioned in the second proviso of section 5 of the Criminal Law Amendment Act, 1885, deals with procedure only. Therefore, after the Act of 1904 comes into operation a prisoner who previously committed an offence under section 5, sub-section 1 of the Criminal Law Amendment Act, 1885, may, within the limit of six months from the commission of the offence imposed by section 27 of the Act of 1904, be prosecuted for the offence, although he committed it more than three months previously to the commencement of the prosecution, so that the limitation of time for commencing the prosecution imposed by section 5 of the Act of 1885 is exceeded. *Re v. Dharma*, 74 L. J. K.B. 450; [1905] 2 K.B. 335; 92 L. T. 700; 53 W. R. 431; 69 J. P. 198; 21 T. L. R. 353—C.C.R.

Children under Sixteen—Proof of Age.—Upon the prosecution for cruelty to a child under the Prevention of Cruelty to Children Act, 1894, of a person having the custody, charge, or care of such child, it is not necessary under that Act to prove the age of such child by the production of its birth certificate, coupled with evidence of identity; any such lawful evidence as would establish any other fact at the trial is sufficient, even in the absence of the child itself at the trial. *Reg. v. Cox*, 67 L. J. Q.B. 293; [1898] 1 Q.B. 179; 77 L. T. 534; 18 Cox C.C. 672—C.C.R.

Trial of Prisoner—Presence of Child in Court.—Section 16 of the Prevention of Cruelty to Children Act, 1894, has reference to the attendance before the Court of the child in respect of whom the offence is alleged to have been committed only for the purpose of furnishing evidence, and does not by implication require the attendance of the child in any case in which

the presence or evidence of the child cannot be had or is not desired. *Re v. Hale*, 74 L. J. K.B. 65; [1905] 1 K.B. 126; 91 L. T. 839; 53 W. R. 400; 69 J. P. 83; 3 L. G. R. 40; 20 Cox C.C. 739; 21 T. L. R. 70—C.C.R.

Witness—Admissibility—Husband and Wife.]

—The words "any other offence involving bodily injury to a child under the age of sixteen years" in the schedule to the Prevention of Cruelty to Children Act, 1894, include the crime of culpable homicide. Therefore the wife of a man charged with the culpable homicide of his child aged twelve months, or alternatively with a contravention of section 1 of the Act mentioned, is a competent witness under section 12 of the same Act. *Advocate (H.M.) v. Fraser*, 3 F. (Just. Cas.) 67—Ct. of Justy.

(m) *Dealing in Old Metals.*

Penalty for Purchasing Less than Amount Named.]—It is of the essence of the offence created by section 13 of the Prevention of Crimes Act, 1871, that the accused should be a "dealer in old metals." *Adams v. McKenna*, 3 F. (Just. Cas.) 79—Ct. of Justy.

(n) *Embezzlement.*

Indictment Charging Embezzlement of Money—Embezzlement of Money or Goods.]—The prisoner was indicted for the embezzlement of a sum of money:—*Held*, that he could not be convicted of embezzling goods. *Re v. Clarke*, 69 J. P. 150—C.C.R.

Evidence.]—In such a case counsel for the prisoner is entitled to ask questions tending to shew that there has been no embezzlement of money. *Ib.*

(o) *False Pretences.*

Credit obtained by Fraud—Meal Consumed at Restaurant without Means to Pay for it.]—A person who orders and consumes a meal at a restaurant without being possessed of the means to pay for it does not obtain goods by false pretences under section 88 of the Larceny Act, 1861, but does incur a debt or liability by fraudulently obtaining credit so as to constitute an offence within the meaning of section 13 of the Debtors Act, 1869. *Reg. v. Jones*, 67 L. J. Q.B. 41; [1898] 1 Q.B. 119; 77 L. T. 503; 46 W. R. 191—C.C.R.

Subsequent Attempts—One Transaction.]—On an indictment charging the defendant with obtaining goods by false pretences, evidence was admitted to shew that the defendant had a few days subsequent to that charged in the indictment obtained other goods by similar false pretences:—*Held*, that as it appeared on the facts that it was all one transaction in which the defendant was engaged the evidence was properly admitted. *Re v. Smith*, 92 L. T. 208; 69 J. P. 51; 20 Cox C.C. 804—C.C.R.

Made in Scotland—Goods Obtained in England—Jurisdiction.]—Where a person makes a false

representation in Scotland which induces the person to whom it is made to supply him with goods on credit in England, the person making such representation may be properly tried in England upon an indictment charging him with offences under section 11, sub-section 13, and section 13, sub-section 1 of the Debtors Act, 1869. *Reg. v. Ellis*, 68 L. J. Q.B. 103; [1899] 1 Q.B. 230; 79 L. T. 532; 47 W. R. 188; 62 J. P. 388; 19 Cox C.C. 210—C.C.R.

Obtaining Goods on Credit—False Cheque—Cheque Drawn on Closed Account.—A person in payment for certain goods gave a cheque drawn on a bank at which he represented that he had an account, knowing that his account had been closed, and that the cheque would not be honoured:—*Held*, that the offence was not obtaining credit, but goods, by false pretences, and that there was evidence on which he could properly be convicted of that offence. *Rea v. Cosnett*, 84 L. T. 800; 49 W. R. 633; 65 J. P. 472; 20 Cox C.C. 6—C.C.R.

Officer of Friendly Society—Entry of Name on List as Entitled to Sick Pay—Intervention of Other Officer.—It was the duty of the prisoner, who was an officer of a society, to return the names of members entitled to sick pay. He wrongfully entered on the list a member's name, which he gave to the secretary, and in due course received an order from the treasurer to pay the member the sum named. When the prisoner received the money he applied it in payment of a debt due from the member to himself:—*Held*, that there was evidence upon which the jury might find that the money was obtained by the prisoner by a false pretence made by him to the treasurer. *Rea v. Taylor*, 49 W. R. 671; 65 J. P. 457—C.C.R.

Agent Entrusted with Valuable Security—Person not Following Vocation of Agent.—In order to constitute an agent within the meaning of section 75 of the Larceny Act, 1861, it is necessary that the person entrusted with a security for money should be in the position of an agent apart from the particular transaction in question. Therefore a conjurer and "thought-reader" who, having been entrusted with a cheque with a direction to apply it for a specific purpose, in violation of good faith and contrary to the terms of such direction, converts it to his own use, cannot be convicted of a misdemeanour under the section. *Reg. v. Portugal* (55 L. J. Q.B. 567; 16 Q.B. D. 487) followed. *Reg. v. Kane*, 70 L. J. K.B. 143; [1901] 1 K.B. 472; 84 L. T. 240; 65 J. P. 26—C.C.R.

"Beneficial owner" of Money.—Persons who have the control of the disposition of money, or who have the power of devoting it to the purposes of their enjoyment or amusement, are "beneficial owners" of the money within the meaning of section 1 of the Larceny Act, 1868. *Reg. v. Neat*, 69 L. J. Q.B. 118; 81 L. T. 680; 64 J. P. 39; 19 Cox C.C. 424—C.C.R.

Remoteness—Competitor in Handicap Race—False Statement as to Previous Performances—Attempt to Obtain Prize.—The defendant was convicted of attempting to obtain prizes for foot races by false pretences. It was proved that entries for two races at an athletic meeting were made in the name of one Sims, and that such entries contained correct statements as to

the recent performances of Sims as a runner, including a statement that he had never won a race. The entries were not written either by Sims or by the defendant. At the meeting the defendant ran in the name of Sims. By reason of the statements in the entries he obtained long starts, and won both races. He was in fact a superior runner and a previous winner. After the races he falsely stated, in reply to questions put to him by the handicapper, that he really was Sims, and that the statements in the entries were true statements as to his performances. He did not apply to have the prizes handed over to him:—*Held*, that there was evidence for the jury of an attempt to obtain the prizes by false pretences, and that the attempt was not too remote from the pretence; and that the defendant was properly convicted. *Reg. v. Larner* (14 Cox C.C. 497) disapproved. *Reg. v. Button*, 69 L. J. Q.B. 901; [1900] 2 Q.B. 597; 83 L. T. 288; 48 W. R. 703; 19 Cox C.C. 568; 64 J. P. 600—C.C.R.

Evidence—Evidence of Offences Similar but Subsequent to the Charge—Connected Scheme of Fraud—Admissibility.—Where on the trial of an indictment for obtaining goods by false pretences there is evidence that, at dates subsequent to the offence charged, the prisoner obtained goods from other persons by similar false pretences, such evidence is admissible when it points directly to one and the same system of fraud and a connected scheme of dishonesty. *Reg. v. Rhodes*, 68 L. J. Q.B. 83; [1899] 1 Q.B. 77; 79 L. T. 360; 47 W. R. 121; 62 J. P. 774—C.C.R.

Obtaining Credit by Fraud—Evidence of Similar Frauds by Prisoner—Relevancy.—Upon the trial of an indictment for obtaining credit by means of fraud, evidence of other similar frauds by the prisoner immediately preceding the offence charged in the indictment is relevant and admissible as tending to show a system of fraud, and negating any honest motive on the part of the prisoner. *Rea v. Wyatt*, 73 L. J. K.B. 15; [1904] 1 K.B. 188; 52 W. R. 285; 63 J. P. 31; 20 Cox C.C. 462; 20 T. L. R. 68—C.C.R.

Relevancy and Admissibility—False Pretences—Course of Conduct Shewing Intention to Defraud.—Upon the trial of an indictment for obtaining money by false pretences by means of worthless cheques, evidence of other and similar frauds by the prisoner, given in support of an indictment for a similar fraud upon another person in respect of which the prisoner was acquitted, is relevant and admissible as illustrating a course of conduct shewing an intention to defraud. *Reg. v. Ollis*, 69 L. J. Q.B. 918; [1900] 2 Q.B. 758; 83 L. T. 251; 49 W. R. 76; 64 J. P. 518; 19 Cox C.C. 554—C.C.R.

Amendment of Indictment.—See *Rea v. Byers*, 71 J. P. 205.

(v) *Falsification of Accounts.*

Account not Belonging to Employer—Sufficiency of Indictment.—In order to support an indictment under section 1 of the Falsification of Accounts Act, 1875, charging a servant with making a false entry in an account, it must be alleged in the indictment and proved that the account belongs to, or was in the possession of,

the employer, or was received by the servant for or on account of his employer. *Rea v. Palin*, 75 L. J. K.B. 15; [1906] 1 K.B. 7; 93 L. T. 673; 54 W. R. 396; 69 J. P. 423; 22 T. L. R. 41—C.C.R.

Collector of Poor Rate—Balance of Account.]—A collector of poor rates whose duties included the keeping of the overseers' receipt and payment book, stated the account shewing a balance to be due from the overseers to the inhabitants. This balance, which was correct as to the difference between receipts and expenditure, he stated as "balance in hand." He, however, was unable to produce this amount:—*Held*, that the words "in hand" did not make the entry false, the account being a correct record of receipts and expenditure, and that the collector could not therefore be convicted of falsification of accounts even if he had misappropriated the amount. *Reg. v. Williams*, 79 L. T. 739; 63 J. P. 103; 19 Cox C.C. 239—C.C.R.

Omitting and Concurring in Omitting Material Particulars from Book—Slips with Entries Omitted sent from Paris to London—Entries made by Employer in Cash Account Book in London from Slips—Jurisdiction of English Court.]—The prisoner was employed in Paris to receive money on account of his employers in London. It was his duty to pay money so received into a bank, to enter on slips an account of all such sums, and to send those slips to London. A cash account book was kept in London into which those slips were entered by one of the prisoner's employers. The prisoner received various sums of money which he kept and intentionally omitted from the slips sent to London, knowing that entries omitted on the slips would likewise be omitted from the cash account book kept in London, as they in fact were:—*Held* (KENNEDY, J., and CHANNELL, J., doubting), that the prisoner was properly convicted under the Falsification of Accounts Act, 1875, s. 1, of omitting and concurring in omitting the entries in the cash account book in London, and that as the offence was completed in London, where the slips were received, the Court had jurisdiction to try the case. *Rea v. Oliphant*, 74 L. J. K.B. 591; [1905] 2 K.B. 67; 94 L. T. 824; 53 W. R. 556; 69 J. P. 230; 21 Cox C.C. 192; 21 T. L. R. 416—C.C.R.

Entries Made with Intent to Defraud.]—In a charge of falsification of accounts it is necessary to shew not merely false entries in the books or accounts, but that such false entries were made with intent to defraud, and the question of the intent with which such entries was made is for the jury. *Rea v. Drewett*, 69 J. P. 37; 21 T. L. R. 164—C.C.R.

(q) *Forgery.*

"Record"—Official Document not kept in Pursuance of any Statutory Authority—Register of Ordinations.]—"Record" in section 28 of 24 & 25 Vict. c. 98, means record of a Court of competent jurisdiction, and forgery of a document which, although an official document, is not kept in pursuance of any statutory authority, does not constitute an offence within that section. Consequently, uttering as a certificate of letters of ordination a document purporting to be a copy of the register of ordinations to which

the signature of the registrar of the diocese was forged is not indictable under that section, the register of ordinations not being kept under any statutory authority. *Rea v. Etheridge*, 19 Cox C.C. 676—Kennedy, J.

Sentence of Hard Labour—"Cheat or fraud punishable at common law."]—A prisoner who is convicted upon an indictment for forgery at common law cannot be sentenced to hard labour under section 29 of the Criminal Procedure Act, 1851, as having been convicted of the offence of a cheat or fraud punishable at common law. *Rea v. Hamilton*, 70 L. J. K.B. 480; [1901] 1 K.B. 740; 84 L. T. 332; 49 W. R. 575; 65 J. P. 265; 19 Cox C.C. 675—C.C.R.

Keeping Record whereby False Evidence Given—Conviction for Forgery—Action for Damages.]—See NEGLIGENCE.

(r) *Fraud.*

Credit Obtained by—Meal Consumed without Means to Pay for it.]—A person who orders and consumes a meal at a restaurant without being possessed of the means to pay for it does not obtain goods by false pretences under section 88 of the Larceny Act, 1861, but does incur a debt or liability by fraudulently obtaining credit so as to constitute an offence within the meaning of section 13 of the Debtors Act, 1869. *Reg. v. Jones*, 67 L. J. Q.B. 41; [1898] 1 Q.B. 119; 77 L. T. 503; 46 W. R. 191; 19 Cox C.C. 87—C.C.R.

—Evidence of Similar Frauds by Prisoner—Relevancy.]—Upon the trial of an indictment for obtaining credit by means of fraud, evidence of other similar frauds committed by the prisoner shortly before the offence charged in the indictment is relevant and admissible as tending to negative accident or mistake, and to shew system. *Rea v. Walford*, 71 J. P. 215—C.C.R.

(s) *Fraudulent Misappropriation.*

Conviction Set Aside—Evidence—Bank Director—Confusion of Civil and Criminal Liability.]—Conviction of a bank director set aside on the grounds that the Judge in charging the jury confused the charge of fraudulent appropriation of money with the general charge of irregularity in the conduct of business, and that he misdirected the jury in telling them that it was not conclusive of the defendant's innocence that he was solvent instead of giving them proper guidance on what amounted to fraudulent misappropriation within the meaning of the Criminal Code. *Nelson v. Regem*, 71 L. J. P.C. 55; [1902] A.C. 250; 86 L. T. 164—P.C.

(t) *Fraudulent Prospectus.*

Manager of Limited Company—Unlawful Publication of False Statements—Person Managing Affairs of Company.]—A person who in fact manages the affairs of a limited company is a manager within the meaning of section 84 of the Larceny Act, 1861—although he may not have been appointed to the office under the Companies Act, 1862—and is therefore liable to be convicted under that section of unlawfully making, circulating, and publishing written

statements false to his knowledge, with intent to induce persons to become shareholders in the company. *Ree v. Lawson*, 74 L. J. K.B. 296; [1905] 1 K.B. 541; 92 L. T. 301; 53 W. R. 459; 69 J. P. 122; 20 Cox C.C. 812; 21 T. L. R. 231—C.C.R.

Director of Public Company—Issuing False Statements of Accounts—Intent.—A director, manager, or public officer of any body corporate or public company who makes or publishes false statements of accounts, knowing them to be false, with the intent that they shall be acted upon by those whom they shall reach, is presumed in law to have done so with intent to defraud within sections 83 and 84 of the Larceny Act, 1861. *Reg. v. Birt*, 63 J. P. 328—Ridley, J.

(u) Larceny.

Statute.—1 Edw. 7 c. 10 is the *Larceny Act, 1901*.

Fish Taken at Sea—Possession of Owner of Smack—Skipper of Smack.—Fish taken at sea are in the possession of the owner of the smack by which they are taken, as soon as they are taken, and are consequently the subject of larceny. A., who was employed as skipper of a smack used for trawling outside territorial waters, during the course of a fishing voyage put into port, sold the fish he had taken, and appropriated the proceeds to his own use:—*Held*, that he was properly convicted of larceny. *Ree v. Mallison*, 86 L. T. 600; 66 J. P. 503; 20 Cox C.C. 204—C.C.R.

House-pigeon—Unlawfully Killing—Right of Person other than Owner to Prosecute.—The right to prosecute under section 23 of the Larceny Act, 1861, for unlawfully and wilfully killing a house-pigeon under such circumstances as do not amount to larceny at common law is not limited to the owner of the pigeon or the person aggrieved, and it is competent to any person to prosecute for an offence committed under that section, even though compensation has been paid to the owner and the owner is satisfied with such compensation. *Smith v. Dear*, 88 L. T. 664; 67 J. P. 244; 20 Cox C.C. 458—D.

Ferrets—"Animals kept in a state of Confinement."—Ferrets are "animals kept in a state of confinement" within sections 21 and 22 of the Larceny Act, 1861, and therefore persons resisting apprehension by a police officer, who finds them in possession of a ferret which they knew to be stolen, are guilty of murder, if such resistance directly results in the police officer's death. *Ree v. Sherriff*, 20 Cox C.C. 334—Darling, J.

Deer—Unlawful Possession of—Deer "kept or being in" Forest—Deer Killed Outside Forest.—A person who kills and takes possession of a deer which has strayed outside the boundaries of a forest has not "unlawfully" killed the deer within the meaning of section 12 of the Larceny Act, 1861, and cannot therefore be convicted under section 14 of being in unlawful possession of it. *Threlkeld v. Smith*, 70 L. J. K.B. 921; [1901] 2 K.B. 531; 85 L. T. 275; 50 W. R. 158; 20 Cox C.C. 38—D.

Current Coin—Sale by Thief of Coin as Curiosity—Order of Restitution against Purchaser.—Current coin may be sold as a curiosity, instead of being transferred as current coin of the realm. *Moss v. Hancock*, 68 L. J. Q.B. 657; [1899] 2 Q.B. 111; 80 L. T. 693; 47 W. R. 698; 63 J. P. 517; 19 Cox C.C. 324—D.

If a current coin which has been stolen is sold as a curiosity by the thief, who is subsequently convicted of the larceny, an order of restitution of the coin may be made under section 100 of the Larceny Act, 1861, against the purchaser. *Semble*, that if a current coin is dealt with and transferred as such by a thief who has stolen it, an order of restitution cannot be made against the person who in good faith receives it from the thief. *Ib.*

Collecting Debts on Commission—Fraudulent Conversion of Sums Collected.—The prisoner was convicted under section 1, sub-section 1 (b) of the Larceny Act, 1901, for having received for and on account of the prosecutor from a customer of the prosecutor certain sums of money and fraudulently converted the same to his own use and benefit. It appeared that the prisoner was employed on the terms that he should collect for the prosecutor the debts of customers set forth in a list, and that he should account for the moneys so collected at the end of each week, after deducting 5 per cent. for his own remuneration. The prisoner collected various sums, failed to pay them over to the prosecutor, and fraudulently converted them to his own use:—*Held*, that the conviction was right. *Ree v. Lord*, 69 J. P. 467—C.C.R.

Sale of Goods—Fraudulent Delivery of Goods by Seller's Servant to Purchaser—Receipt Given for Less Quantity of Goods than those Actually Delivered—No Identification of Specific Goods Stolen.—A servant of the seller of residual metal products, in collusion with the prisoner, who was in the habit of buying from the seller the residual metal products, sold and delivered to the prisoner 32 tons 13 cwt. of the residual metal products, but only entered against him in the seller's books 31 tons 3 cwt. and charged him with the smaller amount only. There was no evidence of any contract between the seller or any agent of the seller and the prisoner for the sale of the goods other than the fraudulent delivery of the larger quantity of goods by the seller's servant to the prisoner. The prisoner was charged on an indictment with the larceny of 1 ton 10 cwt. of residual metal products, and was convicted:—*Held*, that, as there was no contract between the seller or any agent on his behalf and the prisoner by which the property in the goods passed to the prisoner, he was properly convicted of larceny, although it was not possible to say which 1 ton 10 cwt. out of the 32 tons 13 cwt. had been stolen, and there was therefore no proof of the theft by the prisoner of any specific goods. *Ree v. Tidswell*, 74 L. J. K.B. 725; [1905] 2 K.B. 273; 93 L. T. 111; 69 J. P. 318; 21 Cox C.C. 10; 21 T. L. R. 531—C.C.R.

Stealing from the Person—Venue in Compound Larceny—Indictment for Compound Larceny—Power to Convict of Less Offence than that for which Prisoner is Indicted.—The venue in an indictment charging the compound larceny of

stealing from the person was laid in the county of the city of Gloucester, whither the stolen property was taken by the prisoners, it having been proved that the theft was committed in the county of Wilts.—*Held*, that there was no jurisdiction to try the prisoners in the city of Gloucester, as there would have been if they had been charged with simple larceny only. *Held*, further, that the jury could not find a verdict of simple larceny upon an indictment for compound larceny. *Rex v. Fenley*, 20 Cox C.C. 252—Jelf, J.

Agent Entrusted with Valuable Security—Person not Following Vocation of Agent.]—In order to constitute an agent within the meaning of section 75 of the Larceny Act, 1861, it is necessary that the person entrusted with a security for money should be in the position of an agent apart from the particular transaction in question. Therefore a conjurer and “thought-reader” who, having been entrusted with a cheque with a direction to apply it for a specific purpose, in violation of good faith and contrary to the terms of such direction, converts it to his own use, cannot be convicted of a misdemeanour under the section. *Reg. v. Portugal* (55 L. J. Q.B. 567; 16 Q.B. D. 487) followed. *Reg. v. Kane*, 70 L. J. K.B. 143; [1901] 1 K.B. 472; 84 L. T. 240; 65 J.P. 26; 19 Cox C.C. 658—C.C.R.

Bailee—Larceny by—Bailment of Money.]—Where a person has been entrusted by another with a valuable security, with authority and instructions to raise thereon a loan for that other person, and having effected the loan and received the proceeds in cash misappropriates the latter to his own use, proof of these facts constitutes evidence on which he may be convicted of larceny as a bailee of the money received. *Reg. v. Holloway (Governor)*; *George, ex parte*, 66 L. J. Q.B. 830; 77 L. T. 247; 18 Cox C.C. 631—D.

Trustee—Indictment—Express Trust in Writing.]—An indictment under section 80 of the Larceny Act, 1861, need not allege that the defendant, who is charged with fraudulently converting or appropriating trust moneys to his own use, is a trustee “on some express trust created by some deed, will, or instrument in writing.” An allegation that the defendant was a trustee is sufficient. *Reg. v. Piper*, 65 J. P. 10—Ridley, J.

“Direction in writing”—Receipt Embodying Verbal Directions.]—A receipt written and signed by a person to whom money has been entrusted with specific verbal instructions as to its application, embodying such verbal instructions, is a “direction in writing” within the meaning of section 75 of the Larceny Act, 1861. *Reg. v. Kane*, 65 J. P. 9—Ridley, J.

Indictment—Charge of Previous Conviction—Arraignment upon the Whole Indictment.]—The prisoner was charged in the first count of an indictment with the misdemeanour of attempting to commit a larceny; in the second count, which dealt with the same facts as in the first count in an alternative manner, with an offence under section 7 of the Prevention of Crimes Act, 1871, after two previous convictions;

and in the third count, with a previous conviction for felony. At the trial he was called upon to plead to the whole indictment in the first instance, and, after pleading “Not guilty,” was convicted:—*Held*, upon a writ of error, that the provisions of section 116 of the Larceny Act, 1861, were quite general, and not confined to offences under that Act, and that section 9 of the Prevention of Crimes Act, 1871, did not affect their generality, and that as the arraignment did not comply with the requirements of section 116 it was therefore bad, and the conviction must be quashed. *Faulkner v. Regem*, 74 L. J. K.B. 562; [1905] 2 K.B. 76; 92 L. T. 769; 53 W. R. 665; 69 J. P. 241; 20 Cox C.C. 838; 21 T. L. R. 417—D.

Indictment of Wife for Larceny of Husband's Goods—Averment that Wife took Goods when about to Leave Husband.]—It is not essential that an indictment against a married woman for stealing the goods of her husband should aver that she was his wife, and wrongfully took the goods when about to leave him. *Rex v. James*, 71 L. J. K.B. 211; [1902] 1 K.B. 540; 86 L. T. 202; 50 W. R. 286; 66 J. P. 217; 20 Cox C.C. 156—C.C.R.

Receiving Stolen Property—Evidence—Proof of Possession of other Stolen Property.]—A conviction upon an indictment charging the prisoners with stealing certain articles and receiving them well knowing them to have been stolen was quashed upon the ground that evidence was allowed to go to the jury under section 19 of the Prevention of Crimes Act, 1871, of the possession of other property alleged to have been stolen within the preceding twelve months, there being no evidence that the latter property had been stolen. *Rex v. Girod*, 70 J. P. 514; 22 T. L. R. 720—C.C.R.

Admissibility of Previous Conviction Involving Fraud.]—The prisoner was indicted for stealing and receiving lace. Evidence was given that some of the stolen lace was found in his possession. Evidence was tendered by the prosecution of the prisoner's conviction within the preceding five years for an offence involving fraud, the requisite notice in that behalf having been given. This was objected to by counsel for the prisoner on the ground that section 19 of the Prevention of Crimes Act, 1871, applied only where the charge of receiving stood alone, and that where, as here, it was coupled with another charge—namely, stealing—the section did not apply. The deputy Recorder admitted this evidence, and the prisoner was convicted:—*Held*, that the evidence was properly admitted. *Rex v. Bromhead*, 71 J. P. 103—C.C.R.

Coercion of Husband—Receiving Goods Knowing Them to have been Stolen—Independent Acts of Receiving by Wife.]—Where a husband and wife are jointly indicted for receiving goods knowing them to have been stolen, the mere fact of the marital relation does not raise any presumption of the husband's control, and even if the husband is in the neighbourhood it is a question for the jury whether the wife was taking an independent part. If it is proved that the wife separately received some portion of the stolen property, and there is no evidence that at the time of such receipt she acted under

her husband's control, the Judge need not leave to the jury the specific question whether there has been a separate receiving by the wife. *Ileg. v. Baines*, 69 L. J. Q.B. 681; 82 L. T. 724; 64 J. P. 408; 19 Cox C.C. 524—C.C.R.

— **Husband's Property Stolen by Wife.**—A woman and her paramour were indicted under the Larceny Act, 1861, for stealing certain goods and also for receiving the same knowing them to have been stolen. The goods were the property of the woman's husband. The woman was found guilty of stealing the goods and the man of receiving them:—*Held* that, as the stealing by a woman of her husband's goods did not amount to a felony either at common law or by virtue of the Larceny Act, 1861, but was only made criminal by the Married Women's Property Act, 1882, the man could not properly be convicted under section 91 of the Larceny Act, 1861, of the offence of receiving. *Reg. v. Smith* (L. R. 1 C.C.R. 266) followed. *Reg. v. Streeter*, 69 L. J. Q.B. 915; [1900] 2 Q.B. 601; 83 L. T. 288; 48 W. R. 702; 64 J. P. 537; 19 Cox C.C. 570—C.C.R.

Receipt of Money Stolen by Wife from Husband—Indictment for Misdemeanour—Absence of Allegation that Thief was Wife of Person from whom Money Stolen.—An indictment charging as a misdemeanour the receipt of money in fact stolen by a wife from her husband knowing the money to have been stolen is good, inasmuch as the stealing by a wife of her husband's property does not amount to a felony either at common law or by virtue of the Larceny Act, 1861, but is made a criminal offence by the Married Women's Property Act, 1882, and therefore the receiving of such stolen property is not a felony within the meaning of section 91 of the Act of 1861; and as there is no other statute making such receipt a felony, it is a misdemeanour only. It is not necessary (although it may be better) to insert in the indictment an allegation that the stealing was not a felony either at common law or under the Larceny Act, 1861. *Rex v. Payne*, 75 L. J. K.B. 114; [1906] 1 K.B. 97; 94 L. T. 288; 54 W. R. 200; 70 J. P. 28; 21 Cox C.C. 121; 22 T. L. R. 126—C.C.R.

Stolen Articles the Separate Property of Wife—Articles in House of Her Husband—Property in the Articles laid in the Husband.—An indictment is bad which lays the property in stolen goods in the person from whose house they were stolen when it is proved that the goods were in fact the separate property of that person's wife. *Rex v. Murray*, 75 L. J. K.B. 593 [1906] 2 K.B. 385; 95 L. T. 295; 70 J. P. 295; 22 T. L. R. 596—C.C.R.

Amendment of Indictment at Trial.—An application was made at the trial, before verdict, under section 1 of the Criminal Procedure Act, 1851, to amend an indictment by substituting the wife in place of the husband as the owner of certain goods which had been stolen, and was refused on the ground that such a variance did not fall within the statute, and also that the prisoners would be prejudiced thereby:—*Held*, that the amendment ought to have been allowed. *Id.*

Reward for Return of Stolen Property—Pub-

lishing Advertisement—"No questions asked"—**Penalty**—"Any property whatsoever"—**Dog.**—Notwithstanding sections 18 to 22 of the Larceny Act, 1861, dogs are included in the words "any property whatsoever" in section 102 of that Act, and therefore the printers and publishers of an advertisement offering a reward for the return of a stolen dog and stating that no questions would be asked, are liable to the penalty of 50*l.* mentioned in that section. *Mirams v. "Our Dogs" Publishing Co.*, 70 L. J. K.B. 879; [1901] 2 K.B. 564; 85 L. T. 6; 49 W. R. 626—C.A.

Taking Fish in Private Water—"Angling."—The respondents laid two fishing-lines in a private river, one end of the lines being attached to two short pieces of wood, which were driven into the ground to make the lines fast, and at the other end were hooks baited with worms, and a stone to keep the lines under water. The lines when laid were left by the respondents. The respondents were subsequently found at the lines taking two fish off the hooks and rebaiting and resetting them, and the lines were taken from them. They were charged under section 24 of the Larceny Act, 1861, with having unlawfully and wilfully taken the fish otherwise than by angling. The Justices refused to convict, upon the ground that the respondents were "angling," and were therefore protected by the proviso in section 25 of the Act:—*Held*, that the respondents were not "angling," and were therefore not protected by the proviso in section 25. *Barnard v. Roberts*, 96 L. T. 648; 71 J. P. 277; 23 T. L. R. 439—D.

Fish in River, taking—Right of Landlord to Prosecute.—*See FISHERY.*

Indictment.—*See* INDICTMENT, col. 656.

Stolen Goods—Conviction of Thief—Order for Restitution—Pawnbroker—Action by Owner.—*See* PAWNBROKER.

— **Delivery by Police.**—*See* TROVER.

(v) *Malicious Injury to Property.*

Breaking into Premises where Furniture was Stored—Compensation.—B. was the owner of a house and demesne. The house had been burnt down except the kitchen, where some furniture, including a picture and two mirrors, was stored. A military chaplain at the C. camp obtained leave to bring some of the band boys stationed at the camp to the demesne for a day's holiday. Some of the boys strolled over to the building, and, from curiosity to see what was in it, smashed open the doors and windows, and five of them entered. One of them in struggling to get out broke the two mirrors:—*Held*, that the acts were malicious and punishable as a crime under the Malicious Damage Act, 1861. *Borrows, In re*, [1900] 2 Ir. R. 593—C.A.

Breaking Plate-glass Window for Purpose of Committing Felony—Malice.—For the purpose of committing a larceny, for which he was subsequently convicted, a thief broke a window-pane, the property of the owner of the stolen

property:—*Held*, that the breaking of the window-pane was an indictable misdemeanour under the Malicious Damage Act, 1861. The statutory meaning of the word "malice" considered. *McDowell v. Dublin Corporation*, [1903] 2 Ir. R. 541—C.A.

Shooting Dog—Bona fide Belief that Act necessary for Protection of Property.—Upon an information against a gamekeeper under section 41 of the Malicious Damage Act, 1861, for unlawfully and maliciously killing a dog, it is a defence to show that the defendant did the act in the *bona fide* belief that it was necessary for the protection of his master's property, and that nothing else could have been done which would effectually have protected it. *Miles v. Hutchings*, 72 L. J. K.B. 775; [1903] 2 K.B. 714; 89 L. T. 420; 52 W. R. 284; 20 Cox C.C. 555—D.

Trespass—Pasture Field—Actual Damage to Grass.—A trespasser upon a pasture field did damage to the grass growing thereon to the extent of 6*d*. He went upon the field in spite of notices warning him that there was "no road," and kept on his way across it after being told by the owner that he was a trespasser, stating that he should continue to cross it as often as he liked:—*Held*, that he was rightly convicted under section 52 of the Malicious Damage Act, 1861, of wilful or malicious damage to real property. *Gayford v. Chouler*, 67 L. J. Q.B. 404; [1898] 1 Q.B. 316; 78 L. T. 42; 62 J. P. 165; 18 Cox C.C. 702—D.

Malicious Damage—Exceeding 5*l*.—Assertion of Right—Unnecessary Violence—Direction to Jury.—Upon an indictment for malicious damage to property exceeding 5*l*. under section 51 of the Malicious Damage Act, 1861, where the defence is an assertion of right, the jury must be directed—first, Did the defendants do what they did in the assertion of a supposed right? Secondly, If so, did they do more than was necessary for the assertion of that right—that is to say, if upon the evidence the jury were reasonably convinced that the defendants used greater violence than it could properly be supposed was necessary for the assertion of the right or its protection, the jury ought to find the defendants guilty of malicious damage. *Reg. v. Clemens*, 67 L. J. Q.B. 482; [1898] 1 Q.B. 556; 78 L. T. 204; 46 W. R. 416; 19 Cox C.C. 18—C.C.R.

(w) *Manslaughter.*

Murder — Manslaughter — Death Resulting from Felonious Act.—If a man by the perpetration of a felonious act brings about the death of another he is guilty of murder; therefore a person who procures abortion on a woman, and the woman dies as the result of that act, such person is guilty of murder unless when he committed the act he could not, as a reasonable man, have contemplated that it could result in death; in which case the crime is reduced to manslaughter. *Reg. v. Whitmarsh* (No. 2), 62 J. P. 711—Bigham, J.

Neglect of Child—Evidence of Prisoner's Means to Provide Food and Medicine—Presumption.—A presumption that the prisoner was, at the VOL. I.

time of the neglect which caused or accelerated the death, possessed of sufficient means to have provided food and medicine is raised by proof of possession by her of such means at a certain date prior to the date of the neglect as, having regard to the circumstances, would presumably not be exhausted at the date of the neglect, and affords evidence to go to the jury of actual possession of means at the date of such neglect. *Rea v. Jones*, 19 Cox C.C. 678—Kennedy, J.

Death from Failure of Mother to make Provision for Her Confinement.—To warrant the conviction of a woman for manslaughter of her new-born child, whose death was caused by want of proper care at birth, it is not enough to show that such woman was guilty of criminal negligence by purposely arranging to be unattended at her confinement. She must also be proved to have been further guilty of negligence towards the child after it was completely born. *Reg. v. Handley* (13 Cox C.C. 79, as cited in *Archbold* (22nd ed.), p. 752) dissented from. *Rea v. Izod*, 20 Cox C.C. 690—Channell, J.

"Peculiar People"—Child's Death Due to Want of Medical Aid—Wilful Neglect—Prevention of Cruelty to Children.—A person over the age of sixteen who, having the custody, charge, or care of a child under that age, fails by reason of holding certain religious views to provide medical aid to such child, when ill, so as to cause unnecessary suffering or injury to its health, is guilty of wilful neglect within the meaning of section 1, sub-section 1 of the Prevention of Cruelty to Children Act, 1894; and should such child die, or its death be accelerated through such wilful neglect, he is guilty of manslaughter. *Reg. v. Senior*, 68 L. J. Q.B. 175; [1899] 1 Q.B. 283; 79 L. T. 562; 47 W. R. 367; 63 J. P. 8; 19 Cox C.C. 219—C.C.R.

The expression "neglect" in section 1, sub-section 1 of the Act of 1894, means the absence of such reasonable care as an ordinary parent would ordinarily use for the protection and care of his child—the failure to take such steps for the protection of infant life and health as the general experience of mankind shows to be proper, provided that the means of rendering such treatment be within the reasonable competence of the person on whom the duty to render it rests.—*Per* Lord Russell of Killowen, C.J. *Ib*.

Neglect to Call in Medical Aid—Conscientious Objection.—Neglect by parents to call in medical aid to their sick child, and in consequence of such neglect such child dies, amounts to manslaughter, and it is no defence to such a charge for the parents to say they have conscientious objections to call in medical aid. *Reg. v. Cook*, 62 J. P. 712—Bigham, J.

(x) *Merchandise Marks Act, 1887.*

Absence of Mens Rea—Forged Mark Applied to China Sold by Auction—Suspicion of Forgery Entertained by Auctioneers and Suggested to Bidders—"Acted innocently."—To obtain a conviction under the Merchandise Marks Act, 1887, the case must be one in which *mens rea* in fact exists; but although the burden of proof is shifted and the prosecution have not

to prove *mens rea*, yet if the defendant can prove absence of *mens rea* he is to be acquitted. *Mens rea* must be applied to the particular offence, and there may be an innocence of intention to infringe the Act, although there may be suspicion of the genuineness of the trade mark. *Christie v. Cooper*, 69 L. J. Q.B. 708; [1900] 2 Q.B. 522; 83 L. T. 54; 49 W. R. 46; 64 J. P. 692—D.

Criminal Liability of Vendor or Principal for Acts of Servants or Agents.—The Merchandise Marks Act, 1887, renders the master or principal criminally liable for the acts of his servants and agents in all cases within section 2, sub-sections 1 and 2, where the conduct constituting the offence is pursued by such servants or agents within the scope or in the course of their employment. The master or principal can only be relieved from criminal responsibility where he can prove that he had acted in good faith and had done all it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act. *Coppen v. Moore*, 67 L. J. Q.B. 689; [1898] 2 Q.B. 306; 78 L. T. 520; 46 W. R. 620; 62 J. P. 458; 19 Cox C.C. 45—D.

(y) *Murder.*

"Endeavour to persuade" a Person to Commit Murder—Communication to Person.—The offence created by section 4 of the Offences against the Person Act, 1861 (which makes it a misdemeanour for a person to solicit, encourage, persuade, or endeavour to persuade, or propose to another to commit a murder), is not complete unless it can be shewn that there has been some communication by the accused to the person whom he is alleged to have solicited or endeavoured to persuade, although it is not necessary to shew that the mind of such person would be affected by such communication. *Rea v. Krause*, 66 J. P. 121—Lord Alverstone, C.J.

Encouraging Persons to Murder—"Sovereigns and rulers of Europe"—Sufficiency.—An indictment charged a person with encouraging persons unknown to murder the sovereigns and rulers of Europe:—*Held*, that the indictment was good, as a sufficiently well-defined class was referred to by the words "sovereigns of Europe." *Rea v. Antonelli*, 70 J. P. 4—Phillimore, J.

Mutual Resolve of Two Persons to Commit Suicide—Survivor.—Where two persons mutually agree to commit suicide, and only one of the two accomplishes that object, the survivor is guilty of murder. *Rea v. Abbott*, 67 J. P. 151—Kennedy, J.

Attempt to Discharge Firearms with Intent—Evidence for Jury.—The prisoner was indicted under section 14 of the Offences against the Person Act, 1861, with feloniously attempting to discharge a loaded revolver at another person with intent to murder him; and on another count, under section 18 of the same Act, with unlawfully and maliciously attempting to discharge the revolver with intent to do grievous bodily harm. It was proved that the prisoner went to the prosecutor's office, drew

the revolver clear from his pocket, and had half-risen from the chair on which he had been sitting, when the prosecutor seized his arm before he could raise it up. A struggle ensued, in which the prisoner, while holding the revolver in his right hand, endeavoured to get his arm loose, but eventually the prosecutor wrested the revolver from him. There was evidence that the prisoner meant to use the revolver. The jury convicted the prisoner on the count laid under section 18:—*Held*, that there was sufficient evidence to go to the jury of an attempt to discharge the revolver within the meaning of section 18. *Rea v. Linneker*, 75 L. J. K.B. 385; [1906] 2 K.B. 99; 94 L. T. 856; 54 W. R. 494; 70 J. P. 293; 21 Cox C.C. 196; 22 T. L. R. 495—C.C.R.

Child—Jurisdiction.—A woman was charged with the murder of her child. There was no evidence as to where the alleged murder was committed, but the child was last seen alive, and was found dead in the prisoner's custody, within the jurisdiction of the Central Criminal Court:—*Held*, that from the fact that the body of the child was found within the jurisdiction of the Central Criminal Court in the custody of the prisoner, the inference could fairly be drawn, in the absence of any explanation, that the alleged murder was committed within that jurisdiction, and therefore that the prisoner could be tried at that Court. *Rea v. Bealey*, 70 J. P. 263—Grantham, J.

(z) *Obscene Literature.*

Aiding and Abetting the Publishing and Sending by Post—Evidence.—The defendant, an editor, published in his paper advertisements, not in themselves obscene, by foreigners resident abroad, of certain books and photographs. On application by a police inspector in England to the address abroad given in the advertisements, books and photographs of an obscene character were sent to him by post. The defendant did not know the actual contents and details of the books and photographs so sent, but knew that those sent in response to the applications invited by the advertisements were of an obscene character:—*Held*, that he was rightly convicted of aiding and abetting the selling, uttering, and publishing obscene literature, and also of sending a postal packet containing obscene literature under the Post Office Protection Act, 1884. *Rea v. De Marney*, 76 L. J. K.B. 210; [1907] 1 K.B. 388; 96 L. T. 159; 71 J. P. 14; 23 T. L. R. 221—C.C.R.

(aa) *Obstruction of Highway.*

Indictment—Misdirection by Judge—Verdict of "Not guilty."—Where at the trial of an indictment for obstructing a highway the jury return a verdict of not guilty, the Court will not suspend the effect of the verdict by staying entry of judgment upon the ground that the Judge misdirected the jury at the trial, inasmuch as the rights of the parties are not finally determined by the Judge at the trial, and therefore a fresh indictment can immediately be presented in respect of the obstruction, to which the former acquittal cannot be pleaded

in bar. *Reg. v. North-Eastern Railway*, 70 L. J. K.B. 548; 84 L. T. 502; 49 W. R. 524; 19 Cox C.C. 682—D.

The rule laid down by LORD ELLENBOROUGH, C.J., in *Reg. v. Wandsworth Inhabitants* (1 B. & Ald. 63), that under very special circumstances the Court will suspend entry of judgment, ought not to be extended to the case where upon an indictment for an obstruction to a highway there has been a verdict of not guilty. *Ib.*

(bb) *Obstructing Administration of Justice.*

Newspaper—Articles Commenting on Case sub judice—Editor and Writer of Articles—Conspiracy—Indictment—Evidence.—Articles had been published in a newspaper commenting upon and containing sensational accounts (some parts of which were not admissible in evidence) of criminal charges against a person during the period of investigation before the magistrate and from committal by him up to and during the trial of such person at the assizes:—*Held*, that the paid editor and a reporter and writer upon the staff of the newspaper who took notes of the proceedings before the magistrate might be properly found guilty upon all counts of an indictment charging—first, an unlawful attempt to obstruct and pervert the due course of justice; secondly, the unlawful doing of an act calculated and tending to the same result; thirdly, the composing, printing, and publishing matters with the same intents; and fourthly, conspiracy to obstruct and pervert the due course of law and justice. *Reg. v. Tibbitts*, 71 L. J. K.B. 4; [1902] 1 K.B. 77; 85 L. T. 521; 50 W. R. 125; 66 J. P. 5; 20 Cox C.C. 70—C.C.R.

(cc) *Perjury.*

Indictment—Affidavit Sworn before Commissioner for Oaths.—In an indictment charging perjury in an affidavit sworn before a commissioner acting under section 2 of the Commissioners for Oaths Act, 1889, it is not sufficient simply to allege the general authority of the commissioner to administer the oath. The indictment must state the circumstances under which the oath was administered, shewing that the commissioner had authority to administer the oath in the particular matter before him. *Reg. v. McDonald*, 21 Cox C.C. 70—Darling, J.

(dd) *Rape.*

Consent of Woman obtained by Fraud—Indecent Assault.—The effect of the Criminal Law Amendment Act, 1885, is to set aside *Reg. v. Flattery* (46 L. J. M.C. 130; 2 Q.B. D. 410), and it is a good defence to an indictment for rape that the carnal knowledge alleged in the indictment was had with the consent of the woman, even though such consent had been obtained by fraud; but the prisoner may be convicted of an indecent assault. *Reg. v. O'Shay*, 19 Cox C.C. 76—Ridley, J.

—**Terms of Complaint.**—On the trial of a person for rape the terms of a complaint made

by the woman on whom the rape is alleged to have been committed are only admissible as evidence of a want of consent on the part of the prosecutrix, and not as evidence of the truth of the charge against the accused. *Reg. v. Lillyman* (65 L. J. M.C. 195; [1896] 2 Q.B. 167) explained. *Reg. v. Rowland*, 62 J. P. 459—Hawkins, J.

(ee) *Reckless Driving.*

Conviction of Aider and Abettor as Principal—“Misdemeanour”—Motor Car—Aiding and Abetting Car being Driven at Dangerous Speed.—In offences less than felony the law does not draw a distinction between principals and accessories; it treats all as principals. *Du Cros v. Lambourne*, 76 L. J. K.B. 50; [1907] 1 K.B. 40; 95 L. T. 782; 70 J. P. 525; 5 L. G. R. 120; 21 Cox C.C. 311; 23 T. L. R. 3—D.

A person who aids or abets the commission of an offence which is punishable on summary conviction is liable, under section 5 of the Summary Jurisdiction Act, 1848, to be proceeded against in all respects as if he were a principal offender. Therefore a person who is summoned for driving a motor car at a speed dangerous to the public may be convicted on that summons, although it may appear that he was not actually driving at the time, but was in fact aiding and abetting the commission of the offence. *Benford v. Sims* (67 L. J. Q.B. 655; [1898] 2 Q.B. 641) approved. *Ib.*

Semble (per LORD ALVERSTONE, C.J.), the word “misdemeanour” in the Accessories and Abettors Act, 1861, is not limited to indictable misdemeanours, but applies to all offences less than felony. *Ib.*

(ff) *Resisting Police.*

“Resisting or wilfully obstructing” Police in Execution of their Duty—Warning Motor-car Drivers of Police Trap.—While two police-constables were on special duty for the purpose of observing and timing the speed of motor cars driven over measured distances on a road, the respondent, by means of signals, and in one instance by calling out “Police trap,” warned the drivers of the cars which he saw approaching that the police were on the watch. In every case the cars slackened speed on the drivers being warned, and it was found that the drivers might have been enabled to avoid travelling at an illegal speed in consequence of the respondent's warnings, but it was not found that the cars were in fact exceeding the legal speed limit at any time. The respondent, when he gave the warnings, knew that the police-constables were engaged in watching the cars, but he was not acting in concert with the drivers nor was he connected with any person or body of persons interested in the driving of motor cars. The Justices dismissed an information laid against the respondent under section 2 of the Prevention of Crimes Amendment Act, 1885, being of opinion that the acts of the respondent did not in law constitute an “obstructing” of the police-constables while in the execution of their duty, within the meaning of that section:—*Held*,

that on their findings the Justices were right in dismissing the information. *Bastable v. Little*, 76 L. J. K.B. 77; [1907] 1 K.B. 59; 96 L. T. 115; 71 J. P. 52; 5 L. G. R. 279; 23 T. L. R. 38—D.

Semble (per LORD ALVERSTONE, C.J., and DARLING, J.), there may be "obstruction" of the police within the meaning of section 2 of the Prevention of Crimes Amendment Act, 1885, short of physical obstruction. *Ib.*

(gg) *Treason.*

Objection on Face of Indictment—Motion to Quash before Plea.]—Upon an indictment for high treason, although the Court has a discretionary power to allow a motion to quash the indictment to be made before plea pleaded, it will not, as a rule, allow such a motion to be made at that stage of the proceedings, but will in most cases leave the prisoner to take the objection by moving in arrest of judgment. *Rev v. Lynch*, 72 L. J. K.B. 167; [1903] 1 K.B. 444; 88 L. T. 26; 51 W. R. 619; 67 J. P. 41; 20 Cox C.C. 468—D.

Effect of Naturalisation after Outbreak of War—Adhering to King's Enemies within Realm.]—There is nothing in the Naturalisation Act, 1870, which legalises an act which would have been a crime before the statute; therefore a person who becomes naturalised in a foreign country under such circumstances that before the statute he would have been guilty of treason is not relieved by the statute from the consequences of his act. Nor can an act of treason give any rights by virtue of the statute to the person guilty of the treasonable act, and therefore if, after war has broken out between Great Britain and another country, a British subject commits an act of treason by becoming naturalised in the belligerent country, he is not thereby protected from the consequences of the commission of subsequent treasonable acts. *Ib.*

Where an indictment for treason alleged that the prisoner adhered to the enemies of the late Queen without the realm, it was held to be good. *Ib.*

(hh) *Trust Money—Misappropriation.*

Statement of Affairs made in Course of Bankruptcy by Accused—Admissibility.]—Upon an indictment under section 80 of the Larceny Act, 1861, for misappropriation of trust-moneys, the statement of affairs made by the accused in the course of his bankruptcy under section 16 of the Bankruptcy Act, 1883, and rule 217 of the Bankruptcy Rules, 1886, is admissible in evidence against him for the purpose of proving the receipt of the moneys by him, inasmuch as the statement is not a "compulsory examination or deposition before any Court on the hearing of any matter in bankruptcy" within section 27, sub-section 2 of the Bankruptcy Act, 1890. *Rev v. Pike*, 71 L. J. K.B. 287; [1902] 1 K.B. 552; 86 L. T. 205; 50 W. R. 672; 66 J. P. 296; 9 Manson, 121; 20 Cox C.C. 163—C.C.R.

(ii) *Unnatural Offence.*

Attempt to Commit—Evidence not on Oath—Admissibility.]—An attempt to commit an un-

natural offence or to commit an indecent assault upon a male person is not an offence "involving bodily injury" within the meaning of the schedule to the Prevention of Cruelty to Children Act, 1894; the unsworn testimony of a child who does not know the nature of an oath is therefore inadmissible on such a charge. *Reg. v. Beer*, 62 J. P. 120—Darling, J.

3. PRINCIPAL AND ACCESSORY.

Conviction of Aider and Abettor as Principal—"Misdemeanour"—Motor Car—Aiding and Abetting Car being Driven at Dangerous Speed.]—In offences less than felony the law does not draw a distinction between principals and accessories; it treats all as principals. *Du Cros v. Lambourne*, 76 L. J. K.B. 50; [1907] 1 K.B. 40; 70 J. P. 525; 23 T. L. R. 3—D.

A person who aids or abets the commission of an offence which is punishable on summary conviction is liable, under section 5 of the Summary Jurisdiction Act, 1848, to be proceeded against in all respects as if he were a principal offender. Therefore a person who is summoned for driving a motor car at a speed dangerous to the public may be convicted on that summons, although it may appear that he was not actually driving at the time, but was in fact aiding and abetting the commission of the offence. *Benford v. Sims* (67 L. J. Q.B. 655; [1898] 2 Q.B. 641) approved. *Ib.*

Semble (per LORD ALVERSTONE, C.J.).—The word "misdemeanour" in the Accessories and Abettors Act, 1861, is not limited to indictable misdemeanours, but applies to all offences less than felony. *Ib.*

Accessory after the Fact—Misdemeanour.]—On an indictment charging two persons—a man and a woman—with an indecent assault upon a child, the jury found the male prisoner guilty of indecent assault and returned against the female prisoner a verdict of being an accessory after the fact:—*Held*, that the conviction of the female prisoner must be quashed. *Rev v. Bubb*, 70 J. P. 143—C.C.R.

4. HUSBAND AND WIFE.

Capacity to Commit Crime—Joint Commission—Marital Compulsion.]—The fact that the parties charged with a crime are married does not form a presumption of compulsion by the husband, and no such presumption arises where a woman procures and contrives the commission of an offence committed by the husband in her absence; and in such a case section 24 of the New Zealand Criminal Code, which excuses a person actually present at the perpetration of a crime and under the compulsion of threats, has no application. *Brown v. Att.-Gen. for New Zealand*, 67 L. J. P.C. 7; [1898] A.C. 234; 77 L. T. 414; 18 Cox C.C. 658—P.C.

5. EVIDENCE.

Prisoner, of—Grand Jury.]—Under section 1 of the Criminal Evidence Act, 1898, a prisoner is not entitled to give evidence for the defence

before the grand jury. *Reg. v. Rhodes*, 68 L. J. Q.B. 83; [1899] 1 Q.B. 77; 79 L. T. 360; 47 W. R. 121; 62 J. P. 774; 19 Cox C.C. 182—C.C.R.

— **Judge's Right to Comment on Prisoner's Failure to Give Evidence at Trial.**—A Judge at the trial has the right to comment on a prisoner's failure to give evidence on his own behalf under the Criminal Evidence Act, 1898; but the right of comment rests solely on the Judge's discretion, and its exercise depends upon the circumstances of each particular case, and is one as to which no general rule can be laid down. *Ib.*

— **Right to Sum up for Prosecution—Right to Comment on Prisoner's Evidence.**—Where upon a criminal trial counsel for the defence calls the prisoner as a witness under the provisions of the Criminal Evidence Act, 1898, but calls no other evidence, the right of the prosecuting counsel to sum up the evidence against the prisoner is not extinguished, but is merely postponed until after the prisoner has given his evidence. *Reg. v. Gardner*, 68 L. J. Q.B. 42; [1899] 1 Q.B. 150; 79 L. T. 358; 47 W. R. 77; 62 J. P. 743—C.C.R.

In exercising his right of summing up, the counsel for the prosecution is entitled to comment upon the evidence given by the prisoner. *Ib.*

— **Statement by Prisoner Imputing Falseness to Prosecutor—“Imputation” upon Prosecutor's Character—Cross-examination of Prisoner as to Character.**—Where upon the trial of an indictment the prisoner was called as a witness, and, in reply to a question put to him in cross-examination as to the truth of a statement by the prosecutor, said “It is a lie, and he is a liar,”—*Held*, that, notwithstanding the prisoner's answer, the nature of the defence was not such as to “involve imputations on the character of the prosecutor” within the meaning of section 1 (f) (ii.) of the Criminal Evidence Act, 1898, so as to render the prisoner liable to be cross-examined as to his character. *Reg. v. Rouse*, 73 L. J. K.B. 60; [1904] 1 K.B. 184; 89 L. T. 677; 52 W. R. 236; 63 J. P. 14; 20 Cox C.C. 592; 20 T. L. R. 68—C.C.R.

— **Time when Defended Prisoner, who neither Calls nor Gives Evidence, is to Make Unsworn Statement to Jury.**—An unsworn statement made by a defended prisoner who calls no evidence must be made before and not after the speech made by counsel for the prosecution in summing up his evidence. *Reg. v. Sherrieff*, 20 Cox C.C. 334—Darling, J.

— **Statement on Oath before Magistrate—Admissibility.**—The statement which a prisoner makes in giving evidence before the magistrates by whom he is committed for trial may be used as evidence against him at the trial, and the deposition containing such statement may be put in evidence at the trial, although he then declines to give evidence. If also, having given evidence when before the magistrates, he replies to questions put to him under section 18 of the Indictable Offences Act, 1848, whether he desires to say anything in answer to the charge, by saying that his evidence already given is true,

the whole of that evidence and his reply to the question may be given in evidence against him as a statement under that Act. *Reg. v. Bird*, 79 L. T. 359; 47 W. R. 112; 62 J. P. 760; 19 Cox C.C. 180—C.C.R.

— **Admissions Obtained by Questions—Police—No Caution Given.**—The police have no right to put questions to a prisoner in custody tending to convict him even after cautioning him. It is a matter in the discretion of the Judge to admit or reject the answers given to such questions, and the latter course should be adopted if there is any reason to believe that a trap was being laid for the prisoner. Persons about to be taken into custody should not be cross-examined by the police. *Reg. v. Histed*, 19 Cox C.C. 16—Hawkins, J.

— **Statement in Reply to Police.**—An answer given by an accused person in reply to a question put to him by a police constable, without threat or inducement, may be given in evidence against him. *Rogers v. Hawken*, 67 L. J. Q.B. 526; 78 L. T. 655; 62 J. P. 279; 19 Cox C.C. 122—D.

— **Statement by One Prisoner in Presence of Another Prisoner.**—On the trial of the prisoner for stealing and receiving lace evidence was given that articles stolen from several places were found in the possession of the prisoner, and that other portions of the stolen property were found in the possession of C., a friend and associate of the prisoner. On being charged together C. said, “Yes, it's quite right; I sold them for Horace” (meaning the prisoner). The prisoner made no reply. The statement which C. had previously made, and which had been taken down in writing, was then read over to the prisoner, and he again made no reply. The prisoner had ample opportunity of denying the statement or making any explanation or observation he thought fit:—*Held*, that such statement was properly admitted as dealing with the prisoner's conduct and demeanour. *Rea v. Bromhead*, 71 J. P. 103—C.C.R.

— **Prisoner's Evidence before the Magistrates—Admissibility at Trial.**—If a prisoner has elected to give evidence before the magistrate, and is committed for trial, the prosecution can at the trial, before closing their case, put in the evidence given by the prisoner on oath before the magistrate. *Rea v. Boyle*, 20 T. L. R. 192—Jelf, J.

— **After Plea of Guilty—“Stage of the proceedings.”**—The Criminal Evidence Act, 1898, which makes the prisoner a competent witness “at every stage of the proceedings,” does not entitle him to give evidence on oath in mitigation of sentence after he has pleaded guilty. The phrase “stage of the proceedings” is not applicable to the period between a plea of guilty and sentence. *Reg. v. Hodgkinson*, 64 J. P. 808—Darling, J.

— **Evidence of Accused before Justices.**—Where a prisoner is about to be committed for trial the Justices should impress upon him the advisability of giving evidence in defence—where he intends to set up a defence—at the earliest possible stage, otherwise the value of the evidence in defence is much lessened. *Rea v. Humphries*, 67 J. P. 396—Wills, J.

— **Letter Written by Prisoner to Prosecutrix while in Custody—Admissibility.**—While in custody a prisoner wrote a letter to the prosecutrix:—*Held*, that the letter was admissible in evidence against him on his trial. *Re v. Heal*, 69 J. P. 224—Grantham, J.

— **Prisoner Giving Evidence on Oath—Joint Indictment—Cross-examination of One Prisoner by Another.**—When one prisoner gives evidence on oath inculpating another charged on a joint indictment, he is liable to be cross-examined by or on behalf of that other. *Re v. Hadwen*, 71 L. J. K.B. 581; [1902] 1 K.B. 882; 86 L. T. 601; 50 W. R. 589; 66 J. P. 456; 20 Cox C.C. 206—C.C.R.

— **Cross-examination of Prisoner as to Previous Conviction—Defence Involving Imputations on Character of Witness for Prosecution.**—The prisoner and the warehouseman of a firm were tried on a charge of stealing certain copper from the works of the firm. The warehouseman, who had offered to sell the copper to the prisoner, brought it out of the works and handed it over to the prisoner, who was then arrested. The warehouseman pleaded guilty. The prisoner alleged in defence that he was acting under the instructions of a police-sergeant. The sergeant, who was a witness for the prosecution, admitted in cross-examination that he had been friendly with the prisoner for some months; that he gave the prisoner instructions that if any one asked him to buy any metal in doubtful circumstances, not to buy, but to let the sergeant know, and, if possible, to get a sample; but he denied that he had any connection with the prisoner in regard to the robbery in question. The prisoner gave evidence in support of his defence. He was asked in cross-examination whether he had ever been convicted, and, the question not being objected to by his counsel, he answered in the affirmative. The answer was allowed to go to the jury, who returned a verdict of guilty:—*Held*, that the nature or conduct of the defence was not such as to involve imputations on the character of the sergeant as a witness for the prosecution within the meaning of section 1 (f) (ii.) of the Criminal Evidence Act, 1898, and therefore that the prisoner ought not to have been asked or required to answer the question as to his previous conviction; and that, as the evidence had been allowed to go to the jury, the conviction must be quashed. *Re v. Bridgewater*, 74 L. J. K.B. 35; [1905] 1 K.B. 131; 91 L. T. 838; 53 W. R. 415; 69 J. P. 26; 20 Cox C.C. 737; 21 T. L. R. 69—C.C.R.

The Court will not as a matter of course quash a conviction on the ground that the prisoner has been improperly asked in cross-examination whether he has been previously convicted, and has answered in the affirmative, if it appears that the prisoner's counsel allowed the question to be answered without objection. *Id.*

— **Cross-examination of One Prisoner by the Other.**—Where one of two persons jointly charged gives evidence on his own behalf under section 1 of the Criminal Evidence Act, 1898, the other accused is entitled to cross-examine him. *Re v. Hadwen* (71 L. J. K.B. 581; [1902] 1 K.B. 882) approved. *Hackston v. Millar*, 8 F. (Just. Cas.) 52—Ct. of Justy.

— **Prior Conviction of a Statutable Offence.**—The Criminal Evidence Act, 1898, applies to all criminal offences, and no person charged, who gives evidence on his own behalf, can be asked or required to answer any question tending to shew that he has been previously convicted, notwithstanding that the offence charged against him is created by a statute the provisions of which render him a competent witness. *Charnock v. Merchant*, 69 L. J. Q.B. 221; [1900] 1 Q.B. 474; 82 L. T. 89; 48 W. R. 334; 64 J. P. 183; 19 Cox C.C. 443—D.

— **Imputations on Character of Witness for Prosecution—Statement by Prisoner that Witness Committed Offence Charged Against Prisoner.**—Evidence given by a prisoner that a witness for the prosecution and not the prisoner committed the offence with which the prisoner is charged, involves an imputation on the character of such witness within the meaning of section 1 (f) (ii.) of the Criminal Evidence Act, 1898, and thus enables counsel for the prosecution to cross-examine the prisoner regarding previous convictions against him. *Reg. v. Marshall*, 63 J. P. 36—Darling, J.

— **Absence of Proper Caption—Statement Put to Prisoner in Cross-Examination.**—A statement made by a deceased person, for the alleged murder of whom the prisoner was indicted, being inadmissible in evidence by reason of the absence of the proper caption and also being inadmissible as a dying declaration, was put to the prisoner in cross-examination:—*Held*, that, although this might be done, it was better in such a case to limit the cross-examination to questions asked by the prisoner of the deceased person, at the time the statement was made by the latter, suggesting the defence now set up. *Reg. v. Simpson*, 62 J. P. 825—Wills, J.

— **Confession—Admissibility.**—When a statement has been made by a prisoner in answer to the questions of a person in authority, it is in the discretion of the Judge to admit or reject such a statement. The latter course should be adopted if there is reason to think that the prisoner, owing to pressure exercised by the questioner, or in order to escape from his custody, may have been induced to make admissions. *Re v. Knight*, 69 J. P. 108; 20 Cox C.C. 711; 21 T. L. R. 310—Channell, J.

— **Inducement.**—The prisoner, who in the presence of a police constable was asked by his master, a farmer, how he accounted for the number of sheep on the farm not being so large as it should be, admitted that he had sold some of them and had not accounted to his master for the money which he had received for them. In answer to further questions as to whether he had let any corn go off the place, he said he had done so. The master, on cross-examination, admitted that when he asked the prisoner about the corn he might have said, "You had better tell me all about the corn that is gone," and further, that he would not swear that he did not induce the prisoner to confess about the corn. A witness who was present also stated on cross-examination that the master asked the prisoner to speak the truth, and said it would be better for him if he did so:—*Held*, that as the words used contained in themselves an inducement to make a statement, no part of

the prisoner's confession was admissible against him on his trial for larceny. *Reg. v. Rose*, 67 L. J. Q.B. 289; 78 L. T. 119; 18 Cox C.C. 717—C.C.R.

An answer given by an accused person in reply to a question put to him by a police constable, without threat or inducement, may be given in evidence against him. *Rogers v. Hawken*, 67 L. J. Q.B. 526; 78 L. T. 655; 62 J. P. 279—D.

Statement of Prisoner's Husband in Prisoner's Presence—Admissibility.]—A statement made by a woman to her husband and by him repeated to a police officer in her presence is admissible in evidence against her on her trial, where it appears that she expresses no dissent from the statement when so made to the police officer. *Reg. v. Bexley*, 70 J. P. 263—Grantham, J.

Depositions—Deceased Witness—Admissibility—Statutory Requirements.]—The deposition of a deceased witness taken in accordance with the provisions of section 17 of the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), is admissible in evidence on the trial of the accused for an indictable offence, although section 6 of Russell Gurney's Act (30 & 31 Vict. c. 35) may not have been complied with. *Reg. v. Katz*, 64 J. P. 807—Darling, J.

—Witness Unable to Travel—Pregnancy—Evidence of Police Officer—Coroner's Depositions.]—The evidence of a police officer that a witness called before the coroner is apparently very close to her confinement, and consequently not able to attend at the trial, is not sufficient to entitle the prosecution to read her deposition. Coroner's depositions are on the same footing as those taken before magistrates. *Reg. v. Butcher*, 64 J. P. 808—Darling, J.

Deposition before Coroner—Admissibility.]—The admissibility in a criminal trial of a deposition taken before a coroner depends on the common law, and is in no way governed by either Jervis's Act of 1848 or Russell Gurney's Act of 1867. Where the deponent at a coroner's inquest was proved to be dead, and that his deposition had been duly signed by himself and the coroner, and that it was taken in the presence of the accused, who by her solicitor had full opportunity of cross-examining the deponent, such deposition was held admissible in evidence at the subsequent trial of the accused, except as to such portions of it as would have been inadmissible on the *viva voce* examination of the deponent. *Reg. v. Cowle*, 71 J. P. 152—Grantham, J.

Deposition not Signed by Witness—Admissibility.]—The deposition of a witness, since deceased, taken in the presence of the accused, who had full opportunity of cross-examining the deponent, and which was signed by the magistrate and assented to as correct by the witness on being read over to her,—*Held*, admissible in evidence at the trial as having been taken in accordance with section 17 of the Indictable Offences Act, 1848, although it was not signed by the deponent by reason of serious injuries to her hands precluding her from writing or making a mark. *Reg. v. Holloway*, 65 J. P. 712—Wills, J.

Refreshing Memory—Solicitor's Diary.]—A solicitor for the purpose of refreshing his memory may be allowed to look at his own account of his interviews with the prisoners, dictated by him to a shorthand-writer, and by the latter written in longhand shortly after the interviews took place, and read over by the solicitor shortly afterwards, although the shorthand writer is alive and is not called as a witness. *Reg. v. Dexter*, 19 Cox C.C. 360—Grantham, J.

False Evidence Given by Witness at Police Court—Evidence Induced by Defendant to Charge of Incitement to Murder.]—The prisoner was indicted for having persuaded a certain person to murder another person. For the prosecution it was proposed to call a witness who had given evidence for the defence at the police Court, which he afterwards confessed was false, and in respect of which he was convicted of perjury, and who now alleged that he had been induced by the defendant to give such false evidence:—*Held*, that this evidence was admissible. *Reg. v. Watt*, 70 J. P. 29; 20 Cox C.C. 852—Phillimore, J.

Previous Convictions—Admissibility at Trial for Purpose of Proving Subsequent Offence.]—Upon the trial of an indictment under section 7 of the Prevention of Crimes Act, 1871, for being found in a public place within seven years immediately after the expiration of a sentence for the last of two previous crimes, under such circumstances as to satisfy the Court that the prisoner was about to commit an offence punishable on indictment, evidence of the previous convictions is admissible before the jury return their verdict for the purpose of proving the offence with which the prisoner is charged. *Reg. v. Penfold*, 71 L. J. K.B. 306; [1902] 1 K.B. 547; 86 L. T. 204; 50 W. R. 671; 66 J. P. 248; 20 Cox C.C. 161—C.C.R.

Evidence of Offences Similar but Subsequent to the Charge—Connected Scheme of Fraud—Admissibility.]—Where on the trial of an indictment for obtaining goods by false pretences there is evidence that, at dates subsequent to the offence charged, the prisoner obtained goods from other persons by similar false pretences, such evidence is admissible when it points directly to one and the same system of fraud and a connected scheme of dishonesty. *Reg. v. Rhodes*, 68 L. J. Q.B. 83; [1899] 1 Q.B. 77; 79 L. T. 360; 47 W. R. 121; 62 J. P. 774—19 Cox C.C. 182—C.C.R. And see *Reg. v. Walford*, 71 J. P. 215—C.C.R.

Evidence of Previous Offences.]—The defendant was charged with unlawfully using a certain public-house for the purpose of betting with persons resorting thereto on November 13, 1903, and also on the same day, then being a person using the said public-house for the purpose of certain moneys being received by and on his behalf in connection with betting transactions. The defendant was arrested in the bar of the public-house, having upon him at the time lists of persons and the amount due to them for bets, and certain betting slips containing names of horses, the amount for which they were to be backed, and the name of the person backing the horse. In the parlour leading from the bar were a large

number of slips similar to those found on the prisoner. It was not proved that the defendant made any bets in the said public-house on November 13 in person or that he went there for that purpose. It appeared that the licensee of the public-house had pleaded guilty to keeping the house in question on November 13 and on divers other days during the preceding six months for the purpose of betting with persons resorting thereto:—*Held*, that evidence intending to shew—first, that betting slips similar to those found on the defendant and to those found in the parlour of the public-house on November 13 had previously to that date been frequently received from customers at the public-house by the licensee, and had been forwarded by him to the defendant; and secondly, that the lists found on the defendant were an epitome of slips received by him from the licensee on dates prior to November 13—was properly admitted. *Reg. v. Mean*, 69 J. P. 27; 21 T. L. R. 172—C.C.R.

Dying Declaration — Admissibility.]—A woman who had taken poison, and who in the opinion of the doctor was unlikely to recover, repeatedly ejaculated, while suffering great pain, the expression, “I’m dying”:—*Held*, that this did not conclusively shew a fixed and settled belief in her impending death so as to allow of a statement made by her to the nurse who attended her being admitted as a dying declaration. *Reg. v. Abbott*, 67 J. P. 151—Kennedy, J.

— A woman upon whom an illegal operation was alleged to have been performed, said to a witness about 7 A.M., “I’m dying.” She seemed then in great pain, and repeatedly complained of the pain, also complaining of it while making the statement which it was sought to give in evidence as a dying declaration. The woman appeared to be quite rational. She died at 7.20 A.M.:—*Held*, that the statement she made was admissible as a dying declaration. *Reg. v. Cowle*, 71 J. P. 152—Grantham, J.

— **Portions of Previous Statement by Declarant Assented to and Signed as Correct.]**—A statement otherwise admissible as a dying declaration is not rendered inadmissible by the fact that the magistrate to whom the statement is made, owing to the weak and exhausted condition of the declarant, repeats to her portions of a statement made by her some days previously and writes same down in his own words, she stating that it is correct and signing same. *Reg. v. Whitmarsh* (No. 1), 62 J. P. 680—Darling, J.; *S. P. Reg. v. Whitmarsh* (No. 2), 62 J. P. 711—Bigham, J.

— **Expectation of Immediately Impending Death.]**—In answer to a question put to her, a dying woman said, “I am aware that I am seriously ill”:—*Held*, that as this did not show that in her own opinion she expected immediate death, her statement was not admissible in evidence. *Reg. v. Smith*, 65 J. P. 426—Bruce, J.

— **Questions put to Declarant—Answers only Recorded.]**—A doctor took down the answers given by a dying woman to questions put to her

by a magistrate:—*Held*, that these answers were not admissible in evidence. *Id.*

— **Opinion of Medical Practitioner — Deposition not Stating Place where Taken.]**—A deposition of a dying person, taken under section 6 of 30 & 31 Vict. c. 35, is not admissible in evidence unless it states the place where it is taken. It is no objection to the admissibility of such a deposition that the medical practitioner at the trial states that he did not think at the time when the deposition was taken that the deponent was not likely to recover, though at that time he had expressed a contrary opinion to the magistrate who took the deposition. *Reg. v. Curtis*, 21 T. L. R. 87—Bigham, J.

6. INDICTMENT.

No Date Specified in.]—The prisoner was charged with the larceny of a number of articles, the property of his master. No date was specified in the indictment when the larcenies were alleged to have been committed. An application was made before the jury were sworn to quash the indictment on the ground that no date was mentioned. The chairman of quarter sessions declined to accede to the application, and the trial proceeded and the prisoner was convicted, the dates of the larcenies being proved:—*Held*, that the chairman was right in declining to quash the indictment. *Reg. v. Nicholls*, 68 J. P. 452—C.C.R.

Several Defendants.]—An indictment in which several defendants are charged may contain counts charging offences against individual prisoners as well as counts charging all the prisoners jointly. If it is likely that injustice may be caused to any one prisoner by trying them all together, the Court may order them to be tried separately. *Reg. v. Cox*, 67 L. J. Q.B. 293; [1898] 1 Q.B. 179—C.C.R.

Stolen Articles the Separate Property of Wife — Articles in House of Her Husband — Property in the Articles laid in the Husband.]—An indictment is bad which lays the property in stolen goods in the person from whose house they were stolen when it is proved that the goods were in fact the separate property of that person's wife. *Reg. v. Murray*, 75 L. J. K.B. 593; [1906] 2 K.B. 385; 95 L. T. 295; 70 J. P. 295; 21 Cox C. C. 250; 22 T. L. L. 596—C.C.R.

Amendment of Indictment at Trial.]—An application was made at the trial, before verdict, under section 1 of the Criminal Procedure Act, 1851, to amend an indictment by substituting the wife in place of the husband as the owner of certain goods which had been stolen, and was refused on the ground that such a variance did not fall within the statute, and also that the prisoners would be prejudiced thereby:—*Held*, that the amendment ought to have been allowed. *Id.* And see *Reg. v. Byers*, 71 J. P. 205.

Adding Count—Prisoner Embarrassed.]—The accused were committed for trial on charges of perjury and conspiracy to commit perjury, and

to these counts in the indictment was added another charging the accused with a conspiracy to defraud. There was evidence in the depositions to support the added count. The Court, however, being of opinion that the accused would be embarrassed by this fresh count, refused to allow the prosecution to give evidence in support of it. *Reg. v. Harris*, 64 J. P. 360—Grantham, J.

Verdict of Acquittal without Plea to Indictment.—Circumstances under which a verdict of acquittal was taken without the defendant being present in Court and without pleading to the indictment. *Reg. v. Haynes*, 64 J. P. 441—Ridley, J.

Vexatious Indictments Act—Attorney-General's Fiat.—It is not necessary to produce and prove the Attorney-General's fiat for the presentment of an indictment under the Vexatious Indictments Act, 1859. *Reg. v. Dexter*, 19 Cox C.C. 360.

Autrefois Convict—Indictment for Obtaining Credit for Goods by False Pretences or Other Fraud—Trial for Larceny of Same Goods.—A person cannot, after having been convicted upon an indictment for the misdemeanour of obtaining credit for goods by false pretences or other fraud, be lawfully tried upon an indictment for larceny of the same goods. *Reg. v. King*, 66 L. J. Q.B. 87—C.C.R.

7. CROWN CASES RESERVED.

Jurisdiction of Court to Entertain Case.—Although a question arises on a plea of "guilty," it is a question arising "on the trial" within the meaning of section 1 of the Crown Cases Act, 1848; and the Court for Crown Cases Reserved has therefore power under section 2 of that Act to make such order as justice might require; and in exercise of that power may quash the conviction. *Reg. v. Brown* (59 L. J. M.C. 47; 24 Q.B. D. 357) followed. *Reg. v. Clark* (36 L. J. M.C. 16; L.R. 1 C.C.R. 54) not followed. *Reg. v. Plummer*, 71 L. J. K.B. 805; [1902] 2 K.B. 339; 86 L. T. 836; 51 W. R. 137; 66 J. P. 647—C.C.R.

8. PRACTICE AND PROCEDURE.

(a) Generally.

Procedure—Several Prisoners Tried Together for an Offence—Case Stated upon Point of Law Affecting Each Prisoner—One Prisoner only included in Question Reserved—Jurisdiction to Quash Conviction of Each Prisoner.—Where several persons are tried together and convicted for an offence, and at the trial evidence which equally affects each prisoner is wrongly admitted, the Court of Crown Cases Reserved has jurisdiction upon a Case stated under section 2 of the Crown Cases Act, 1848, to quash the conviction against each prisoner, although by the Case stated the opinion of the Court as to the admissibility of the evidence and the legality of the conviction is asked with reference to one prisoner only. *Reg. v. Saunders*

(No. 2), 68 L. J. Q.B. 296; [1899] 1 Q.B. 490; 80 L. T. 28; 63 J. P. 150—C.C.R.

Right to Sum up for Prosecution—Right to Comment on Prisoner's Evidence.—Where upon a criminal trial counsel for the defence calls the prisoner as a witness under the provisions of the Criminal Evidence Act, 1898, but calls no other evidence, the right of the prosecuting counsel to sum up the evidence against the prisoner is not extinguished, but is merely postponed until after the prisoner has given his evidence. *Reg. v. Gardner*, 68 L. J. Q.B. 42; [1899] 1 Q.B. 150; 79 L. T. 358; 47 W. R. 77; 62 J. P. 743; 19 Cox C.C. 177—C.C.R.

In exercising his right of summing up, the counsel for the prosecution is entitled to comment upon the evidence given by the prisoner. *Id.*

Trial—Duty to Inform Prisoner of Right to Address Jury.—The Judge at the trial of a prisoner not defended by counsel ought to inform him of his right to address the jury, but the Judge's omission to do so does not invalidate the conviction. *Reg. v. Saunders* (No. 1), 63 J. P. 24—C.C.R.

Suspension of Entry of Judgment—Indictment for Obstruction to Highway—Misdirection by Judge—Verdict of "Not guilty."—Where at the trial of an indictment for obstructing a highway the jury return a verdict of not guilty, the Court will not suspend the effect of the verdict by staying entry of judgment upon the ground that the Judge misdirected the jury at the trial, inasmuch as the rights of the parties are not finally determined by the Judge at the trial, and therefore a fresh indictment can immediately be presented in respect of the obstruction, to which the former acquittal cannot be pleaded in bar. *Reg. v. North-Eastern Railway*, 70 L. J. K.B. 548; 84 L. T. 502; 49 W. R. 524—D.

The rule laid down by LORD ELLENBOROUGH, C.J., in *Reg. v. Wandsworth Inhabitants* (1 B. & Ald. 63), that under very special circumstances the Court will suspend entry of judgment, ought not to be extended to the case where upon an indictment for an obstruction to a highway there has been a verdict of not guilty. *Id.*

(b) Bail.

Statute.—61 & 62 Vict. c. 7 is the *Bail Act*, 1898.

Person Committed under Fugitive Offenders Act, 1881—Powers of High Court.—The Fugitive Offenders Act, 1881, does not take away from the High Court its inherent power to grant bail to a fugitive offender, apprehended in England and committed to prison by a magistrate to await his surrender to take his trial at a Consular Court. *Reg. v. Spilsbury*, 67 L. J. Q.B. 938; [1898] 2 Q.B. 615; 79 L. T. 211; 62 J. P. 600; 19 Cox C.C. 160—D.

Circumstances under which the Court refused to grant bail in such a case. *Reg. v. Hole*, 62 J. P. 616—D.

In what Cases.]—Observations by the Court as to granting bail. *Reg. v. Rose*, 67 L. J. Q.B. 289; 78 L. T. 119; 18 Cox C.C. 717—C.C.R.

(c) *Stating Case.*

Mode of—Adoption of Shorthand Notes.]—A case stated for the opinion of the Court for Crown Cases Reserved must briefly state the questions of law reserved and such facts only as raise those questions, and the Judge in stating a Case cannot adopt as part thereof a transcript of the shorthand notes of the evidence given at the trial. *Re v. Gray* (No. 1), 68 J. P. 40—C.C.R.

Notice that Case is to be Argued by Counsel.]—The rule which requires that where a case is to be argued by counsel notice thereof should be given to the clerk of the Court at least two days previously to the sitting of the Court should be observed in every case. *Ib.*

(d) *Quashing Conviction.*

Indictment—Charge of Previous Conviction—Arraignment upon the Whole Indictment.]—The prisoner was charged in the first count of an indictment with the misdemeanour of attempting to commit a larceny; in the second count, which dealt with the same facts as in the first count in an alternative manner, with an offence under section 7 of the Prevention of Crimes Act, 1871, after two previous convictions; and in the third count, with a previous conviction for felony. At the trial he was called upon to plead to the whole indictment in the first instance, and, after pleading "Not guilty," was convicted:—*Held*, upon a writ of error, that the provisions of section 116 of the Larceny Act, 1861, were quite general, and not confined to offences under that Act, and that section 9 of the Prevention of Crimes Act, 1871, did not affect their generality, and that as the arraignment did not comply with the requirements of section 116 it was therefore bad, and the conviction must be quashed. *Faulkner v. Regem*, 74 L. J. K.B. 562; [1905] 2 K.B. 76; 92 L. T. 769; 53 W. R. 665; 69 J. P. 241; 21 T. L. R. 417—D.

Conviction Set Aside—Fraudulent Misappropriation—Evidence—Bank Director—Confusion of Civil and Criminal Liability.]—Conviction of a bank director set aside on the grounds that the Judge in charging the jury confused the charge of fraudulent appropriation of money with the general charge of irregularity in the conduct of business, and that he misdirected the jury in telling them that it was not conclusive of the defendant's innocence that he was solvent instead of giving them proper guidance on what amounted to fraudulent misappropriation within the meaning of the Criminal Code. *Nelson v. Regem*, 71 L. J. P.C. 55; [1902] A.C. 250; 86 L. T. 164; 20 Cox C.C. 150—P.C.

(e) *Costs.*

Costs—Murder—Act Committed in Borough—Death Occurring in County.]—The costs of a

prosecution of a person on a charge of murder alleged to have been committed within the borough of Wigan, where the death occurred outside the borough, and in the county of Lancaster, were held to be payable by the borough of Wigan, although the Justices of that borough before whom proceedings had been taken had refused to commit the accused, and he had been brought before the assizes on the inquisition of the county coroner. *Reg. v. Brown; Wigan Corporation, Ex parte*, 62 J. P. 521; 19 Cox C.C. 83—Ridley, J.

(f) *Illegal Detention of Prisoner.*

Detention by Warders after Prisoner Acquitted—Liability of Gaoler.]—A person who had been acquitted of a criminal charge, and was directed to be discharged, was detained by the prison warders in the cells below the Court while they questioned him and took a note of particulars regarding his personal and physical characteristics, and various other matters:—*Held*, that such detention was unlawful, and that the gaoler was liable in damages in respect of same. *Mee v. Cruickshank*, 86 L. T. 708; 66 J. P. 89; 20 Cox C.C. 210—Wills, J.

9. PROPERTY OF CONVICT.

Felony—Conviction for—Real Estate—Administrator of Property—Estate Tail of Convict—Power to Bar—Actual Tenant in Tail—Disposition.]—The Forfeiture Act, 1870, does not confer power upon the administrator of a convict's property to bar his estate tail in real property and to convey the fee-simple absolute to a purchaser, inasmuch as in the case of such property a determinable fee-simple only is vested in the administrator by virtue of section 10 of the Act. *Gaskell and Walters' Contract, In re*, 75 L. J. Ch. 503; [1906] 2 Ch. 1; 94 L. T. 658; 22 T. L. R. 464—C.A. Affirming, 54 W. R. 327—Kekewich, J.

Alienation by Convict—Fines and Recoveries Act, 1833.]—The convict, however, is competent to execute a disentailing assurance under the Fines and Recoveries Act, 1833; for such assurance is not an alienation within section 8 of the Forfeiture Act, 1870, and the fee-simple thus acquired will vest in the administrator under section 10 of the Act, and by this means a good title can be made. *Banks v. Small* (56 L. J. Ch. 832; 36 Ch. D. 716) and *Lilford (Lord) v. Att.-Gen.* (36 L. J. Ex. 116; L. R. 2 H.L. 63) applied. *Ib.*

Felony—Administrator—Sale of Convict's Property—Forfeiture.]—The administrator of a convict's property has an absolute discretionary power under the Forfeiture Act, 1870, to sell the same, and a *bona fide* sale in the exercise of such discretion cannot be impeached by the convict after his discharge. *Carr v. Anderson*, 72 L. J. Ch. 534; [1903] 2 Ch. 279; 88 L. T. 503; 51 W. R. 465; 20 Cox C.C. 416—C.A.

Observations on the practice at Scotland Yard and the duty of the administrator as regards the sale of a convict's property. *Ib.*

Action by Convict against Administrator to

Recover Property—Costs.—By section 20 of the Act the costs as between solicitor and client of every action which may be brought against an administrator are made a first charge upon the property “unless the Court before which such action is tried . . . shall think fit otherwise to order”:—*Held*, that, even if the section applied to actions by a convict against his administrator, which was doubtful, the Court had a discretion as to costs. *Carr v. Anderson*, 72 L. J. Ch. 50; [1903] 1 Ch. 90; 87 L. T. 440; 51 W. R. 165—Buckley, J. See s. c. in C.A. *supra*.

10. OTHER MATTERS.

Aiding and Abetting Commission of Offence.—*See* JUSTICE OF THE PEACE.

Appeal.—*See* *Criminal Appeal Act*, 1907 (7 Edw. 7 c. 23).

Bail—Contract to Indemnify.—*See* CONTRACT.

Bankruptcy Matters.—*See* BANKRUPTCY.

Betting.—*See* GAMING.

Corrupt Practices.—*See* ELECTION LAW.

Crimping.—*See* SHIPPING.

Debtors' Act, Proceedings under.—*See* BANKRUPTCY.

Extradition.—*See* 6 Edw. 7 c. 15.

Gaming.—*See* GAMING.

Highway, Non-repair of.—*See* WAY.

Jurisdiction.—*See* JUSTICE OF THE PEACE.

Mens Rea.—*See* *Brooks v. Mason*, *post*, INTOXICATING LIQUORS.

Night Poaching.—*See* GAME.

Obscene Libel.—*See* DEFAMATION.

Penalty.—*See* JUSTICE OF THE PEACE.

Picketing.—*See* TRADE UNION.

Poisoning Fish.—*See* FISHERY.

Proceedings under Debtors Act.—*See* BANKRUPTCY.

Relating to Fisheries.—*See* FISHERY.

Trespass in Pursuit of Game.—*See* GAME.

CROPS.

Agricultural Tenancy, under.—*See* LANDLORD AND TENANT.

Bill of Sale, included in.—*See* BILL OF SALE.

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CROWN.

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2. *Prerogative and Privileges*, 662.
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1. STATUTES.

Civil List.—1 Edw. 7 c. 4 is the *Civil List Act*, 1901.

Demise of the Crown.—1 Edw. 7 c. 5 is the *Demise of the Crown Act*, 1901.

Osborne Estate.—2 Edw. 7 c. 37 is the *Osborne Estate Act*, 1902.

Royal Titles.—1 Edw. 7 c. 15 is the *Royal Titles Act*, 1901.

2. PREROGATIVE AND PRIVILEGES.

Prerogative—Action between Subjects Involving Crown Rights—Appeal from County Court—Removal to Revenue Side of Queen's Bench Division—Information by Attorney-General for Declaration of Crown Rights—Stay of Proceedings in County Court Appeal.—In an action in a County Court against a lessee of a quarry from the Crown for trespass upon the surface of the land in which the quarry was, the plaintiff recovered judgment for damages and for an injunction. The defendants having given notice of appeal, the Attorney-General filed an information against the plaintiff for a declaration of the rights of the Crown:—*Held*, that the Crown had a right by virtue of its prerogative to have the County Court appeal transferred to the revenue side of the Queen's Bench Division; and was also entitled, notwithstanding that judgment had been given in the action in the County Court, to a stay of proceedings in the appeal until after the trial of the information. *Stanley of Alderley (Lord) v. Wild*, 69 L. J. Q.B. 318; [1900] 1 Q.B. 256; 82 L. T. 14; 48 W. R. 242—C.A.

Crown Debts—Queen Anne's Bounty.—First fruits and tenths, notwithstanding their transfer from the Crown to the Governors of Queen Anne's Bounty, and though now payable to the treasurer of that body instead of, as formerly, into the Exchequer, are Crown debts, and therefore are not, when a bishop vacates a see, apportionable in favour of his successor as against such treasurer, the Crown not being bound by the Apportionment Act, 1870. *Rochester (Bishop) v. Le Fanu*, 75 L. J. Ch. 743; [1906] 2 Ch. 513; 95 L. T. 602; 22 T. L. R. 800—Swinfen Eady, J.

— **Policy of Life Insurance—Statutory Exemption of Policy Moneys from Claims of Creditors.**

—The exemption from the claims of creditors conferred by statute in respect of moneys due under a life insurance policy does not apply to debts due to the Crown where the Crown is not named in the statute and there is no clear indication of an intention in it to bind the Crown. *Att.-Gen. for New South Wales v. Curator of Intestate Estates*, 77 L. J. P.C. 14; [1907] A.C. 519; 23 T. L. R. 752—P.C.

— **Statutory Preference of Government—Insolvency—Bodies Receiving Government Grants—Claim of such Bodies to Preference.**—A statutory preference given in insolvency or winding-up in favour of liabilities to the Government does not operate for the benefit of bodies which receive grants from the Government (where such grants are made and warrants drawn severally to the bodies entitled thereto on whose behalf the receipt is given to the Government), and such bodies have the management and control of the money allotted to them, the Government having no cognisance of the state of their accounts, and may be sued by a person entitled to payment thereout. In such a case the recipient of the money paid by the Government for such purposes is not a debtor to the Government, and the bodies entitled to grants are not distributing agents of the Government. *For v. Newfoundland Government*, 67 L. J. P.C. 77; [1898] A.C. 667; 78 L. T. 602; 5 Manson, 238—P.C.

— **Bankruptcy—Preferential Payment.**—In the administration of a bankrupt's estate under the New South Wales Bankruptcy Act, 1899, the Crown is entitled to preferential payment over all other creditors. *Baynes, In re* (9 Queensland L. J. 30), and *Clarkson v. Att.-Gen. of Canada* (16 Ontario Rep. 202) disapproved. *Commissioners of Taxation v. Palmer*, 76 L. J. P.C. 41; [1907] A.C. 179; 96 L. T. 278; 14 Manson, 106; 23 T. L. R. 304—P.C.

Treasure Trove—"Animus revocandi"—Franchise—Prerogative.—In the case of the discovery of concealed treasure, it is sufficient for the Crown, in order to establish its right to treasure trove, to make out a *prima facie* presumption that the treasure was hidden with the *animus revocandi*. To displace this *prima facie* presumption it is not sufficient to exhibit some other theory, which is merely equally plausible, to account for the concealment, or loss—it is necessary, on the contrary, positively to establish some rival theory of greater credibility. *Att.-Gen. v. British Museum Trustees*, 72 L. J. Ch. 743; [1903] 2 Ch. 598; 88 L. T. 858; 51 W. R. 582—Farwell, J.

A franchise is a royal privilege, or branch of the king's prerogative, subsisting in a subject by a grant from the Crown. So long as it is attached to the Crown it is called "prerogative," but when granted to a subject it is called "franchise." Privileges, accordingly, that belong to the King by virtue of his prerogative—for example, the right to treasure trove—cannot pass in a royal grant under the word "franchise." *Ib.*

Privilege of Goods from Distress for Rent.—Crown property, even though the Crown be not tenant, is privileged from distress for rent, on premises demised to a subject. *Secretary of State for War v. Wynne*, 75 L. J. K.B. 25; [1905]

2 K.B. 845; 93 L. T. 797; 54 W. R. 235; 22 T. L. R. 8—D.

Pilotage Dues—Collier Carrying Coal for the Navy—King's Ship.—A vessel owned by his Majesty's Government, and appearing in the Navy List, was exclusively engaged in going to and from various ports carrying coal for the Navy. The appellant, the master of the vessel, held a Board of Trade certificate, and was employed by the Devonport dockyard authorities under the Admiralty. He was not an officer of the Royal Navy. The crew were engaged at the dockyard under articles of agreement. The respondent, a licensed pilot, at the request of the appellant, piloted the vessel into the port of Cardiff. Upon proceedings by the respondent against the appellant for the recovery of the pilotage dues authorised by by-laws made pursuant to the Merchant Shipping Act, 1894, and the Bristol Channel Pilotage Act, 1861, the magistrate gave judgment for the respondent for the amount claimed:—*Held*, that the vessel was a King's ship, and that the appellant was not liable for the payment of the pilotage dues. *Symons v. Baker*, 74 L. J. K.B. 965; [1905] 2 K.B. 723; 93 L. T. 548; 54 W. R. 159; 10 Asp. M.C. 129; 21 T. L. R. 734—D.

Salvage—Vessel Belonging to the Crown—No Action Maintainable.—The King cannot be impleaded in his own Courts, and his vessels cannot be seized and proceeded against by an action *in rem* for salvage. Observations on *The Cybele* (47 L. J. P. 86; 3 P. D. 8). *Young (Master of the ss. Furnesia) v. The ss. Scotia*, 72 L. J. P.C. 115; [1903] A.C. 501; 89 L. T. 374; 9 Asp. M.C. 485—P.C.

"Bona vacantia"—Caducary Rights—Intestate Domiciled Abroad without Kin—Movables in this Country—"Mobilier sequenter personam."—The maxim *Mobilier sequenter personam* applies only to the succession and distribution of property, and not to the caducary rights of a State. The right to *caduca bona* is a right *occupationis*, not a right of succession, and such property falls to the State in which it is situated, and not to the State where the possessor was domiciled. *Barnett's Trusts, In re*, 71 L. J. Ch. 408; [1902] 1 Ch. 847; 86 L. T. 346; 50 W. R. 681—Kekewich, J.

Where, therefore, a person domiciled abroad dies intestate without heirs or next-of-kin his movables in this country go to the Crown as *bona vacantia* and not to the State to which he belonged. *Ib.*

— **Will—Real Estate—Conversion—Settled Land Act, 1882.**—A testator who was possessed of freeholds devised all his property to his wife for life, and appointed trustees and executors, but made no further disposition. The trustees of the will were appointed trustees for the purposes of the Settled Land Act, and the widow sold portions of the land and paid the purchase-money to the trustees. On the death of the widow, there being no heir-at-law or next-of-kin of the testator,—*Held*, that the proceeds of sale did not belong to the trustees beneficially, but went to the Crown as *bona vacantia*. *Bond, In re; Panes v. Att.-Gen.*, 70 L. J. Ch. 12; [1901] 1 Ch. 15; 82 L. T. 612; 49 W. R. 126—Kekewich, J.

— **Proof by Company—Further Dividends—Right of Crown.**—The real and personal chattels of a dissolved corporation aggregate devolve upon the Crown as *bona vacantia*. *Higginson, In re; Att.-Gen., ex parte*, 68 L. J. Q.B. 198; [1899] 1 Q.B. 325; 79 L. T. 673; 47 W. R. 285; 5 Manson, 289—D.

A limited company proved in the bankruptcy of one of its debtors, and received from time to time dividends in respect of its proof. Some years, however, before a final dividend was declared, the company was wound up and dissolved by order of Court:—*Held*, that the Crown was entitled to the final dividend to which the company would have been entitled, if in existence, as *bona vacantia*. *Id.*

3. WHEN BOUND BY STATUTE.

Crown Property — Liability to Pecuniary Burden.—In order that a pecuniary burden may be imposed upon Crown property by statute, the Crown must be expressly named or it must appear by necessary implication that the Crown has agreed or is intended to be bound; and the insertion of a particular protecting clause is not of itself sufficient to show that only the class of property included within it was intended to be exempt. *Hornsey Urban Council v. Hennell*, 71 L. J. K.B. 479; [1902] 2 K.B. 73; 86 L. T. 423; 50 W. R. 521; 66 J. P. 613—D.

— **Statute Limiting Speed of Locomotives—Statute, whether Binding on Crown.**—Section 4 of the Locomotives Act, 1861, which provides that, subject to the regulations in the Act authorised to be made by local authorities, it shall not be lawful to drive any locomotive through any city, town, or village at a greater speed than two miles an hour, does not apply to a locomotive which is the property of the Crown, and is being used by a servant of the Crown acting in obedience to his instructions for Crown purposes. *Cooper v. Hawkins*, 73 L. J. K.B. 113; [1904] 2 K.B. 164; 89 L. T. 476; 52 W. R. 233; 68 J. P. 25; 1 L. G. R. 833—D.

4. OFFICERS.

Acts of Telegraph Department — Execution of Works — Negligence of Subordinate Official — Liability of Postmaster-General in Official Capacity.—An action will not lie against the Postmaster-General in his official capacity for damage caused by the negligence of a subordinate official of the telegraph department of the Post-Office in laying an electric cable. *Bainbridge v. Postmaster-General*, 75 L. J. K.B. 366; [1906] 1 K.B. 178; 94 L. T. 120; 54 W. R. 221; 22 T. L. R. 70—C.A.

Tort by Government Officials — Trespass against Crown or Executive.—An action for trespass committed or intended is not maintainable against officials of the Crown or Government sued in their official capacity or as an official body. *Raleigh v. Goschen*, 67 L. J. Ch. 59; [1898] 1 Ch. 73; 77 L. T. 429; 46 W. R. 90—Romer J.

— **Act of State—Seizure of Property—Juris-**

diction of Court—Dismissal of Frivolous and Vexatious Action—Abuse of Process of Court.

—A statement of claim alleged that under articles of agreement entered into about December, 1846, between the East India Company and certain chiefs and sirdars of the Sikh Khalsa or Commonwealth occupying a territory known as the Punjab, it was agreed among other things: That a British officer should be appointed by the Governor-General to remain at Lahore; that every attention should be paid in conducting the administration to the feelings of the people, and to maintaining the just rights of all classes; that a Council of Regency should be constituted; that the administration of the country should be conducted by that Council in consultation with the British Resident; that a British force should remain at Lahore for the protection of the Maharajah Duleep Singh and the preservation of the peace of the country; that the Lahore State should pay to the British Government twenty-two lacks of rupees for the maintenance of this force; and that the provisions of this engagement should have effect during the minority of the Maharajah, and should cease and terminate on his attaining the full age of sixteen years, or on September 4, 1854.

It was then alleged that by a proclamation in August, 1847, the Company announced that it felt the interest of a father in the education and guardianship of the Maharajah, and took and placed him wholly under its tutelage; and that in March, 1849, the following terms, known as the "Terms of Lahore," were agreed upon between the company and certain members of the Regency: That the Maharajah should resign for himself, his heirs and his successors, all right, title, and claim to the sovereignty of the Punjab or to any sovereignty power whatever; that all the property of the State of whatever description and wheresoever found should be confiscated to the Honourable East India Company in part payment of the debt due by the State of Lahore to the British Government and of the expenses of the war; that the gem called the Koh-i-noor, which was taken from Shah Shooja-ool-Moolk by Maharajah Rungeet Singh, should be surrendered by the Maharajah of Lahore to the Queen of England; and that the Maharajah should receive from the Company for the support of himself, his relatives, and the servants of the State, a pension of not less than four and not exceeding five lacs of the Company's rupees per annum.

It was further alleged that by an Act for the better government of India, passed in 1858, the territories under the government of the Company were vested in her Majesty, and all treaties made by the Company were to be binding on her Majesty, and all contracts, covenants, liabilities, and engagements of the Company were to be enforceable by and against the Secretary of State in Council; that the Maharajah died on October 22, 1893, and by will devised his real and personal estate to his son, Prince Victor, and absolutely declared that he should be his heir to all his political and other rights or State rights, whether arising from treaties with Great Britain or otherwise, and inclusive of all his claim to real and personal property in India according to the law of India; that Prince Victor became bankrupt in September, 1902, and that the plaintiff was

appointed his trustee in bankruptcy. It was then alleged that by reason of the above facts the company, and subsequently the defendant, became trustee of not less than four and not exceeding five lacs of rupees per annum for the Maharajah; that as such trustee the defendant was liable to pay the arrears of pension accrued during the Maharajah's lifetime; that the pension did not cease on his death but descended to his son, and declarations to this effect were claimed. The claim further alleged that the Company, and afterwards the defendant, became possessed of certain private property, real and personal, of the Maharajah as guardians, and afterwards as trustees, and claimed a declaration that the defendant was liable to account therefor to the plaintiff. The action having been dismissed in chambers as being frivolous and vexatious and an abuse of the process of the Court,—*Held* that, inasmuch as the facts stated in the claim disclosed that the various acts done were "acts of State" done by the East India Company as trustees for the Crown, the action ought to be dismissed as frivolous and vexatious in the absence of amendment thereof; such amendment to be verified by affidavit satisfying the Court that there are facts which can probably be proved, and which are *prima facie* proved by the affidavit, and that such facts support the general statements in the statement of claim. *Salaman v. Secretary of State for India*, 75 L. J. K.B. 418; [1906] 1 K.B. 613; 94 L. T. 858—C.A.

Libel upon Persons Discharging Public Duties Imposed by Statute—Jurisdiction.—The remedy of criminal information for a libel is not confined to cases of libel upon persons acting in a judicial capacity while discharging judicial duties; but the Court can in its discretion grant a criminal information for the protection of persons who are discharging public duties imposed upon them by statute in respect of a libel published of them in the exercise of those duties. Accordingly, if a libel is published in a newspaper concerning the members of a committee of Justices appointed under the Licensing Act, 1904, by the quarter sessions or the general body of Justices in a county borough, to carry out the provisions of that Act and to decide as to the amount of compensation to be levied upon existing licences as a compensation fund for the extinction of other licences—the libel charging the members of that committee with being influenced by improper motives in fixing the amount of the levy—the Court will grant a criminal information upon the ground that the committee are acting in the discharge of public duties imposed upon them by the Act, although they may not be acting in a strictly judicial capacity. *Rex v. Russell*, 93 L. T. 407; 69 J. P. 450; 21 T. L. R. 749—D.

Exemption of Post-Office Officials from Tolls.—*See* POST-OFFICE.

5. CONTRACTS.

Commissioners of Works and Buildings—Liability to Action for Breach of Contract.—A builder who has entered into a contract under seal with the Commissioners of his Majesty's Works and Public Buildings to build a post-office is entitled to maintain an action against

them for breach of the contract, and is not obliged to proceed by petition of right. *Graham & Sons v. Works and Public Buildings Commissioners*, 70 L. J. K.B. 860; [1901] 2 K.B. 781; 85 L. T. 96; 50 W. R. 122; 65 J. P. 677—D.

6. ROYAL CHARTER AND GRANTS.

Charter—Construction.—In the construction of a royal charter reserving a rent to the Crown, which rent has been paid for a considerable length of time, the Court ought to adopt a construction consistent with the grant falling within the powers of the Crown rather than one which would make the grant in excess of the royal prerogative, and to assume, unless there is clear evidence to the contrary, that the state of things at the date of the charter was such as to make the grant of it within the powers of the Crown. *Att.-Gen. v. Simpson*, 70 L. J. Ch. 828; [1901] 2 Ch. 671; 85 L. T. 325—C.A.

—River—Exclusive Licence—Validity.—A royal charter purporting to confer upon the patentee the exclusive navigation for all time of part of a public navigable river, and the exclusive licence of transporting goods thereover, is void both by the Statute of Monopolies, 1623, and by the common law. *Simpson v. Att.-Gen.*, 74 L. J. Ch. 1; [1904] A.C. 476; 91 L. T. 610; 3 L. G. R. 190; 69 J. P. 85; 20 T. L. R. 761—H.L. (E.)

Grant of Land—Reservation to Grant—Omission from Subsequent Grant.—In 1829 the Crown granted land adjoining the sea to a corporation, reserving (*inter alia*) "all such part of the said piece or parcel of land hereinbefore described as may be within 100 feet of high-water mark on the sea coast, or in any creek, harbour or inlet." In 1830 the corporation, in execution of a previous contract, sold the land to D., through whom the respondents claimed, and D. executed a mortgage to the corporation to secure part of the purchase-money, which was then unpaid. The land was conveyed to D. "to hold the same subject to the reservation and conditions in the now recited grant" (meaning the grant of 1829 from the Crown) "contained." In 1833 the corporation was dissolved by Order in Council, and its property thereupon reverted to the Crown, "subject to all mortgages and contracts for sale previously lawfully made." In 1840 D. paid off the mortgage, and the Crown granted the land to him. This grant made no mention of the reservation above mentioned, and described the land as being bounded on one side "by the water of" the "harbour";—*Held*, that the effect of the grant of 1840 was to do away with the reservation contained in the earlier grant. *Att.-Gen. for New South Wales v. Dickson*, 73 L. J. P.C. 48; [1904] A.C. 273; 90 L. T. 213—P.C.

Grant for Services Rendered—Barring Entail.—*See* ESTATE.

7. CROWN LANDS.

Occupation for Less than Sixty Years—Temporary Absence of Occupier—Crown Grant—Peace-

able Possession by Grantee—“**Information of intrusion.**”—The statute 21 Jac. 1, c. 14, is one of procedure only, and its effect is to put a person against whom the Sovereign may file an “information of intrusion” in the same position as a defendant in an ordinary action of ejectment, in cases where the Crown has been out of possession for twenty years, and to enable him to retain possession until the Crown has proved its title. *Emmerson v. Madison*, 75 L. J. P.C. 109; [1906] A.C. 569; 95 L. T. 568—P.C.

But the principle that if a person having title can gain possession of land in the occupation of a person who has no title, the latter cannot succeed in ejectment against the former on the strength of earlier occupation, applies to a grantee from the Crown who obtains possession of land which has been in adverse possession for less than sixty years. It is not necessary in such a case for the Crown to file an “information of intrusion” under 21 Jac. 1, c. 14. *Ib.*

Decisions of the Courts of New Brunswick and Nova Scotia, that the Crown must in all cases in which it has been out of possession for twenty years file an “information of intrusion,” overruled. *Ib.* And see COLONY.

8. CIVIL SERVICE.

Abolition of Office—Damages for Deprivation of Office.—A statute providing that on the abolition of any public office the person holding the same may be required to accept another office at the same salary or five-sixths thereof, and on his refusal to accept such change of duty that he should not be entitled to receive any compensation, but that when no such substituted office is available such person shall be entitled to retire upon the superannuation allowance thereafter provided, imposes no imperative duty upon the Government, but leaves it absolutely to its discretion whether any other such office shall be offered, even though the displaced official has not been a civil servant for such a period as to entitle him to a superannuation allowance. *Young v. Waller*, 67 L. J. P.C. 80; [1898] A.C. 661; 78 L. T. 508—P.C.

Consequently, where a civil servant entered upon his employment under the terms of an Act which provided that he could only be dismissed upon certain grounds specified, and he was dismissed otherwise than in accordance with such Act, an Act passed subsequently to such dismissal, and purporting to restore to the Crown the same right of dispensing with the services of any public servant as existed before the passing of the former Act, does not apply to such civil servant and can have no operation with respect to persons not then in the public service whose rights had vested under the earlier enactment before the later statute was passed. *Ib.* See also PUBLIC OFFICER.

Power of Dismissal without Compensation.—A retrospective operation ought not to be given to a statute unless the intention of the Legislature that it should be so construed is expressed in plain and unambiguous language, where the

effect of such construction would be to convert an act wrongfully done at the time into a legal act and to deprive the person injured of the remedy which the law then gave him. The rule laid down by ERLE, C.J., in *Midland Railway v. Pye* (80 L. J. C.P. 314, 318; 10 C. B. (N.S.) 179, 191) approved. *Young v. Adams*, 67 L. J. P.C. 75; [1898] A.C. 469; 78 L. T. 506—P.C.

9. COSTS.

Liability of Crown for Costs.—The Crown is not liable to pay costs under the Crown Suits Act (18 & 19 Vict. c. 90) unless the action or proceeding by, or on behalf of, the Crown is taken in the name of the Attorney-General. *Reg. v. Beadle* (7 E. & B. 492) approved and followed. *Madden's Estate, In re*, [1902] 1 Ir. R. 63—C.A.

Immunity of Crown Department from Costs.—In proceedings by the Board of Trade claiming a certain foreshore, which were unsuccessful, *Held*, that as the Board represented the Crown and the case did not fall within the Crown Suits Act, 1855, costs could not be given against it. *Vernon's Estate, In re*, [1901] 1 Ir. R. 1—Ross, J.

No order for costs can be made against the Secretary of State for War under the Crown Suits Act, 1855. *Beadle, In re* (7 E. & B. 92), followed. *Secretary of State for War v. Booth*, [1901] 2 Ir. R. 692—Q.B. D.

Summary Jurisdiction—Revenue—Information on Behalf of the Crown.—Section 53 of the Summary Jurisdiction Act, 1879, gives power to a Court of summary jurisdiction to make an order for the payment of costs in a proceeding under any statute relating to the revenue of the Crown under the control of the Commissioners of Inland Revenue or Customs to which the Crown or some one on behalf of the Crown is a party. *Thomas v. Pritchard*, 72 L. J. K.B. 23; [1903] 1 K. B. 209; 87 L. T. 688; 51 W. R. 58; 67 J. P. 71; 20 Cox C.C. 376—D.

Prerogative Writ of Mandamus—Jurisdiction of Court.—The Court has no jurisdiction to give costs either to or against the Crown, when the Crown appears upon the argument of a rule for a prerogative writ of *mandamus*. *Re v. Canterbury (Archbishop)* (No. 2), 71 L. J. K.B. 932; [1902] 2 K.B. 503; 86 L. T. 450; 50 W. R. 476; 66 J. P. 455—D.

The rule of the common law that the Crown “never paid nor received costs” has not been altered with regard to the prerogative writ of *mandamus*, either by the Act 1 Will 4, c. 21, s. 6, or by the existing Rules of the Supreme Court. *Ib.*

10. ATTORNEY-GENERAL.

Building Beyond the Building-line—Mandatory Injunction.—The Attorney-General may maintain an action for a mandatory injunction to pull down a building erected in contravention of section 3 of the Public Health (Buildings in Streets) Act, 1888. The penalty imposed by the section is not the only remedy which may

be pursued. *Att.-Gen. v. Ashbourne Recreation Co.* (72 L. J. Ch. 67; [1903] 1 Ch. 101) followed. *Att.-Gen. v. Wimbledon House Estate Co.*, 73 L. J. Ch. 593; [1904] 2 Ch. 34; 91 L. T. 163; 68 J. P. 341; 2 L. G. R. 828; 20 T. L. R. 489—Farwell, J.

Previous Conviction.—A previous conviction and fine in proceedings before magistrates is no answer to an action by the Attorney-General. *Ib.*

Laches.—How far *laches* may be pleaded in an action at the suit of the Attorney-General, *quare. Ib.*

By-Laws—Infringement—Penalties—Action in High Court for Injunction.—A local authority which has made by-laws in accordance with section 157 of the Public Health Act, 1875, which, among other things, prescribe the width of new streets, is not confined to the remedy thereby provided by way of penalty for breach thereof, but may apply to the High Court for an injunction to restrain such breach. In such a case the Attorney-General may sue as plaintiff at the relation of the local authority. *Att.-Gen. v. Ashbourne Recreation Co.*, 72 L. J. Ch. 67; [1903] 1 Ch. 101; 87 L. T. 561; 51 W. R. 125; 67 J. P. 73; 1 L. G. R. 146—Buckley, J.

— — — **Laying out "New street"—Houses Abutting on Public Highways — Special Remedies under By-Laws — Action — Attorney-General.**—The defendants, who were owners of a piece of land abutting upon two public highways, erected several houses upon the land without altering or interfering with the roadway or removing the fences, but making the necessary openings for entrance and exit. Under the by-laws of the borough in which the land was situated, any person laying out a "new street" was required to make it of a specified width, and in case of any person offending against the by-laws certain penalties were imposed, to be recovered by summary proceedings. The plaintiffs, as urban authority for the borough, were also empowered by the by-laws to remove, alter, or pull down any works done in contravention of the by-laws. No proceedings were taken by the urban authority for penalties, but they alleged that the defendants were laying out the two highways as "new streets," in contravention of the by-laws, and brought an action (to which the Attorney-General was not a party) claiming an injunction to restrain them from so doing, and also asking for a declaration that the plaintiffs were entitled to pull down any work done by the defendants in breach of the by-laws:—*Held*, that the plaintiffs could not maintain the action without the Attorney-General being a party, the Court also stating that they saw no reason to differ from *Joyce, J.*, on the inference which he drew from the facts—namely, that the defendants were not in fact laying out the two highways as new streets. *Att.-Gen. v. Ashbourne Recreation Ground Co.* (72 L. J. Ch. 67; [1903] 1 Ch. 101) approved. *Devonport Corporation v. Tozer*, 72 L. J. Ch. 411; [1903] 1 Ch. 759; 88 L. T. 113; 52 W. R. 6; 67 J. P. 269; 1 L. G. R. 421—C.A.

Obstruction to Highway.—A county council

cannot legally sanction the erection of a permanent structure not authorised by the necessities of the public service, along or upon a county road. The Attorney-General, as representing the public, is the proper person to prevent this by injunction. *Att.-Gen. v. Mayo County Council*, [1902] 1 Ir. R. 13—M.R.

Action by Attorney-General at Relation of Ratepayers.—The London County Council had power to purchase compulsorily or by agreement certain tramways, but purchased omnibuses belonging to a tramway company, and continued to run them at a profit:—*Held*, that the question whether they had power to do so was properly raised in an action by the Attorney-General at the relation of certain persons who were ratepayers within the county, and by the relators as plaintiffs. *Att.-Gen. v. London County Council*, 70 L. J. Ch. 367; [1901] 1 Ch. 781; 84 L. T. 245—C.A.

Observations upon the powers and duties of the Attorney-General. *London County Council v. Att.-Gen.*, 71 L. J. Ch. 268; [1902] A.C. 165; 86 L. T. 161; 50 W. R. 497; 66 J. P. 340—H.L. (E.)

Information — Relator — Injunction.—Where the relators join the Attorney-General as co-plaintiffs they are entitled on proof of special damage to an injunction in their own right, although they could not have succeeded if the Attorney-General had not. *Att.-Gen. v. Barker*, 83 L. T. 245—Farwell, J.

Information "ex relatione" — Selection of Division in High Court—Transfer.—The Court has jurisdiction to order the transfer of an action *ex relatione* from the Chancery Division to the Queen's Bench Division where, according to the usual practice of the Attorney-General, the choice of the division in which the action was originally brought was left entirely to the relator and co-plaintiff. The co-plaintiff in such a case cannot assert the prerogative of the Crown to choose its own tribunal. *Att.-Gen. v. Wilson*, 70 L. J. Ch. 234; 83 L. T. 646; 49 W. R. 195—C.A.

Right to Sue without Joining Attorney-General—Special Damage.—A plaintiff may sue in respect of a public right without joining the Attorney-General—first, where the interference with the public right is such that some private right of his is at the same time interfered with; and secondly, where no private right is interfered with, but the plaintiff in respect of his public right suffers special damage peculiar to himself from the interference with the public right. *Boyce v. Paddington Borough Council*, 72 L. J. Ch. 28; [1903] 1 Ch. 109; 87 L. T. 564; 51 W. R. 109; 67 J. P. 23; 1 L. G. R. 98—Buckley, J. See s.c. in C.A., *post*, METROPOLIS.

See also *Sheringham Urban Council v. Halsey*, 91 L. T. 225; 2 L. G. R. 744; 68 J. P. 395; 20 T. L. R. 402—Joyce, J.

Laches — Relator.—*Quare*, whether *laches* on the part of a relator can be imputed to the Attorney-General. *Att.-Gen. v. Metcalf*, 76 L. J. Ch. 259; [1907] 2 Ch. 23; 96 L. T. 351; 71 J. P. 182; 23 T. L. R. 263—Kekewich, J.

Right of Attorney-General to Sue—Inclosure Award—Pasturage on Roads—Beneficial Right in Parishioners — Parish Council.—An inclosure Act gave power to set out roads, and an award made under it directed that the grass and herbage upon the roads set out should be let yearly, under such regulations as the inhabitants of the parish might make, and the money arising therefrom should be laid out in the repairs of the roads in the parish. The defendants occupied a piece of land adjoining one of the roads set out, and he depastured his cattle upon the herbage growing on the road. The Attorney-General, on the relation of the rural district council, brought an action for an injunction to restrain him from so doing, and the rural district council also claimed damages for the injury done to the letting value of the herbage.—*Held*, that the beneficial right of pasturage was in the parishioners under the award, and, since the Local Government Act, 1894, it was vested in the parish council, and the parish council might have maintained an action, and that therefore the rural district council were not the proper parties to sue for damages; and that the Attorney-General could only interfere to protect the rights of the community in general, and not the rights of a limited portion thereof, especially when that limited portion could have brought the action alone; and that therefore the Attorney-General had no right to bring the action. *Att.-Gen. v. Garner*, 76 L. J. K.B. 965; [1907] 2 K.B. 480; 97 L. T. 486; 71 J. P. 357; 5 L. G. R. 944; 23 T. L. R. 563—Channell, J.

Power to Sue an Officer of the Crown.—An aggrieved person may sue an officer of the Crown to restrain a threatened act in alleged pursuance of an Act of Parliament, but really outside its limits. The Attorney-General is not a necessary or proper party to such an action. *Nireaha Tamaki v. Baker*, 70 L. J. P.C. 66; [1901] A.C. 561; 84 L. T. 638—P.C.

Proceedings by Individual without Concurrence of Attorney-General.—*See CORPORATION.*

CRUELTY.

Animals, to.—*See ANIMALS.*

Children, to.—*See 4 Edw. 7 c. 15.*

Husband, by.—*See HUSBAND AND WIFE.*

CUSTODY OF CHILDREN.

See HUSBAND AND WIFE, col. 944.

CUSTOM.

Common Bull and Boar for Use of Parishioners —Charge on Tithes—Inclosure Act—Land Allotted in Satisfaction of Tithes—Continuance of Charge.—An ancient custom existed for the owner of rectorial tithes, as a charge thereon, to provide a bull and a boar for the use of the parishioners. In 1830 an Act of Parliament was passed for extinguishing tithes in the parish,

whereby land was allotted to the owner of the tithes in lieu and satisfaction of the tithes, the Act making no mention of the custom.—*Held*, that the charge which attached to the ownership of the tithes was not shifted to the ownership of the substituted land, and that the owners of the land could not be compelled to observe the custom. *Lanchbury v. Bode*, 67 L. J. Ch. 196; [1898] 2 Ch. 120; 78 L. T. 14; 62 J. P. 248—Kekewich, J.

Taking Gravel from Bed of River by Inhabitants of Parish—Inclosure Act—Waste of Manor—River—Several Fishery in River.—An alleged right in the inhabitants of a parish to take gravel without stint from the bed of a river, the property in which was in the plaintiff, held bad in law. In an action to restrain interference with a several fishery in the river, formerly flowing through the waste of a manor, by dredging gravel from the bed of the river, the defendants set up a right to the bed of the river by reason of an inclosure award by which eight yards on each bank of the river were allotted to the inhabitants for the purpose of throwing mud and weeds thereon and for other purposes.—*Held*, that the defendants had no such right. *Hough v. Clark*, 5 L. G. R. 1195; 23 T. L. R. 632—Swinfen Eady, J.

Fishermen of Parish—Private Land—Custom to Dry Nets—Variation in User—Validity—Time Immemorial—Impossibility of Custom—Onus of Proof—Recession of Sea—Accretion.—A custom enjoyed from time immemorial, and continued without interruption, for all the inhabitants of a parish, being fishermen, to dry their nets on a particular piece of ground adjoining the sea and the property of a private owner, at all times necessary or proper for the purposes of the trade or business of a fisherman, is a valid custom; and the fact of the variation of the user owing to the fishermen taking advantage of modern inventions or new operations, so long as they do not thereby throw an unreasonable burden on the landowner, does not make the custom invalid. The same customary right will extend to land added to the original piece of land by accretion owing to the recession of the sea. The principles laid down in *Dyce v. Hay* (1 Macq. H.L. 305, 312) and *Hull and Selby Railway, In re* (8 L. J. Ex. 260; 5 M. & W. 327), applied. *Mercer v. Denne*, 74 L. J. Ch. 723; [1905] 2 Ch. 538; 93 L. T. 412; 3 L. G. R. 1293; 21 T. L. R. 760; 70 J. P. 65; 54 W. R. 303—C.A.

Prescription Act, 1832.—Such a custom is not within section 2 of the Prescription Act, 1832. *Mounsey v. Ismay* (34 L. J. Ex. 52; 3 H. & C. 486) and *Shuttleworth v. Le Fleming* (34 L. J. C.P. 309; 19 C. B. (N.S.) 687) followed. *Mercer v. Denne*, 74 L. J. Ch. 71; [1904] 2 Ch. 534; 91 L. T. 513; 53 W. R. 55; 68 J. P. 479; 3 L. G. R. 385; 20 T. L. R. 609—Farwell, J.

Onus of Proof—Reputation—Impossibility of Custom.—The claimants of the custom having proved user of the close for the purposes of the custom during living memory (extending over seventy years) and by reputation for many years before their birth, the onus is on the person denying the custom to demonstrate the impossibility of its existence in the time of Richard 1. *Id.*

Mooring in the Port of London—Right Incidental to Navigation—Immemorial User—Possibility of Legal Origin.]—There can be a legal origin for a custom to moor vessels in a navigable tidal estuary of the river Thames, forming part of the Port of London, by means of beams buried in the soil of the foreshore and attached to a chain and buoy to which the same vessel from time to time returns, and such an origin will be presumed on proof of immemorial user. Such a right is incidental to navigation, and apart from any grant or dedication, any of her Majesty's subjects navigating navigable tidal waters is entitled to enjoy it. *Att.-Gen. v. Wright*, 66 L. J. Q.B. 834; [1897] 2 Q.B. 318; 77 L. T. 295; 46 W. R. 85; 8 Asp. M.C. 320—C.A.

Lloyd's—Liability of Underwriter—Settlement of Loss in Account with Insurance Broker—Assured's Knowledge of Custom.]—The custom of Lloyd's whereby an underwriter, by settling a loss in account with the insurance broker employed to effect the policy and to collect the loss, is discharged from liability, is not binding upon the assured unless he is proved to have knowledge of its existence. *Quare*, whether such a custom is or is not reasonable. *Sweeting v. Pearce* (9 C. B. (N.S.) 534; 30 L. J. C.P. 109) is not overruled by *Robinson v. Mollett* (L. R. 7 H.L. 802; 44 L. J. C.P. 362). *Matvieff v. Crosfield*, 51 W. R. 365; 8 Com. Cas. 120—Kennedy, J.

Domestic Servant—Employment of.]—See MASTER AND SERVANT, col. 1473.

Port, of.]—See SHIPPING.

Sale of Goods, on.]—See SALE OF GOODS.

Trade, of—Reputed Ownership.]—See Goetz, Jonas & Co., In re, col. 117, *ante*, **BANKRUPTCY**.

Unreasonable, when.]—See WORK AND LABOUR.

CY-PRÈS.

See **CHARITY**.

DAMAGES.

1. *When Recoverable*, 675.
2. *Measure of*, 677.
3. *Other Matters*, 678.

1. WHEN RECOVERABLE.

Bailment—Implied Warranty of Fitness—Breach—Action against Person to whom Article was Warranted—Damages against Him—Costs—Costs of Appeal—Liability of Warrantor.]—Upon the letting of an article for a certain purpose there is an implied warranty that in point of fact the article is reasonably fit for the purpose for which it was supplied. The plaintiff hired some sacks from the defendant to unload a cargo of peas. While one sack was being hoisted out of the ship it gave way, and a labourer named B. was injured. B.

brought an action against the present plaintiff and recovered 25*l.* and costs. An appeal against this decision was dismissed with costs:—*Held*, that the sack was not reasonably fit for the purpose for which it was supplied, and that, therefore, the action against the present plaintiff not having been unreasonably defended, the plaintiff could recover against the defendant the 25*l.* damages, the costs he had to pay B., and his own costs in that Court, on the authority of *Mowbray v. Merryweather* ([1895] 2 Q.B. 640), but that the costs of the appeal could not be recovered. *Vogan v. Oulton*, 79 L. T. 384—Wright, J.

Chattel—Deprivation of Use.]—The owner of a chattel who is wrongfully deprived of its use may recover substantial damages for the deprivation, though he may have incurred no out-of-pocket expenses consequent thereon. *The Mediana*, 69 L. J. P. 35; [1900] A.C. 118; 82 L. T. 95; 48 W. R. 398; 9 Asp. M.C. 41—H.L. (E.)

Hire of—Breach of Warranty of Fitness—Damage to Third Person—Remoteness.]—The defendant supplied sacks to the plaintiffs for the purpose of being used in unloading a cargo of peas from a ship. One of these sacks, while it was being hoisted full of peas from the hold of the ship, broke and fell and injured a man who was engaged in the work. The injured man recovered from the plaintiffs 25*l.* damages and costs. The sack in question, when supplied by the defendant, was unfit for the purpose for which it was supplied:—*Held*, that the plaintiffs were entitled to recover, as damages for breach of warranty, the damages and costs which they had incurred. *Vogan v. Oulton*, 81 L. T. 435—C.A.

Lease—Insanitary Condition of Premises—Innocent Misrepresentation—Rescission of Contract.]—The plaintiffs, who were the lessees of certain premises which they used for the purpose of breeding prize poultry, alleged that they had been induced to take the lease on the representations of the defendant's agents that the premises were in a sanitary condition, and that the state of repair of the premises was good. The defendant denied that any such representations were made. The premises proved to be in an insanitary condition and in a bad state of repair:—*Held*, that, assuming innocent misrepresentations were made which entitled the plaintiffs to rescission of their contract, they could not claim to be indemnified by way of compensation for injuries sustained by the insanitary condition of the premises and occasioned by their entering into the contract. Such compensation is in reality damages pure and simple, and is not the proper consequence of rescinding the contract. *Newbigging v. Adam* (34 Ch. D. 582) discussed. *Whittington v. Seale-Hayne*, 82 L. T. 49—Farwell, J.

Breach of Contract—Bonus to Buyers.]—In March, 1902, the I. Company offered a bonus to those who would enter into exclusive relations with it. The defendant company issued in reply its bonus scheme, and on May 24, 1902, the plaintiff signed it. By this contract the plaintiff agreed not to sign the I. bonus scheme or any other similar scheme "containing any condition which would prevent him from buy-

ing, displaying, selling, or distributing Ogdens' goods or the goods of any other manufacturer." The defendant company on its part undertook for four years to distribute among such customers as purchased direct from the company its entire net profits on the goods sold by it in the United Kingdom, and, in addition, to distribute during the four years commencing April 2, 1902, the sum of 200,000*l.* per annum. The defendant company, besides cutting prices very much, commenced trading in an extravagant way, and the result of this method of trading was that in nine months the company made a trading loss of nearly half a million sterling. On September 27, 1902, the defendant company sold its business to the I. Company, and then went into voluntary liquidation. In December, 1902, after this purchase, the plaintiff signed a bonus agreement of the I. Company which differed from their bonus agreement of March, 1902, in that it contained no clause limiting the plaintiff in his choice of manufacturers, and his signing did not violate any term of the defendant company's bonus scheme. Under this scheme of December, 1902, the plaintiff received 520*l.*, 62*l.* of which was in respect of O.'s goods sold by the I. Company:—*Held*, that the plaintiff could not recover damages under the head of a loss of a share of the net profits, but that he was entitled to damages for the failure to distribute the 200,000*l.* per annum, and that the amount he received from the I. Company under their scheme of December, 1902, ought not to be taken into consideration in assessing them except as to the 62*l.* *Nathan v. Ogdens*, 95 L. T. 458—A. T. Lawrence, J.

Negligence—Architect—Defective Plans not Used—Nominal Damages.—The plaintiffs retained the defendant for reward to prepare plans for buildings to cover a piece of land of certain dimensions. The defendant negligently prepared plans for buildings to cover a site of smaller dimensions. The plaintiffs, not knowing this, paid him 200*l.* for the plans. They subsequently renounced their intention of building, and parted with the land. They then discovered the error in the plans. The plans were not wholly useless. In an action to recover the 200*l.* as damages for negligence,—*Held*, that the plaintiffs were entitled to damages; but that, as the defendant would have been bound to rectify the plans without further cost, the damages were merely nominal. *Columbus Co., Lim. v. Clowes*, 72 L. J. K.B. 330; [1903] 1 K. B. 244; 51 W. R. 366—Wright, J.

Prospective Damages.—Prospective damages are properly awarded for the breach of an annual contract which provides that the purchaser shall ultimately buy all the existing material in the possession of the vendor. *George D. Emery Co. v. Wells*, 75 L. J. P.C. 104; [1906] A.C. 515; 95 L. T. 589—P.C.

2. MEASURE OF.

Breach of Contract—Consequential Action against other Party to Contract—Costs Reasonably Incurred in Defending Action—Costs as between Solicitor and Client.—A colliery company committed a breach of a contract to supply a coal merchant with coal, which they

knew was required for the purpose of coaling a ship, with the result that the merchant was unable to fulfil a contract between him and the shipowners. The shipowners having sued the merchant in respect of his breach of contract for over 150*l.* damages, the merchant asked the company to defend the action; but the company replied that they denied all liability, and in any case the claim was excessive. The merchant then paid 20*l.* into Court with a denial of liability, and at the trial it was found that that sum was sufficient to satisfy the shipowners' claim, and judgment was given for the merchant, with costs to the shipowners up to the date of the payment into Court, and to the merchant after that date. In an action by the merchant against the company to recover damages for their breach of contract,—*Held*, that, the defence of the previous action being in the circumstances reasonable, the merchant was entitled to recover, under the rule in *Hadley v. Baxendale* (23 L. J. Ex. 179; 9 Ex. 341), as damages which might reasonably be supposed to have been in contemplation of the parties at the time they made the contract as a probable result of a breach of it, the 20*l.* paid into Court in the previous action to meet the shipowners' claim, the shipowners' costs of the action prior to the payment into Court, and the merchant's costs in the action after that date, less the costs recovered from the shipowners, to be taxed as between solicitor and client upon the scale used when such costs are to be paid by a person other than the client. *Baxendale v. London, Chatham, and Dover Railway* (44 L. J. Ex. 20; L. R. 10 Ex. 35) and *Fisher v. Val de Travers Asphalt Co.* (45 L. J. Q.B. 479; 1 C.P. D. 511) discussed and distinguished. *Hammond v. Bussey* (57 L. J. Q.B. 58; 20 Q.B. D. 79) followed. *Agius v. Great Western Colliery Co.*, 68 L. J. Q.B. 312; [1899] 1 Q.B. 413; 80 L. T. 140; 47 W. R. 403—C.A.

Sale of Growing Timber—Loss of Profits.—The plaintiff, a timber merchant, claimed specific performance of an agreement for the sale of timber growing on the defendant's lands, but an enquiry as to damages was directed instead of a decree being given for specific performance. The defendant was aware that the plaintiff bought the timber to dispose of in the ordinary way of his trade, and it was shewn that similar timber was not procurable in the market, and that the plaintiff would have realized a considerable profit on its sale:—*Held*, that the measure of damages was the difference between the contract price of the timber plus the expenses which would be incurred in cutting, removing, and making it marketable, and the amount which the plaintiff would have realised by the sale of the timber. *M'Neill v. Richards*, [1899] 1 Ir. R. 79—M.R.

3. OTHER MATTERS.

Cargo—Failure to Ship.—See *Ashmore v. Cox*, 68 L. J. Q.B. 72.

Collision Cases, in.—See SHIPPING.

Copyright, for Infringement of.—See COPYRIGHT.

Covenant—Breaches of.—See LANDLORD AND TENANT.

Delay in Delivery of Goods.—See CARRIER.

Future Apprehended Injury — Subsidence—Mining Operations.]—See MINES.

Impossibility of Performance of Contract.]—See CONTRACT.

Injunction Granted, where.]—See NUISANCE.

Liquidated Damages or Penalty.]—See PENALTY.

Negligence, for.]—See NEGLIGENCE.

Patent, for Infringement of.]—See PATENT.

Prospectus—Fraudulent Misrepresentation in.]—See COMPANY.

Remoteness.]—See NEGLIGENCE.

Sale of Land, on.]—See VENDOR AND PURCHASER.

Trespass to Land.]—See TRESPASS.

Warranty—Sale of Unsound Food.]—See SALE OF GOODS.

Works done under Statutory Powers.]—See STATUTE.

DEATH (PRESUMPTION OF).

See EVIDENCE.

DEBENTURE.

See COMPANY, col. 410.

DEBTORS ACT.

Married Woman—Administratrix—Neglect to Pay Money into Court pursuant to Order.]—Defendant was a married woman and legal personal representative of C. T. deceased, an intestate. In pursuance of an order on an administration summons she made an affidavit that 227l., part of the personal estate of the deceased, was in her hands, which sum by a further order she was directed to pay into Court. Having failed to do so, on motion for leave to issue attachment, her counsel contended that she was not liable, and that the order was wrong, not being in the form settled in *Scott v. Morley* (57 L. J. Q.B. 43; 20 Q.B. D. 120):—*Held*—first, that the jurisdiction to issue the writ was clear under section 4, sub-section 3 of the Debtors Act, 1869, if the defendant were not a married woman, and that *Scott v. Morley*, not having been decided under that section, did not cover this case; secondly, that the order having no reference to a breach of trust or *devastavit* committed by her was right, and that attachment might issue, subject to the discretion conferred on the Court by the Debtors Act, 1878, if it might have issued before the Married Women's Property Act, 1882, which according to *Othway v. Wing* (12 Sim. 90) was the case; thirdly, that the order for the writ ought therefore to go, but that as the defendant's affidavit was insufficient, it should lie in the office for three weeks to give her an oppor-

tunity of stating how she had dealt with the funds, and of applying for relief. If then it appeared that a breach of trust or *devastavit* had been committed so that the case came within sections 1 (2) and 24 of the Act of 1882, there would be difficulty in allowing the writ to go. Plaintiff to have his costs out of the defendant's separate estate, if any. *Turnbull, In re*; *Turnbull v. Nicholas*, 81 L. T. 439; 48 W. R. 136—Stirling, J.

Judgment of High Court—Order of County Court for Payment by Instalments—Execution—Debtors Act, 1869.]—A County Court Judge has power under sub-section 2 of section 5 of the Debtors Act, 1869, to modify a judgment for the recovery of a debt made by the High Court by directing the debt to be paid by instalments; and so long as the order of the County Court stands the plaintiff cannot issue execution upon his judgment in the High Court. Principle of *Jones v. Jenner* (25 L. J. Ex. 319) applied. *Dictum* of Cave, J., in *Ives, In re*; *Addington, ex parte* (55 L. J. Q.B. 246, 248; 16 Q.B. D. 665, 670, 671), dissented from. *Montgomery v. De Bulmes*, 67 L. J. Q.B. 768; [1898] 2 Q.B. 420; 78 L. T. 671; 47 W. R. 22—C.A.

Debtor Appointed Executor—Refusal to Pay Debt—Order of Court of Equity to Pay—Non-compliance with Order—"Trustee or Person acting in a fiduciary capacity"—Discretion of Court.]—A testator appointed a person who was indebted to him one of the executors of his will. The debtor and the co-executor proved the will. Although the debtor had at one time since the testator's death ample means to pay the debt, he refused to do so, and denied all liability for the same, and deliberately paid off other creditors. An action for the administration of the testator's estate was brought against him, and by the judgment it was declared that he was accountable for the debt as assets in his hands belonging to the estate of the testator, and he was ordered to pay the same into Court within fourteen days after service of the judgment. He did not pay the money into Court, and filed his own petition in bankruptcy. On a motion for leave to issue a writ of attachment against him for non-compliance with the judgment,—*Held*, that he was a trustee or person acting in a fiduciary capacity and ordered by a Court of equity to pay a sum in his possession within section 4, sub-section 3 of the Debtors Act, 1869, and that the circumstances of the case justified the Court in the exercise of its discretion in ordering the writ of attachment to go. *Dictum* of MALINS, V.C., in *Diamond Fuel Co., In re*; *Mitcalfe, ex parte* (49 L. J. Ch. 347, 349; 13 Ch. D. 815, 820), disapproved of. *Woodward, In re*; *Woodward v. Woodward* (30 Sol. J. 753), explained. *Bourne, In re*; *Davey v. Bourne*, 75 L. J. Ch. 474; [1906] 1 Ch. 697; 94 L. T. 750; 22 T. L. R. 417—C.A.

Release of Debtor—Mistake—Issue of Second Writ of Attachment.]—Where a writ of attachment has been issued against a defendant for non-compliance with an order of the Court, and the defendant has been arrested, but subsequently by mistake released by the gaoler without an order of the Court for his discharge from custody, the Court has no jurisdiction under the Debtors Act, 1869, s. 4, to allow a further

writ of attachment to issue against him in respect of the same offence. *Church's Trustee v. Hibbard*, 72 L. J. Ch. 46; [1902] 2 Ch. 784; 87 L. T. 412; 51 W. R. 293—C.A.

Semble, an order might in such a case be made for a re-arrest under the original writ of attachment, but the period of imprisonment would end at the expiration of one year from the original arrest. *Ib.*

Customs Pensioner—Pension Inalienable—Payment of Debt by Instalments.—An order to pay a judgment debt by instalments will not be made against a Customs pensioner whose only property consists of a pension which is inalienable under the Customs and Inland Revenue Act, 1876, and no part of which has been received by him since the date of the judgment. Such a pension while accruing does not constitute "means" within the meaning of the Debtors Act. (Boyd, J., dissenting.) *Bank of Scotland v. Cunningham*, [1899] 2 Ir. R. 780—Q.B. D.

Army Officer—Default in Payment of Instalment of Judgment Debt.—A committal order for default in payment of an instalment of a judgment debt ordered to be paid by the judgment debtor by instalments will be made against the debtor, although he is an officer in the army and the only income of which he is proved to be in receipt is his pay as such officer. *Hamilton v. Coningham*, [1903] 2 Ir. R. 564—C.A.

Trustee—Money "in his possession or under his control"—Order for Payment into Court—Default—Trustee in Humble Circumstances.—Upon an application for leave to issue a writ of attachment against a trustee who has failed to comply with an order for payment into Court of money alleged to be "in his possession or under his control" within the third exception of section 4 of the Debtors Act, 1869, it must be strictly proved that the money so ordered to be paid has been in the actual possession or control of the person sought to be committed. It is not sufficient to prove mere constructive receipt by a solicitor or agent on such person's behalf. *Fewster, In re; Herdman v. Fewster*, 70 L. J. Ch. 254; [1901] 1 Ch. 447; 84 L. T. 45—Joyce, J.

Trustee—Order on to Pay Money into Court.—*See NE EXEAT REGNO.*

Criminal Offences.—*See BANKRUPTCY*, col. 144, and *CRIMINAL LAW*.

DECLARATION.

Dying.—*See CRIMINAL LAW.*

Statutory.—*See EVIDENCE.*

DEED.

1. *Interpretation*, 682.
2. *Grant and Conveyance*, 684.
3. *Registration*, 685.
4. *Alteration*, 686.
5. *Rectification*, 686.
6. *Setting Aside*, 688.

1. INTERPRETATION.

Estate Clause.—In a conveyance of land, the general clause purporting to convey "all the estate, &c.," of the grantor may be restricted in its construction by the recitals and general scope of the instrument. *Williams v. Pinckney*, 67 L. J. Ch. 34; 77 L. T. 700—C.A.

Recitals—Estoppel—Priorities.—An estate was settled (subject to two mortgages to X in fee) to the use of A for life, with remainder, in default of A's issue, which happened, to the use of B for life, with remainder to the use of A in fee. B was also absolutely entitled to a 2,000l. mortgage for a term of five hundred years on the fee. By a settlement made in 1876 on C's marriage (after reciting the titles of A and B subject to the two mortgages to X), A and B, "according to their respective estates and interests," conveyed the fee-simple "and all the estate, &c." of the grantors to trustees to hold (subject to the two mortgages to X) to the use of A, B, and C for successive life estates, with remainder to uses to secure a jointure to C's wife, with remainders over. This deed contained no reference to the 2,000l. mortgage. B afterwards voluntarily transferred the 2,000l. mortgage to C, who charged it in favour of the plaintiffs, who had no notice of the settlement. A and B having died, an action was brought by the plaintiffs to establish the 2,000l. mortgage as against the settlement:—*Held*, that according to the true construction of the settlement, the mortgage for 2,000l. was not within its scope, and was not by virtue of the "estate clause" conveyed by B so as to be subject to the settlement, and that it therefore had priority over all the estates and interests, including the jointure created by the settlement. *Held also*, that no estoppel as to the mortgage was raised by the settlement, and there was no ground for equitable relief in favour of those claiming under the settlement on account of any representation made by B, or standing by on his part. *Ib.*

Ornamental Garden—Common User.—"Lessees and sub-lessees or tenants"—"Families and friends"—**Right of User.**—By deed a vendor, after granting in fee a site upon which a row of houses known as Stanley Gardens was being built, granted to the purchaser "his heirs executors administrators and assigns and his and their lessees and sub-lessees or tenants (being occupiers for the time being" of Stanley Gardens), "and for his and their families and friends," the use of a garden adjoining. Nothing in the deed defined the class of houses in Stanley Gardens. The defendants were an incorporated company who had purchased several of the houses for the purpose of affording a residential home and club for ladies engaged in professional work, where for a small weekly payment in advance members were provided with a furnished bedroom with use of public rooms, food being charged for at reasonable rates and paid for weekly. A small sum was paid by the defendants towards the maintenance of the garden in respect of each of the houses held by them:—*Held*, that the members of the club, whether resident or not, were not "lessees" or "sub-lessees" or "tenants" or "families" or "friends" of the defendants within the mean-

ing of the deed, and were not entitled to the use of the garden, and that the defendants were not entitled to authorise them to use it. *Keith v. Twentieth Century Club*, 73 L. J. Ch. 545; 90 L. T. 775; 52 W. R. 554; 20 T. L. R. 462—Buckley, J.

Ancient Document—Contemporanea Expositio—Railway Company—Agreement with Landowner—Wayleave.—By an indenture dated 1854 a landowner agreed to grant a wayleave over certain portions of his land to a railway company, which agreed to pay a rent calculated on the amount of coal carried over any part of the lines comprehended in their private Act. Part of those lines did not pass over the property of the landowner; but for upwards of forty years the rent was only demanded and paid in respect of that part of the undertaking which passed over the landowner's property. His successor now claimed rent in respect of coals carried over the whole of the railway comprised in the Act:—*Held*, that as the language of the agreement was plain and unambiguous, it must be construed according to its true meaning, notwithstanding that the parties had interpreted it differently for more than forty years; that the rent was payable for coal carried over all the lines, and that the plaintiff was entitled to an account for six years before the issue of the writ. *North-Eastern Railway v. Hastings (Lord)*, 69 L. J. Ch. 516; [1900] A.C. 260; 82 L. T. 429—H.L. (E.)

Words of Limitation—Habendum to Grantee—Supplying Omission of Words of Limitation by Interpretation Clause.—Under section 51 of the Conveyancing and Law of Property Act, 1881, in a deed, in order to pass the legal estate in fee-simple, it is necessary, in the absence of the word "heirs," to use the actual words of limitation, mentioned in the section—namely, "in fee simple." Therefore, where, after the passing of the Act, freehold land was expressed to be granted "unto the grantee . . . unto and to the use of the grantee for ever," and where the deed contained an interpretation clause in the description of the parties to the deed, by which the word "grantee" was, unless a contrary intention appeared, to be read as "grantee and his heirs and assigns":—*Held*, that (apart from any question of specific performance or rectification) the words of limitation could not, consistently with the context, be read into the *habendum*, and that the legal estate in the fee-simple did not pass. *Ford and Ferguson's Contract, In re*, [1906] 1 Ir. R. 607—M.R.

Guarantee—Effect of Recital on Construction of Bond.—A recital in a bond not plainly inconsistent with its condition will not control or limit its operation, and where the recital, referring to a previous guarantee, states the desire of the principal debtor to obtain advances in addition to the sum covered by the guarantee, but the condition is to pay all the sums due by the principal debtor to the obligee, the amount covered by the bond is the whole sum due without deduction of the moneys secured by the guarantee. *Australian Joint-Stock Bank v. Bailey*, 68 L. J. P.C. 95; [1899] A.C. 396—P.C.

Lease—Parcels—Right of Way—Misdescription—Falsa Demonstratio—Rectification.—In

the application of the doctrine *falsa demonstratio non nocet* it is immaterial in what part of the description the *falsa demonstratio* appears. It is not necessary that it should follow the true part, and qualify what has gone before. *Cowen v. Truefitt*, 68 L. J. Ch. 563; [1899] 2 Ch. 309; 81 L. T. 104; 47 W. R. 661—C.A.

Whether the doctrine applies in a case where the Court can see what the document in question was really intended to mean, *quære*. *Ib.*

Release.—A release contained in a deed, although couched in very general terms, must if possible be so construed as not to defeat the object or purpose of the deed of which it forms part. *Perkins, In re; Poyser v. Beyfus*, 67 L. J. Ch. 454; [1898] 2 Ch. 182; 78 L. T. 666; 46 W. R. 595; 5 Manson, 193—C.A.

Two Deeds—Inconsistency.—Where two deeds dealing with the same matter are so differently framed as to be really inconsistent, the Court will infer that it was intended by all parties that the later should be substituted for the earlier. *National Bank of Australasia v. Falkingham*, 71 L. J. P.C. 105; [1902] A.C. 585; 87 L. T. 90—P.C.

Grammatical Error—Correction of.—In construing a deed the Court can correct a grammatical error which, if allowed to stand, would have the effect of nullifying the obvious intention of the grantor. *Glen's Trustees v. Lancashire and Yorkshire Accident Insurance Co.*, 8 F. 915—Ct. of Sess.

2. GRANT AND CONVEYANCE.

Parcels—Misdescription in Deeds—Evidence—Survey.—A. was in possession of two contiguous estates, M. and P. In 1872 he sold M. to the respondents, and a survey was made on behalf of both parties to determine the boundary between M. and P., and the respondents thenceforward occupied the lands of M. as determined by the survey. In 1881 the estate of P. was sold to the appellant, and in 1896 he commenced proceedings to establish that the respondents were occupying as part of the estate of M. lands which were really part of the estate of P. It appeared that on measuring up the acreage of the plots of land specifically mentioned in the deeds as forming part of M., they were found to be less than the land actually occupied by the respondents:—*Held*, that the measurements in the deeds did not affect the title of the respondents to the lands included in the conveyance to them as determined by the contemporary survey. *Barnard v. De Charteroy*, 81 L. T. 497—P.C.

Exception—Uncertainty—Election—Perpetuity.—Where a grant is clear, but there is an exception so framed as to be bad for uncertainty, the grant will be operative though the exception fails. *Savill v. Bethell*, 71 L. J. Ch. 652; [1902] 2 Ch. 523; 87 L. T. 191; 50 W. R. 580—C.A.

By a deed granting a plot of land to be ascertained by election, nothing passes until the election; and by a deed granting specified lands with the exception of a plot to be ascertained by election, the whole passes subject to an exception which can only be ascertained

and take effect when the election is made. It follows that an exception which can only be made good by election is bad in a conveyance operating at common law, since a freehold estate to commence *in futuro* cannot be so created. In the case of a conveyance operating under the Statute of Uses, a similar exception would be bad for perpetuity if the election need not be made, according to the terms of the conveyance, within the proper limit of time, though if the conveyance were silent on the subject the law might imply the limit of the lifetime of the grantor and grantee. *Ib.*

The doctrine of making good an exception by election considered. *Ib.*

Vendors conveyed to a purchaser freehold lands "save and except and reserving unto the vendors a piece of land not less than 40 ft. in width commencing" at a defined point on the plan "and terminating at the nearest road to be made by the purchaser or his assignee on the estate," to hold the same unto and to the use of the purchaser in fee-simple; and the purchaser covenanted that the trade of an inn-keeper should not be carried on upon the lands thereby conveyed. There was no obligation on the purchaser to make any road, and the contemplated road was never in fact completed:—*Held*, that the exception was void, and that the piece of land purporting to be excepted was subject to the covenant as part of the lands conveyed by the deed. *Ib.*

Presumption—River Bed.—The presumption that a conveyance of land adjoining a river passes the bed *ad medium filum* without special mention does not apply unless the bed is in the disposition of the grantor so that it would pass if expressly mentioned. *Ecroyd v. Coultard*, 67 L. J. Ch. 458; [1898] 2 Ch. 358; 78 L. T. 702—C.A.

The presumption that a conveyance of land passes one-half of the soil of the adjoining highway extends to streets in towns and is not rebutted by the circumstance that the grantor is the municipal authority entitled to part of the soil of the other half of the street. *White's Charities, In re*; *Charity Commissioners v. London Corporation*, 67 L. J. Ch. 480; [1898] 1 Ch. 659; 78 L. T. 550; 46 W. R. 479—Romer, J.

8. REGISTRATION.

Land in Middlesex—Title of Official Receiver—"Conveyance"—Vendor and Purchaser.—An order of adjudication in bankruptcy, coupled with an order that the debtor's estate be administered under section 121 of the Bankruptcy Act, 1883, whereby the official receiver becomes the trustee in the bankruptcy, does not amount to a "conveyance" to the official receiver within the meaning of the Middlesex Registry Act, and there is therefore nothing of which a memorial can be registered under the Act. The title of the official receiver to land in Middlesex belonging to the bankrupt will consequently not be postponed to that of a subsequent mortgagee from the bankrupt himself whose mortgage has been duly registered. *Calcott and Elvin's Contract, In re*, 67 L. J. Ch. 553; [1898] 2 Ch. 460; 78 L. T. 826; 46 W. R. 673; 5 Manson, 208—C.A.

Middlesex Registry—Rectifying Register—Jurisdiction.—By the combined effect of section 1 of the Land Registry (Middlesex Deeds) Act, 1891, section 95 of the Land Transfer Act, 1875, and section 7 of the Land Transfer Act, 1897, the Court now has jurisdiction to order that the registration of a deed in the Middlesex Registry ought to be vacated, and that the register be rectified accordingly. *Stephenson v. Yorke*, 69 L. J. Ch. 253; [1900] 1 Ch. 505; 82 L. T. 55; 48 W. R. 430—Buckley, J.

Sale of Land—Unregistered Title—Subsequently Registered Title—Dolus malus—Postponement of Registered to Unregistered Owner.—Although by the law of Natal registration is necessary to the complete ownership of land, the right of an unregistered purchaser will prevail over that of a person who by *dolus malus* procures a transfer in the register. *Crowly v. Bergtheil*, 68 L. J. P.C. 81; [1899] A.C. 374; 80 L. T. 423—P.C.

Such *dolus malus* exists where a solicitor procures representation to the last registered owner by misleading statements, and obtains an order of Court authorising a sale by private contract by suppressing, among other circumstances, the fact that the purchaser is his own client, where such client has constructive notice of the unregistered purchaser's rights. *Ib.*

Solicitor's Costs on Sale of Land.—See SOLICITOR.

4. ALTERATION.

Mortgage-deed—Alteration of Instrument by Correction of Christian Name—Evidence.—The Christian name of one of three mortgagees had been wrongly given in the "parties" to a deed of conveyance by way of mortgage which nowhere else contained their express names, and which was not in fact executed by them. At a later date the wrong name had been erased and the right name substituted; but meanwhile the wrong name was entered in the recitals of subsequent muniments of title:—*Held*, that the alteration was not a material one so as to avoid the deed, as the deed took effect from the moment of its execution by the conveying parties, and parol evidence was admissible to remove the difficulty caused by such a misdescription or inconsistency. *Suffell v. Bank of England* (51 L. J. Q.B. 401; 9 Q.B. D. 555) discussed. *Howgate and Osborn's Contract, In re*, 71 L. J. Ch. 279; [1902] 1 Ch. 451; 86 L. T. 180—Kekewich, J.

Signature—Subsequent Alteration of Date—Material Alteration—Validity.—A deed is not invalid merely because of an alteration, subsequent to execution, in a part that is not material, by whomever such alteration be made. *Pigot's Case* (11 Co. Rep. 26b) dissented from. *Aldous v. Cornwell* (37 L. J. Q.B. 201; L. R. 3 Q.B. 573) followed. *Crediton (Bishop) v. Exeter (Bishop)*, 74 L. J. Ch. 697; [1905] 2 Ch. 455; 93 L. T. 157; 54 W. R. 156—Swinfen Eady, J.

5. RECTIFICATION.

Intention.—Action by R., married in 1872, for rectification of a post-nuptial settlement,

On March 18, 1875, R., being about to become a stockbroker, executed a voluntary settlement of certain property. The property was settled upon his wife for life, with remainder to her children. On September 29, 1899, Mrs. R. died:—*Held*, that the object of the settlement was to provide for the plaintiff's wife and children in case of bankruptcy; on the evidence the life interest in favour of the plaintiff was intentionally omitted, and the Court therefore would not interfere. *Rake v. Hooper*, 83 L. T. 669—Kekewich, J.

— **Prior Agreement in Writing.**—Where a deed has been executed in pursuance of and in conformity with a previous agreement in writing come to between the parties, the Court will not rectify the deed on the ground that due effect has not been given to the intention of the parties. *May v. Platt* (69 L. J. Ch. 357; [1900] 1 Ch. 616) and *Davies v. Pfitton* (2 Dr. & W. 225) followed. *Thompson v. Hickman*, 76 L. J. Ch. 254; [1907] 1 Ch. 550; 96 L. T. 454; 23 T. L. R. 311—Neville, J.

Marriage Settlement—Mistake—Parol Evidence—Appointment—Non-Execution of Power—Statute of Frauds.—The Statute of Frauds is not a valid defence to an action for the rectification of a marriage settlement where there is satisfactory parol evidence of a mistake made in drawing up the settlement, and of an intention to include a fund over which the husband had a power of appointment. Such an action is not one seeking "to charge any person upon any agreement made upon consideration of marriage," within section 4 of the statute. The settlement, being under seal, will, when rectified, operate as a valid exercise of the power of appointment over the fund. *Johnson v. Bragge*, 70 L. J. Ch. 41; [1901] 1 Ch. 28; 83 L. T. 621; 49 W. R. 198—Cozens-Hardy, J.

Conveyance not in Accordance with Written Contract—Common Mistake—Time.—Upon a sale of land the conveyance did not accord with the written contract between the parties, and the vendor brought an action for rectification of the conveyance on the ground of common mistake some six years after the date of the conveyance. The Court, being satisfied that there had been mistake common to both parties, which the vendor had only recently discovered, made an order for rectification. *Beale v. Kyte*, 76 L. J. Ch. 294; [1907] 1 Ch. 564; 96 L. T. 390—Neville, J.

Lapse of Time—Laches.—In considering a question of *laches*, time runs not from the date of the conveyance, but from the date when the party seeking relief first became aware of the mistake. *Bloomer v. Spittle* (41 L. J. Ch. 369; L. R. 13 Eq. 427) considered. *Ib.*

Accuracy of Written Contract—Parol Evidence.—*Semble*, that in such a case it is open to the defendant to adduce parol evidence to shew that the parties were not *ad idem* when the written agreement was signed, and that, if this were shewn, rectification of the conveyance would not be granted by the Court. *Ib.*

6. SETTING ASIDE.

Husband and Wife—Trustee—Wife's Security for Her Husband's Debt—No Independent Advice.—A deed executed by a married woman as security for her husband's debts, obtained by pressure and without independent advice by the husband and the wife's trustee, who was the creditor's agent, and also by concealment of material facts, set aside. *Turnbull v. Duval*, 71 L. J. P. C. 84; [1902] A. C. 429; 87 L. T. 154—P. C.

Non-disclosure—Fresh Evidence—New Trial.—Application for a new trial, on the ground of the non-disclosure of a deed—no case of fraud or surprise having been made out and no application made in the action for discovery of documents—refused. *Ib.*

Solicitor-Trustee of Settlement—Subsequent Variations of Settlement—Surrender of Rights by Married Woman—No Independent Advice.—Deeds, whereby a married woman was without consideration induced to surrender rights conferred by a post-nuptial settlement, set aside, on the ground that the solicitor who prepared the deeds, being himself a trustee thereof, failed in his duty in not making the lady understand the real nature of the transaction and in not seeing that she had advice independently of her husband. *Willis v. Barron*, 71 L. J. Ch. 609; [1902] A. C. 271; 86 L. T. 805—H. L. (E.)

Misrepresentation as to Contents—Plea of Non est Factum—Mortgage—Covenant—Two Deeds upon Same Parchment—Deed Partially Void.—The defendants, who were husband and wife, were the mortgagors and the plaintiffs the mortgagees of a reversionary interest of the wife. The wife had no knowledge of business, and executed the mortgage deed at the request of her husband, who gave her to understand that the document was of the nature of a power of attorney which would enable him to raise money in the future should he require it. She never received any part of the mortgage-money or any benefit under the deed, and had no intention of herself charging her reversionary interest. The deed contained a joint and several covenant by the husband and wife to pay principal and interest. In an action by the mortgagees to enforce the mortgage the wife pleaded that the deed was not her deed, but was signed by her in consequence of a misrepresentation:—*Held*, that the wife had been induced to execute the deed by a false representation as to the nature and character of the document she was signing, and that the deed did not bind her. Even if the plea of *non est factum* had failed as regards so much of the deed as comprised a charge upon the wife's reversionary interest, it could have been sustained as to the wife's covenant. Where there are two deeds on the same parchment, one may be good and the other void; and this rule may properly be applied to a charge upon property and a covenant to pay contained in the same parchment. *Hovatson v. Webb* (76 L. J. Ch. 346; [1907] 1 Ch. 537) distinguished. *Bagot v. Chapman*, 76 L. J. Ch. 523; [1907] 2 Ch. 222; 23 T. L. R. 562—Swinfen Eady, J.

— **Building Leases taken in Name of Nominee—Transfer by Nominee—Execution of Deed**

by Nominee, Believing it to be a Transfer, when in Reality a Mortgage—Plea of "Non est factum"—Partial Invalidity—Estoppel.]—If a man executes a deed knowing that it is one which purports to deal with his property, it will not be sufficient for him, in order to support a plea of *non est factum*, to shew that a misrepresentation was made to him as to the contents of the deed. *Howatson v. Webb*, 77 L. J. Ch. 32—C.A. Affirming, [1907] 1 Ch. 537—Warrington, J.

Observations of SWINFEN EADY, J., in *Bagot v. Chapman* (76 L. J. Ch. 523; [1907] 2 Ch. 222), to the effect that the same deed may be valid as a mortgage but void on the plea of *non est factum* as to the personal covenants for payments contained in it, dissented from. *Ib.*

Quare, whether at the present time an educated man to whom such a misrepresentation as to the nature of a deed has been made as would support a plea of *non est factum* may not be estopped from availing himself of that plea against a person who innocently acts on the faith of the deed being valid. *Ib.*

DEED OF ARRANGEMENT.

See BANKRUPTCY, col. 154.

DEER.

Unlawful Possession of.]—See CRIMINAL LAW.

DEFAMATION.

I. Libel, 689.

1. Generally, 689.
2. Publication, 690.
3. Innuendo, 691.
4. Privilege, 693.
 - (a) Absolute, 693.
 - (b) Qualified, 694.
5. Fair Comment, 697.
6. Trade Libel and Slander of Title, 699.
7. Libel on Deceased Person, 701.

II. Slander, 701.

III. Criminal and Seditious Libel, 703.

IV. Other Matters, 704.

I. LIBEL.

1. GENERALLY.

Sale of Picture Postcard—Interim Injunction—Right to Restrain Publication of Portrait.]—The defendants published and sold, without the consent of the plaintiff, postcards on which were coloured representations of the plaintiff depicting imaginary incidents in her life, and upon the plaintiff objecting they did not withdraw them. The portraits of the plaintiff were stated to be unlike her. The plaintiff thereupon brought an action for an injunction to restrain the publication and sale of the postcards upon

the ground either that they were a libel upon her or that she was entitled to restrain the publication of a portrait of herself without her authority, and applied for an interim injunction:—*Held*, that the Court would not grant an interim injunction, as no sufficient case had been made out on either ground. *Corelli v. Wall*, 22 T. L. R. 532—Swinfen Eady, J.

False Birth Notice in Newspaper—False Statement not ex facie Libellous.]—The publisher of a newspaper is not exempt from liability for damages merely because a statement of fact in regard to a private individual published by him is not *ex facie* defamatory, if in the circumstances it is defamatory. *Morrison v. Ritchie*, 4 F. 645—Ct. of Sess.

A newspaper, among the notices of births printed therein, stated that A B had given birth to a child at a certain date. A B raised an action of damages against the publisher on the ground that the statement was false, and that it was defamatory in respect that the date stated was within two months of her marriage:—*Held*, that the action was maintainable. *Ib.*

Unauthorised Use of a Man's Name—Injury to Property, or in Business or Profession—Cause of Action—Injunction.]—A doctor, whose name has been used without his authority in an advertisement to puff the sale of a medicine, has no cause of action, either for damages or for an injunction, unless the publication is defamatory or injures him in his property, business, or profession. *Dockrell v. Dougall*, 80 L. T. 556—C.A.

2. PUBLICATION.

Libel—Publication—Of and Concerning the Plaintiff.]—In an action for libel evidence was given that the defendant had sent by post an uncovered postcard containing words which the jury found were defamatory of the plaintiff. The words did not on the face of them refer to the plaintiff, so as to raise an implication that any person reading them would understand them as so referring, and there was no evidence that any person did so understand them before the postcard was delivered to the person to whom it was addressed:—*Held*, that there was no evidence of the publication of a libel of and concerning the plaintiff prior to the delivery of the postcard. *Sadgrove v. Hole*, 70 L. J. K.B. 455; [1901] 2 K.B. 1; 84 L. T. 647; 49 W. R. 473—C.A.

Privilege—Communication by Building Owner to Builder as to Quantities.]—A person who had requested a builder to tender for building work wrote a communication to the builder that the quantities supplied to him for the purpose of making the tender were entirely wrong:—*Held*, in an action for libel by the quantity surveyor who had prepared the bill of quantities, that the occasion was privileged. *Ib.* And see col. 693.

Evidence of Malice—Postcard—Reference to Plaintiff not Disclosed.]—The mere fact of sending through the post on an uncovered postcard a defamatory communication, made in circumstances which render the occasion privileged as between the writer and the person to whom it is addressed, is not evidence of malice, if the

communication discloses no reference to the individual of whom it is defamatory intelligible to persons other than the person to whom it is addressed. *Ib.*

Publication of Letter by Stranger—Wrongful Act.]—The defendant wrongfully communicated to another person a letter which had been written by a third person to the plaintiff and which had got into the defendant's possession, and the plaintiff brought an action to recover damages for libel, alleging that the letter contained statements defamatory of her. The Judge at the trial ruled that the occasion was privileged, and the jury found that there was no malice. *Held*, that the privilege was not destroyed by reason of the publication of the letter being a wrongful act. *Thurston v. Charles*, 21 T. L. R. 659—Walton, J.

Circulating Library—Negligence in not Discovering Libel—Burden of Proof.]—In an action brought against the proprietors of a circulating library to recover damages for a libel contained in a book circulated by them in the ordinary course of their business, a verdict was found for the plaintiff.—*Held*, that, in order to escape their *prima facie* liability as publishers of the libel, the burden of proof was upon the defendants to shew that it was not by any negligence on their part that they did not know that the book contained a libel, and as there was evidence upon which the jury could reasonably find that they had failed to shew this, the defendants were not entitled to judgment or to a new trial. *Emmens v. Pottle* (55 L. J. Q.B. 51) explained. *Vizetelly v. Mudie's Select Library*, 69 L. J. Q.B. 645; [1900] 2 Q.B. 170—C.A.

3. INNUENDO.

Words Capable of Defamatory Meaning—Evidence for Jury.]—The plaintiff drew a cheque upon his bank in favour of a customer, who paid it into the defendant bank, where he kept an account, for collection. The defendant bank by some mistake did not present it for payment to the bank upon which it was drawn, and later on it was found at the defendant bank in the box in which returned cheques from the plaintiff's bank were usually left. The plaintiff had ample assets at his bank to meet the cheque. A clerk of the defendants', thinking that the cheque had been returned unpaid, and not knowing for what reason, attached a slip to it on which the words "Reason assigned" were printed, and against those words he wrote "Not stated." The cheque with the slip attached was sent to the person in whose favour it was drawn, who communicated with the plaintiff, and the cheque was paid. The plaintiff brought an action of libel, alleging that the words meant that the cheque had been dishonoured through want of assets.—*Held*, that the words on the slip, coupled with the return of the cheque, were not in their natural meaning libellous, and that it lay upon the plaintiff to prove facts and circumstances leading to the conclusion that they would naturally be understood by reasonable persons as conveying the libellous imputation alleged; and that the plaintiff not having proved this, there was no case to go to the jury. *Frost v. London Joint-Stock Bank*, 22 T. L. R. 760—C.A.

"Thief."]—A newspaper, after setting forth the circumstances of a conviction for "bird-liming" in contravention of a Wild Birds Protection Order, continued: "The mode of operation of the bird-limers is as follows: The thieves set up decoy birds in cages in a hedge in the vicinity of a house where the birds on which they have an eye on are. The hedge itself is strewn with twigs coated with lime, and the thieves have merely to wait till the birds, attracted by the presence of the occupants of the decoy cages, flutter on to the hedge and are caught by the lime." The men, who admitted that they had been convicted, sued the newspaper proprietor and innuendoed the article to mean that they had been guilty of theft.—*Held*, dismissing the action, that the article would not bear the innuendo stated. *Campbell v. Ritchie*, [1907] S.C. 1097—Ct. of Sess.

Comment on Administration of Funds of a Charity.]—A and B appealed for subscriptions for a charitable "home." In commenting on this appeal a newspaper asked, "What guarantee is there that the money subscribed does not go to the private profit of A and B?"—*Held*, that this could bear the innuendo that B was a person capable of appropriating funds collected for a charity to his own purposes. *Boal v. Scottish Catholic Printing Co.*, [1907] S.C. 1120—Ct. of Sess.

Criticism of Management of Hospital Funds.]—A newspaper published in Wick contained an anonymous letter to the following effect: "Is there any way by which the public can ascertain how the money is spent in the management of the B. Hospital? So long as Sir A. B. was paying the whole bill himself some people argued that he had a perfect right to squander a lot of it on the retainers who form his Bridge Street bodyguard. . . . The position is now somewhat different. The public are now being appealed to for assistance. . . . Appeals have been made by the secretary to all the churches in town and county. . . . As there has been such a very strong flavour of jobbery about the institution . . . would it not be fair . . . that a statement should be produced showing how the money is being spent on the hospital? How are the church collections being disposed of?" Sir A. B. mentioned in the letter was member for the group of burghs of which Wick was one. He had founded the B. Hospital and had for a time supported it entirely out of his own means. The secretary and treasurer of the hospital was G., a solicitor in Wick, who was also Sir A. B.'s political agent, with an office in Bridge Street, Wick. G. sued the publishers of the newspaper for damages for the libel alleged to be contained in the letter. He innuendoed the letter to mean that he was guilty of dishonest conduct in the application of the funds of the hospital, and was a person unfit to be entrusted with the management of public funds.—*Held*, that the letter would not support the innuendo. *Green v. Reid*, 7 F. 891—Ct. of Sess.

Corruption by Town Councillor.]—In a newspaper article with regard to an order by a town council directing a footpath to be re-laid at the cost of the proprietors, the writer characterised this order as a "disgraceful job," and stated

that the matter was made worse by the fact that a similar pavement in the same street had been repaired at the expense of the town a short time ago, adding that "the only difference being that the favoured pavement belonged to a town councillor, and I am anxious to know if this is one of the perquisites of his office." In a subsequent article the writer referred by name to Councillor H., who was convener of the roads and footpaths committees, and to "the saving of his own footpath and his condemnation of another quite as good," and to "the convener of the committee which has condemned an excellent footpath . . . burdening the proprietor with an expense which in the same circumstances has not been incurred by himself." H. sued the proprietors and publishers of the newspaper, alleging that the articles were of and concerning him, and represented that he took advantage of his position as a councillor to throw the burden of repairing the footpaths of property belonging to himself upon the burgh, while he caused footpaths belonging to other proprietors to be reconstructed at their expense; that he was unfaithful to the public trust reposed in him; and that he acted corruptly for his own benefit:—*Held*, that the articles might reasonably bear the innuendo put upon them by the pursuer. *Hunter v. Ferguson & Co.*, 8 F. 574—Ct. of Sess.

The question in such cases is not the meaning to be derived from a critical reading of the words in question, but the meaning which the words used would convey to an ordinary reader reading them as newspaper articles are usually read. *Ib.*

Pleading—Finding of Jury against Innuendo, but that Words were a Libel—Judgment.—A plaintiff in an action of libel set out the words complained of in his statement of claim, and imputed an actionable meaning to them by an innuendo, but did not aver that they were libellous *per se*. The defendants pleaded that the words were no libel, traversed the innuendo, and pleaded privilege and fair comment. The jury found against the innuendo, but found that the words were a libel, that they were not fair comment, and that the defendants had acted maliciously. The jury awarded 50*l.* damages. The Judge entered verdict and judgment for the plaintiff:—*Held*, that he was right in so doing. *Fisher v. Nation Newspaper Co.*, [1901] 2 Ir. R. 465—C.A.

4. PRIVILEGE.

(a) *Absolute.*

Magistrate Sitting at Petty Sessions—Statement Made after Withdrawal of Charge.—A Justice of the peace sitting at petty sessions to dispose of criminal cases is acting judicially, and defamatory statements made by him in the course of the proceedings are not actionable, even if alleged to have been made without reasonable and probable cause and maliciously. *Munster v. Lamb* (52 L. J. Q.B. 726; 11 Q.B. D. 588) and *Hodson v. Pare* (68 L. J. Q.B. 309; [1899] 1 Q.B. 455) followed. *Allardice v. Robertson* (1 Dow. & Cl. 495, 515) not followed. *Larv v. Llewellyn*, 75 L. J. K.B. 320; [1906] 1 K.B. 487; 94 L. T. 359; 54 W. R. 368; 70 J. P. 220—C.A.

Judicial Proceeding—Proceedings upon Petition for Reception Order of Lunatic.—Proceedings before a Justice of the peace, acting as the judicial authority under the Lunacy Act, 1890, upon a petition under the Act for the reception of an alleged lunatic, are judicial proceedings, so that statements in the statement of particulars accompanying the petition are absolutely privileged. *Hodson v. Pare*, 68 L. J. Q.B. 309; [1899] 1 Q.B. 455; 80 L. T. 13; 47 W. R. 241—C.A.

— **Irregular Registration of Chancery Order as Judgment.**—A sued B for damages in the Vice-Chancellor's Court. At the hearing, upon a consent being entered into between the parties, the Court ordered the consent to be received, and that all further proceedings in the action should be stayed on the terms therein mentioned—namely, that B should pay to A 327*l.* and costs of suit when taxed, that on payment of these sums all further proceedings be stayed, and that in default A should be at liberty to issue execution. B paid the 327*l.*, but the costs being still due but untaxed, A's solicitor, treating this order as a "judgment," applied for an office copy of same, caused it to be entered in the Records and Writs Office as a judgment, obtained the certificate or memorandum of the officer of that department, and thereupon caused the order to be registered as a judgment against the defendant in the Judgments Registry Office. The Vice-Chancellor having set aside the entry in the Records and Writs Office of the order as a judgment, and its registration, as irregular, B sued A for libel:—*Held*, that the publications complained of, the handing of the documents to the officials of the two offices mentioned, were privileged, as being steps taken, however irregularly, in the course of judicial proceedings. *MacCabe v. Joynt*, [1901] 2 Ir. R. 115—Q.B. D.

Witness not on Oath—Judicial Tribunal—Commission of Enquiry Appointed by Bishop under Pluralities Act, 1838.—An enquiry by a commission of enquiry appointed by the bishop of a diocese under section 77 of the Pluralities Act, 1838, as amended by section 3 of the Pluralities Acts Amendment Act, 1885, is an enquiry by a judicial tribunal, and words spoken by a witness when giving evidence upon the enquiry, though not upon oath, are absolutely privileged. *Dawkins v. Rokeby (Lord)* (45 L. J. Q.B. 8; L. R. 7 H.L. 744) followed. *Barratt v. Kearns*, 74 L. J. K.B. 318; [1905] 1 K.B. 504; 92 L. T. 255; 53 W. R. 356; 21 T. L. R. 212—C.A.

Extent of Privilege—Communications Made by Witness for Preparation of Proof.—The immunity of a witness in respect of his evidence given in Court extends to the statements made to the client and law agent for the purpose of preparing the proof of such evidence. *Watson v. Jones or M'Ewan*, 74 L. J. P.C. 151; [1905] A.C. 480; 93 L. T. 489—H.L. (Sc.)

(b) *Qualified.*

Statements Made in Reply to Threat of Legal Proceedings—Privilege—Malice.—C., a farm manager, who had been dismissed, instructed his solicitor to intimate to his employer a claim of damages for wrongful dismissal. The soli-

citor did so by letter in which he stated that his instructions to recover, failing settlement, were peremptory. To this letter the employer replied that the reason for C.'s dismissal was "that I found him appropriating my butter to his own use, which butter he was in duty bound to deliver at my house." The solicitor again wrote intimating that, failing a settlement, he had no alternative but to proceed. In his reply the employer stated, "I do not anticipate any difficulty in proving that C. did dishonestly take my butter." In an action by C. in respect of these two statements,—*Held*, on the analogy of *Watson v. McEwan* (74 L. J. P.C. 151; [1905] A.C. 480), that the statements being made in reply to a threat of legal proceedings, and being a relevant defence to such proceedings, fell within the degree of protection accorded to judicial slanders made upon record, and were therefore only actionable on an averment of facts and circumstances sufficient to infer malice. *Campbell v. Cochran*, 8 F. 205—Ct. of Sess.

Report against Servant to Employers' Association—Register of Defaulters.—An association of owners of steam fishing vessels resolved that a "register of defaulting crews" should be kept, and that if one of the crew of a vessel belonging to a member should, when engaged to go to sea, refuse to do so, or should come on board drunk, the member should report his name to the secretary for insertion in the register. A member of the association reported an engineer to the secretary as having been drunk and having refused to proceed to sea. The engineer's name and alleged offences were accordingly inserted in the register. The engineer brought an action against the member who had reported him—first, for having wrongfully prevented him from obtaining employment; and secondly for slander.—*Held*, that in making the report the defender was privileged; and that, as it was not proved that he had acted maliciously, he was not liable in damages for the slander. *Held* further, that, apart from slander, the case did not disclose any other ground upon which the pursuer could claim damages in respect of the report. *Keith v. Launder*, 8 F. 356—Ct. of Sess.

Costs—Taxation—Privileged Occasion—Justification—Evidence of Witnesses Exclusively Relating to One Issue.—In an action of libel the defendant pleaded justification, that the occasion was privileged, and that there was no malice on his part. At the trial the jury found the issue of justification in favour of the plaintiff, and as regards the issue of privileged occasion that there was no malice on the part of the defendant. Judgment was entered for the defendant, with costs, on the issue of privileged occasion, and the Judge directed that the plaintiff should have such costs as related exclusively to the issue of justification.—*Held*, that the plaintiff was not entitled to the costs of any of his witnesses called to prove the falsehood of the defendant's statements, where their evidence, although material on the issue of justification, was also material on the issue of privileged occasion, and therefore did not relate exclusively to the issue of justification on which the plaintiff had succeeded. *Harri-son v. Bush* (25 L. J. Q.B. 99; 5 E. & B. 344)

followed. *Brown v. Houston*, 70 L. J. K.B. 902; [1901] 2 K.B. 855; 85 L. T. 160—C.A.

Communication Sent by Reasonable and Customary Means—Incidental Publication—Letter Dictated to Shorthand and Typewriting Clerk—Cablegram Copied by Clerk and Transmitted by Public Cable—Copies Preserved in Letter-book.]

—A company in Japan engaged the plaintiff as their mining manager for three months, the engagement to be continued permanently if their correspondents, a London company, approved. The former company having consulted the latter, the managing director of the latter sent in reply a letter, in which he expressed a fear that the plaintiff might acquire information at his employers' expense and use it not for their benefit, but his own; and he subsequently sent a cablegram in code words meaning that the Japanese company should have no dealings with the plaintiff, but should give him notice of dismissal. The letter was dictated by the managing director to a clerk in the employment of his company, by whom it was taken down in shorthand, typewritten, and copied into the company's open letter-book; and the cablegram was dictated to a clerk, by whom it was typewritten, and, along with its translation, copied into the company's cable-book; and it was then delivered to the employees of the telegraph company, by whom it was transmitted to the Japanese company. The plaintiff brought an action for libel against the London company, in respect of the statements in the letter and the cablegram. The evidence showed that these communications had been sent in accordance with the ordinary course of business in the office of the London company, and that it was necessary in the circumstances to send the second communication by cable.—*Held*, that the publication by the defendants of the statements complained of to the Japanese company was privileged; and that, as they had been transmitted to that company by the usual and necessary means, their incidental publication to the clerks of the London company and of the telegraph company was also privileged. *Edmondson v. Birch*, 76 L. J. K.B. 346; [1907] 1 K.B. 371; 96 L. T. 415; 23 T. L. R. 234—C.A.

Report of Judicial Proceedings in Newspaper—Fair and Accurate Report.—Observations made as to judging whether a report in a daily newspaper of judicial proceedings is fair and accurate. *Quære*, whether a report which contains an observation made by a litigant though not in the witness-box, but made in Court in the course of the legal proceedings, thereby loses the protection which it would otherwise have as a fair and accurate report of judicial proceedings. *Hope v. Leng*, 23 T. L. R. 243—C.A.

Report of Proceedings in Police Court—Charge Sheet—Minute or Memorandum of Conviction.—The plaintiff was summoned for a breach of section 1, sub-section 1 of the Fertilizers and Feeding Stuffs Act, 1893, and convicted. In a report of the police Court proceedings, the defendants stated in their newspaper that the plaintiff was prosecuted for "having issued a certain invoice as to the quality of manure sold by him to J. S. on January 26, which he knew to be false." The

summons did not contain the words "which he knew to be false," but these words appeared in the abstract of the charge in the charge sheet which was shown to the defendants' reporter, and which was a copy identical with the charge sheet subsequently signed by the chairman of the magistrates:—*Held*, that the entry in the charge sheet was not a minute or memorandum of the order for conviction within the meaning of section 14 of the Summary Jurisdiction Act, 1848, and therefore the defendants' publication of it could not be justified as a fair report of legal proceedings, or of a record of documents which had become public documents in the course of judicial proceedings. *Furniss v. Cambridge Daily News*, 23 T. L. R. 705—C.A.

Per Sir GORELL BARNES, P.—The privilege given to reports of proceeding in Courts is based upon this—that, as every one cannot be in Court, it is for the public benefit that they should be informed of what takes place substantially as if they were present. *Ib.*

— **Doctor and Chemist—Prescription.**—A doctor in making a complaint to a chemist that he has not dispensed a medicine in accordance with the doctor's prescription is in a privileged position, and anything said or written by the doctor to the chemist pertinent to the occasion will be protected unless malice is proved. *Gall v. Slessor*, [1907] S.C. 708—Ct. of Sess.

— **Communication to Chief Constable Regarding Official Conduct of Police-sergeant.**—A statement made to a chief constable regarding the official conduct of a police-sergeant is privileged. *Cassidy v. Connochie*, [1907] S.C. 1112—Ct. of Sess.

— **Malice—Statement by Police Surgeon Regarding Illness of Police Constable—Wrong Diagnosis.**—In an action by a police constable against a police surgeon who had attended him for illness the pursuer averred that the defender without sufficient examination had erroneously stated that the pursuer was suffering from the effects of venereal disease, and had repeated the statement to the chief constable; that he had persisted in that statement though informed that other medical men disagreed with his view, and that in doing so he had used violent and abusive language towards the pursuer:—*Held*, that the facts alleged were insufficient to infer malice, and that, the occasion being privileged, the action must be dismissed as irrelevant. *A. v. B.*, [1907] S.C. 1154—Ct. of Sess.

5. FAIR COMMENT.

Newspaper Criticism of Stage Play.—Comment upon a matter of public interest is not actionable if it is relevant to the matter commented upon, and is fair in the sense that it does not disclose in itself actual malice, and that the view expressed in it is honest and such as can fairly be called criticism. *McQuire v. Western Morning News Co.*, 72 L. J. K.B. 612; [1903] 2 K.B. 100; 88 L. T. 757; 51 W. R. 689—C.A.

Matter of Public Interest—Personal Imputa-

tions.—The defence of fair comment on matters of public interest cannot be maintained in an action for libel founded on a criticism, whether of a literary production or of a trade advertisement or of a public man, which contains an imputation of base and sordid motives without there being any facts to warrant the imputation. *Campbell v. Spottiswoode* (32 L. J. Q.B. 185; 3 B. & S. 769) followed and applied. *Joynt v. Cycle Trade Publishing Co.*, 73 L. J. K.B. 752; [1904] 2 K.B. 292; 91 L. T. 155—C.A.

— **Evidence of Malice—Relevancy.**—A comment upon a matter of public interest is not fair if it be actuated by malice. *Thomas v. Bradbury, Agnew & Co.*, 75 L. J. K.B. 726; [1906] 2 K.B. 627; 95 L. T. 23; 54 W. R. 608; 22 T. L. R. 656—C.A.

In an action for libel in respect of a comment upon a matter of public interest in which the defendant alleges that the comment is fair and reasonable, extrinsic evidence on behalf of the plaintiff that the defendant in making the comment was actuated by malice is relevant, and if brought ought to be left to the jury, and a verdict and judgment in favour of the plaintiff will not be set aside because they have been founded upon such evidence. *Ib.*

Campbell v. Spottiswoode (32 L. J. Q.B. 185), *Henwood v. Harrison* (41 L. J. C.P. 206; L. R. 7 C.P. 606), and *Merivale v. Carson* (20 Q.B. D. 275) considered. *Ib.*

Justification—Evidence—Admissibility.—The defendants published a libel on the plaintiffs, and on an action for damages being brought, pleaded fair comment and justification. The libel charged the plaintiffs with swindling, obtaining goods from traders on credit and not paying for them, in the city of L. It was pleaded generally without an innuendo. The plea of fair comment mentioned some matters in the nature of particulars, all confined to L.; but no particulars were given by the defendants or required by the plaintiffs in respect of the plea of justification. At the trial the plaintiffs, in cross-examination, admitted that they left L. secretly; that they left blinds and curtains up in their house when quitting; that they owed rent and bills to traders in L.; and they also admitted having left bills and rent due by them in the city of C., where they had resided before they came to L. Evidence was given that they had previously pursued a course of dealing in C. similar to what was alleged in the libel against them in L. Notwithstanding objection, the Judge admitted this evidence, the objection not being grounded on surprise, but on the admissibility of evidence which had not been mentioned in the libel or in the plea of fair comment:—*Held*, that the evidence was admissible, notwithstanding that no particulars had been given, the plaintiffs having waived their right to obtain particulars. *Hewson v. Cleve*, [1904] 2 Ir. R. 536—C.A.

— **Practice—Particulars.**—The plaintiff having advertised publicly for a partner who would advance money towards the promotion and become a member of a syndicate, a correspondent of the defendants, who were proprietors and publishers of a newspaper, wrote to the plaintiff for particulars relating to the

syndicate and the objects for which it was formed. The plaintiff sent him a number of particulars and documents, which he forwarded to the defendants, who then set out the substance of the particulars and documents and made comments thereon in an article in their newspaper, which the plaintiff complained of as a libel for which he brought an action, laying an innuendo of dishonesty. The defendants denied the innuendo and pleaded that the article was not libellous, and that in so far as it consisted of statements of fact the same were in their general and ordinary signification true in substance and in fact, and that in so far as it consisted of comment it was fair and *bona fide* comment. The plaintiff took out a summons for particulars as to whether the defendants alleged that any of the statements made in the particulars and documents sent by the plaintiff to the defendants' correspondent were untrue and, if so, which of them:—*Held*, that, the defence being one of fair comment alone and not of justification, the plaintiff was not entitled to the particulars. *Digby v. Financial News, Lim.*, 76 L. J. K.B. 321; [1907] 1 K.B. 502; 96 L. T. 172; 23 T. L. R. 117—C.A.

Pleas of "Justification" and "Fair comment"
—Question for Jury—Misdirection.—In an action for a libel in a newspaper where the defendant pleads "justification," and that the assertion was protected as a fair comment on a matter of public interest, it is a misdirection to direct the jury that unless the justification is proved they must find a verdict for the plaintiff, and that, unless justified, the assertion cannot come within the region of fair comment, for the question of "fair comment" does not arise if the plea of justification is proved. A personal attack may form part of a fair comment upon facts truly stated if it is a reasonable inference from such facts. It is a matter of law for the Judge to decide if a personal attack can be reasonably inferred from the statement of facts upon which it purports to be a comment, but it is for the jury to decide whether the inference ought to be drawn in the particular case. *Dakhyl v. Labouchere*, 96 L. T. 399; 23 T. L. R. 364—H.L. (E.)

6. TRADE LIBEL AND SLANDER OF TITLE.

Disparagement of Goods—Imputation of Misconduct.—In an action of libel the statement of claim alleged that the defendants, who were manufacturers of typesetting machines, published of the plaintiffs, who were rival manufacturers, the following written words: "The Empire Typesetter in America. The *Union Printer and American Craftsman*, the most wide-awake and spirited of American trade journals, has recently contained several references to the Empire" (the plaintiffs) "composing machines, which were installed in the office of the *New York Evening Sun* with such a flourish of trumpets. From these paragraphs we gather that five machines altogether have been employed in this office, the first being introduced some time in the month of February last, the other four commencing operations on March 9 last. So short-lived, however, does this installation appear to have been that we learn the machines were discontinued on Wednesday, April 29, and now the Empire Com-

pany" (the plaintiffs) "is in receipt of notice to remove them altogether in the course of a few days. This will be a very serious blow for this machine." There was no allegation of special damage:—*Held* (VAUGHAN WILLIAMS, L.J., dissenting), that these words, besides being a disparagement of the plaintiffs' machines, which would not be actionable without proof of special damage, were also, when taken in their natural and ordinary meaning, capable of being understood by men of ordinary intelligence as conveying an imputation upon the plaintiffs in the way of their trade, and the question of libel or no libel was therefore rightly left to the jury. *Empire Typesetting Machine Co. of New York v. Linotype Co.*, 79 L. T. 8—C.A.

—Malicious Statement—Special Damage.—A statement by a trader that goods of his manufacture are superior to those manufactured by another rival trader, although untrue and made maliciously, is not actionable as a defamatory libel, nor does such a statement afford ground for an action for disparagement of goods, even if the plaintiff is damaged by it, and avers special damage. *Hubbuck v. Wilkinson, Heywood & Clark*, 68 L. J. Q.B. 34; [1899] 1 Q.B. 86; 79 L. T. 429—C.A.

—Special Damage.—The plaintiff was a paving contractor, and an importer of American red-gum wood blocks for street paving. The defendant company were importers of Australian wood for street paving. While the plaintiffs' tender for paving a street with red-gum blocks was being considered by a local authority, a letter was written on behalf of the company to the local authority and sent to each member, as follows: "We understand that your council propose laying the roadway of . . . with American red gum blocks. We would strongly recommend that, before deciding upon this, you should pay a visit of inspection to . . . the roadways of which have been paved with American red gum blocks only from six to eighteen months ago and are now in a rotten condition. We venture to say that the result of such a visit would certainly remove from your minds any idea of using such material for roadways in your district." In consequence of that letter the plaintiff suffered special damage. The jury found a verdict in favour of the plaintiff:—*Held*, that the letter was not incapable of bearing a meaning defamatory of the plaintiff's goods, and that the action could be maintained. *Alcott v. Millar's Karri and Jarrah Forests*, 91 L. T. 722; 21 T. L. R. 30—C.A.

Imputation upon a Tradesman in the Way of his Trade—Criticism on Manufacture or Goods.—If the only meaning which can be reasonably attached to a writing is that it is a criticism upon the goods or manufacture of a trader it cannot be the subject of an action for libel, but an imputation upon a man in the way of his trade is properly the subject of an action without proof of special damage. *Harman v. Delany* (2 Str. 898) and *Evans v. Harlow* (5 Q.B. 624) distinguished and approved. *Linotype Co. v. British Empire Type-setting Machine Co.*, 81 L. T. 331—H.L. (E.)

Where in any particular case the words

complained of are susceptible of a defamatory meaning, or are simply a disparagement of goods, is for the jury. *Ib.*

Words Disparaging the Plaintiff's Property—Special Damage—Malice—Evidence of—Fair Comment.]—In an action to recover damages in respect of an article in a newspaper containing alleged defamatory statements against the plaintiff's property—namely, that a house owned by the plaintiff was haunted, and describing the incidents alleged to have taken place, the jury found a verdict for the plaintiff. The COURT OF APPEAL directed judgment to be entered for the defendants upon the ground that there was no evidence of special damage. *Barrett v. Associated Newspapers*, 23 T. L. R. 666—C.A.

Disparagement of Goods—Rival Newspaper—False Statement as to Circulation.]—The plaintiff and the defendant were the owners of newspapers circulating in the same locality, and the defendant published a statement, which was untrue, that "the circulation of" his newspaper "is 20 to 1 of any other weekly paper" in the district; and "where others count by the dozen, we count by the hundred":—*Held*, that the above statements were not a mere puff by the defendant of his own newspaper, but amounted to an untrue disparagement of the plaintiff's newspaper, and were actionable on proof of actual damage, but that as no damage was proved the action failed. *Lyne v. Nicholls*, 23 T. L. R. 86—Swinfen Eady, J.

Slander of Title to Goods—Remedy by Injunction—Damage Direct Result and Imminent—Damage not Accrued.]—An injunction will lie at the instance of legal or equitable owners of letters patent to restrain the publication of a libel or slander of title, if the defamation is in fact a libel or slander of title, where no damage has actually accrued, provided that damage is imminent and is the natural and direct result likely to follow. *Dunlop Pneumatic Tyre Co. v. Maison Talbot*, 52 W. R. 254; 20 T. L. R. 88—Walton, J. Reversed on evidence, 20 T. L. R. 579—C.A.

7. LIBEL ON DECEASED PERSON.

An action is not maintainable for a libel on a deceased person. *Broom v. Ritchie*, 6 F. 942—Ct. of Sess.

II. SLANDER.

Judicial Privilege.]—A Judge, whether of the Supreme Court or of an inferior Court, has, with respect to words uttered by him in the course of judicial proceedings with reference to the case before him, an absolute privilege. *Primrose v. Waterston*, 4 F. 783—Ct. of Sess.

Action by Husband against Wife.]—An action by a husband against his wife to recover damages for slander is incompetent. *Phillips v. Barnett* (45 L. J. Q.B. 277; 1 Q.B. D. 436) followed. *Young v. Young*, 5 F. 330—Ct. of Sess.

"Liar and fraud."]—The ordinary slang expression of calling a person a "fraud" does not mean that such person has committed a

fraud in the legal sense of the term, and to call a man a "liar and fraud" is not slanderous; the expression is merely abusive language. *Agnew v. British Legal Life Assurance Co.*, 8 F. 422—Ct. of Sess.

Imputation on a Woman of Want of Delicacy.]—*Per* LORD KINCARDINE: It is not *per se* actionable to say of a woman that she wanted delicacy. *A. B. v. Blackwood*, 5 F. 25—Ct. of Sess.

Statement Affecting Credit of Solicitor.]—In an action of damages for slander the pursuer, a solicitor in a country town holding several public appointments of trust, averred that the defender had stated that the pursuer had been "cleaned out and lost his all," and that in consequence the pursuer had suffered in his reputation and business:—*Held*, that the pursuer was entitled to an issue on the ground that it was not unreasonable to suppose that the statement might have injured his reputation and credit. *A. B. v. C. D.*, 7 F. 22—Ct. of Sess.

Imputation of Criminal Offence—Statement that Plaintiff had been Accused of bringing Blackmailing Action—Meaning Reasonably Understood by Hearers.]—In an action for damages for slander the statement of claim alleged that the defendant at a meeting of shareholders of a company at which the plaintiff was present had stated with reference to a previous action brought by the plaintiff against the defendant that the plaintiff had in the course of the proceedings in that action been taxed by the defendant's counsel with having brought a blackmailing action, and that counsel said he made the accusation upon the plaintiff's own evidence; that the meaning of the words was that the plaintiff was a blackmailer, and had brought an unfounded claim against the defendant, and had been guilty of an indictable offence, and also guilty of a misdemeanour in supporting his claim by false evidence, and had so admitted in his evidence before the Court. There was no special damage alleged:—*Held*, that the action was maintainable, for, whether the defendant so intended or not, the hearers of his statement might reasonably have understood it as imputing to the plaintiff a criminal offence—namely, the making a claim, supporting it by an action, and supporting it in that action by false evidence. *Marks v. Samuel*, 73 L. J. K.B. 587; [1904] 2 K.B. 287; 90 L. T. 500; 53 W. R. 88; 20 T. L. R. 430—C.A.

Words Not Actionable in Absence of Special Damage—Insufficiency of Damage Alleged—Remoteness.]—In an action for slander, the words complained of were alleged to have been spoken to the plaintiff's employers, and were as follows: "You have a barman in your employ"—meaning the plaintiff—"who has removed from his landlord's house, leaving 2l. owing for a month's rent, and I cannot get the money from him." The plaintiff alleged, as special damage, that in consequence of the slander he was dismissed from his employment:—*Held*, that the words were not actionable in the absence of special damage resulting from them, and that the special damage alleged was too remote. *Speake v. Hughes*, 73 L. J. K.B. 172; [1904] 1 K.B. 138; 89 L. T. 576—C.A.

Absence of Special Damage—Defamatory Words in Respect of Business—Solicitor in Habit of Receiving Money for Client for Investment—"He is gone for thousands."—To speak of a person, who is a solicitor, though as such he is in the habit, in the usual way, of receiving moneys in trust for and on behalf of clients for investment, that "he has lost thousands" or that "he has gone for thousands instead of hundreds this time," is not actionable without proof of special damage. *Dauncey v. Holloway*, 70 L. J. K.B. 695; [1901] 2 K.B. 441; 84 L. T. 649; 49 W. R. 546—C.A.

Interrogatories.—See DISCOVERY, col. 712.

III. CRIMINAL AND SEDITIOUS LIBEL.

Obscene Libel—Indictment—Form—Omission of Averment "to the manifest corruption of the morals of his Majesty's subjects."—An indictment for publishing a libel which is bad as a charge of publishing a defamatory libel for not setting out the passages relied upon, but which contains an averment that the defendant "unlawfully . . . did . . . publish . . . a . . . libel in the form of a document . . . which said document . . . contains divers . . . obscene . . . matters and things," may be good as an indictment for publishing an obscene libel, although it is better that the indictment should follow the old form and contain an averment that the tendency of the obscene matters is to corrupt the public morals, and that the libel was published with that intent. *Rez v. Barraclough*, 75 L. J. K.B. 77; [1906] 1 K.B. 201; 94 L. T. 111; 54 W. R. 147; 70 J. P. 14; 22 T. L. R. 41; 21 Cox C.C. 91—C.C.R.

Deposit of Document containing Alleged Libel with Indictment.—In order to satisfy the provisions of section 7 of the Law of Libel Amendment Act, 1888, it is not necessary that the incriminated document should be handed in with the bill of indictment if it is actually in the custody of the clerk of assize as an exhibit attached to the depositions. *Id.*

Seditious Libel—Information—Omission of word "Seditious."—An information exhibited for seditious libel is not bad because the words "seditious," "seditiously," are not expressly used, if it clearly appear on the face of the information that the publication was with seditious intent. *Reg. v. M'Hugh*, [1901] 2 Ir. R. 569—Q.B. D.

— **Pleading—Justification—Fair Comment.**—To an information for seditious libel it is not open to the defendant to plead justification under section 6 of the Libel Act, 1843, nor fair comment and absence of malice under section 4 of the Law of Libel Amendment Act, 1888. *Id.*

— **What is.**—A seditious libel is one that tends to disturb the government of this country. Therefore a document published in this country calculated to disturb the government of some foreign country is not a seditious libel, nor is it punishable as a libel. *Rez v. Antonelli*, 70 J. P. 4—Phillimore, J.

IV. OTHER MATTERS.

Corporation—Liability of for Defamation by Servant.—See CORPORATION.

Death of Plaintiff after Payment into Court with Admission of Liability—Payment Out.—See PRACTICE.

Discovery of Manuscript of Libel.—See DISCOVERY.

Fair Comment—Interrogatories.—See DISCOVERY.

DEL CREDERE AGENT.

See PRINCIPAL AND AGENT.

DEMURRAGE.

See SHIPPING.

DEMURRER.

See PRACTICE.

DENTIST.

See MEDICINE AND MEDICAL PRACTITIONER.

DEPOSITIONS.

Commissions, under.—See EVIDENCE.

Magistrates, before.—See CRIMINAL LAW.

DESIGNS.

Infringement—Registered Design and Patent for same Invention—Subsequent Registration of Similar Design—Marking Registration Numbers on Goods—Absence of Knowledge of Registration before Action.—Patent rights and copyright of design may in certain circumstances co-exist in the same person in respect of the same article. The registration of a design which secures mechanical advantages may as an anticipation prevent a subsequent grant of letters patent in respect of the same article whether the applicant be the proprietor of the design or a stranger. And a grant of a patent and the publication of the patented article would prevent a design of the article being novel so as to obtain registration. *Werner Motors, Lim. v. Gamage*, 73 L. J. Ch. 770; [1904] 2 Ch. 580; 91 L. T. 588; 53 W. R. 167; 20 T. L. R. 796—C.A.

Where, however, there is a provisional specification, without publication of the patented article, and then registration of the design, and that is followed by the final specification, the two rights may co-exist, the right acquired by the registration of the design which was valid at the time of registration not being prejudiced by the subsequent filing of the final specification; but the right second in point of time, the copyright of design, would be held subject to the first. That would be so whether the owner of the patent and the owner of the design were the same person or two independent persons. *Ib.* And see COPYRIGHT, col. 555, and TRADE.

DESTRUCTIVE INSECTS.

Statute.]—7 Edw. 7 c. 4 is the *Destructive Insects and Pests Act*, 1907.

DETINUE.

See TROVER.

DILAPIDATIONS.

Ecclesiastical.]—See ECCLESIASTICAL LAW.

Tenancies, under.]—See LANDLORD AND TENANT.

DIRECTOR.

See COMPANY.

DISCLAIMER.

Bankruptcy, in.]—See BANKRUPTCY.

Specification, of Part of.]—See PATENT.

DISCONTINUANCE.

See PRACTICE.

DISCOVERY.

1. Documents, of, 705.
 - (a) Generally, 705.
 - (b) Privilege, 708.
2. Interrogatories, by, 710.
3. Other Matters, 714.

1. DOCUMENTS, OF.

- (a) Generally.

Affidavit of Documents—When Required—Action of a Criminal Character.]—A defendant to an action of conspiracy who is required to make discovery of documents is not entitled to refuse discovery merely on the ground that

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some of them may tend to involve him in a criminal charge with pains and penalties. *National Association of Operative Plasterers v. Smithies*, 75 L. J. K.B. 861; [1906] A.C. 434; 95 L. T. 71; 22 T. L. R. 678—H.L. (E.)

— **Specific Documents.]**—An application for an order for an affidavit of documents under Order XXXI. rule 19a, sub-rule 3, and the affidavit in support of the application, must name and specify the documents discovery of which is sought. It is not sufficient that they should refer to classes of documents, or that the applicant should state that he has grounds for belief, based upon *a priori* reasoning, that a correspondence must have passed, or that books and documents must exist relating to the subject-matter. *White v. Spafford*, 70 L. J. K.B. 658; [1901] 2 K.B. 241; 84 L. T. 574—C.A.

— **Letter Referred to in Scheduled Letter—Production—Documents not Scheduled, but Produced.]**—For the purpose of an application for production of certain specified documents on the ground that they relate to matters in question in the action, if a relevant letter scheduled to an affidavit of documents is produced, privilege not being claimed, and it refers to any other letter or document, that other letter or document is at once *prima facie* relevant to the matter in question in the action, and the person making the affidavit of documents must make an affidavit respecting that document. Letters produced by the party or his solicitor as a matter of courtesy, although not scheduled to the affidavit of documents, must, subject to an explanation that they were produced incautiously or inadvertently, be taken to relate to matters in question in the action, and will be treated in the same way as if they had been scheduled. On such an application questions of privilege will not be discussed. *Ormerod, Grierson & Co. v. St. George's Ironworks*, 95 L. T. 694—Kekewich, J.

— **Inspection—Several Defendants.]**—Where one of several defendants to an action has obtained an order for an affidavit of documents by the plaintiffs, which has been complied with, the Court has power, on the application of another defendant, to order the production to him of the documents mentioned in the plaintiff's affidavit, without the necessity of a deposit and another affidavit of documents; but the plaintiffs will be at liberty to withhold on oath or seal up documents or entries which do not affect the matters in question between the plaintiffs and the particular defendant. *Pardy's Mozambique Syndicate v. Alexander*, 72 L. J. Ch. 104; [1903] 1 Ch. 191; 88 L. T. 11; 51 W. R. 295—Kekewich, J.

Production of Documents—Right of Inspecting Party to Make Copies.]—Under the usual order for production and inspection of documents, the inspecting party is entitled to make copies for himself in the same way as he was entitled to do under the old practice in the Court of Chancery. His right in this respect is not taken away or qualified by sub-rule 18 of rule 27 of Order LXV., which relates to costs only. *Ormerod, Grierson & Co. v. St. George's Ironworks*, 74 L. J. Ch. 373; [1905] 1 Ch. 505; 92 L. T. 541; 53 W. R. 502—C.A.

Libel—Conspiracy to Defame—Inspection of Manuscript of Libel.]—Where separate claims for damages for libel against a newspaper proprietor and other defendants are joined with a joint claim against them for the same libel and also with a joint claim against them for damages for conspiracy to defame and injure, the proprietor of the newspaper, even where he admits publication of an exact copy of the libel, cannot refuse to produce the manuscript of the libel, either on the ground of privilege, or on the ground that its production might tend to incriminate him, if the Court comes to the conclusion that he does not honestly believe that its production will have that effect. To entitle a defendant to refuse discovery on the last mentioned ground, his affidavit must shew that he believes the production of the document will tend to incriminate him. *Kelly v. Colhoun*, [1899] 2 Ir. R. 199—Q.B. D.

Marine Insurance—Order for Ship's Papers—Policies—Conspiracy—Action by Underwriters against Assured for Sums Paid in Excess of Amounts Due.]—The relationship of underwriter and assured is such that the underwriter is entitled to the largest discovery. Therefore the ordinary practice, by which underwriters when sued on a marine policy are entitled to an order for the production upon oath of ship's papers, applies when the underwriters, alleging that the assured have conspired to defraud them by obtaining sums under the policy in excess of those due, sue the assured for the return of such sums. *Boulton v. Houlder* (No. 2), 73 L. J. K.B. 493; [1904] 1 K.B. 784; 90 L. T. 621; 52 W. R. 388; 9 Com. Cas. 182; 9 Asp. M.C. 592; 20 T. L. R. 328—C.A.

Policy of Marine Insurance—Action on—Affidavit of Ship's Papers—Transit Covered by Policy partly by Land and partly by Sea.]—The practice as to discovery of ship's papers in actions against underwriters on policies of marine insurance is not altered by the fact that a part of the transit covered by the policy is by land, or that the policy contains a warehouse to warehouse clause. *Village Main Reef Gold-Mining Co. v. Stearns* (5 Com. Cas. 246) and *Henderson v. Underwriting and Agency Association* (60 L. J. Q.B. 406; [1891] 1 Q.B. 557) considered. *Harding v. Bussell*, 74 L. J. K.B. 500; [1905] 2 K.B. 83; 92 L. T. 531; 10 Com. Cas. 184; 10 Asp. M.C. 50; 21 T. L. R. 401—C.A.

Cargo-owners against Shipowners—Action by—Partial Insurance of Cargo—Documents in Possession of Insurers—Subrogation—Real Plaintiffs—Stay of Proceedings.]—Underwriters of a partially insured cargo are not the real plaintiffs in an action by the assured against the shipowners for loss of the cargo, notwithstanding that they have paid the amount of the insurance and have thereupon become subrogated *pro tanto* to the rights of the assured; and therefore the defendants in such an action are not entitled to have the action stayed as against the plaintiffs on the record, as a means of compelling discovery by the underwriters of documents in their possession in their own right. *Willis & Co. v. Baddeley* (61 L. J. Q.B. 769; [1892] 2 Q.B. 324) distinguished. *James Nelson & Sons, Lim. v. Nelson Line* (No. 1), 75 L. J. K.B. 895; [1906] 2 K.B. 217; 95 L. T.

180; 54 W. R. 546; 11 Com. Cas. 228; 10 Asp. M.C. 265; 22 T. L. R. 630—C.A.

Marine Insurance—Order for Ship's Papers—Policies—Conspiracy—Action by Underwriters against Assured for Sums Paid in Excess of Amounts Due.]—The relationship of underwriter and assured is such that the underwriter is entitled to the largest discovery. Therefore the ordinary practice, by which underwriters when sued on a marine policy are entitled to an order for the production upon oath of ship's papers, applies when the underwriters, alleging that the assured have conspired to defraud them by obtaining sums under the policy in excess of those due, sue the assured for the return of such sums. *Boulton v. Houlder* (No. 2), 73 L. J. K.B. 493; [1904] 1 K.B. 784; 90 L. T. 621; 52 W. R. 388; 9 Com. Cas. 182; 20 T. L. R. 328—C.A.

Marine Policy of Re-insurance—Action on—Ship's Papers.]—Where an underwriter of a policy of marine insurance re-insures and brings an action against the re-insurer on the policy of re-insurance, the re-insurer is entitled to an order for the production upon oath of ship's papers. *China Traders Insurance Co. v. Royal Exchange Assurance Corporation*, 67 L. J. Q.B. 736; [1898] 2 Q.B. 187; 78 L. T. 783; 46 W. R. 497; 8 Asp. M.C. 409—C.A.

(b) *Privilege.*

Affidavit of Documents.]—Observations on the sufficiency of the affidavit of documents claiming privilege for scheduled bundles of documents. *Milbank v. Milbank*, 69 L. J. Ch. 287; [1900] 1 Ch. 376; 82 L. T. 63; 48 W. R. 339—C.A.

—Further Affidavit—Sufficiency—Omission of Statement by Party that Documents for which Protection is Claimed contain nothing Impeaching his own Case.]—In an action to enforce the right to profit made upon an alleged joint purchase and re-sale of land and an account, defendant had counterclaimed for specific performance of an alleged agreement between him and the plaintiff as to certain properties purchased by defendant, and, as alleged, by the plaintiff and defendant jointly, and payments to be made, for a sale, and the execution of a proper conveyance. Defendant in an affidavit of documents had sworn that he objected to produce certain documents on the ground that they related only to his own case, and did not tend to prove or support the plaintiff's case:—*Held*, that the affidavit, according to the *dicta* in the case of *Morris v. Edwards* (60 L. J. Q.B. 292; 15 App. Cas. 309) in the House of Lords, as followed by the Court of Appeal in *Att.-Gen. v. Newcastle-upon-Tyne Corporation* (68 L. J. Q.B. 1012; [1899] 2 Q.B. 478) was technically sufficient, although not containing the statement that the documents for which privilege was claimed contained nothing impeaching his own case. *Johnson v. Whitaker*, 90 L. T. 535—Kekewich, J.

Defence of Title.]—In an action as to a right in property, documents which were prepared for the purpose of the defence to a former action concerning the same right, defended by a predecessor in title of one of the parties, and found

in the office of the successors of the solicitors of such predecessor, are privileged from production. *Minet v. Morgan* (42 L. J. Ch. 627; L. R. 8 Ch. 361) followed. *Wheeler v. Le Marchant* (50 L. J. Ch. 793; 17 Ch. D. 675) explained. *Calcraft v. Guest*, 67 L. J. Q.B. 505; [1898] 1 Q.B. 759; 78 L. T. 283; 46 W. R. 420—C.A.

Documents Privileged in Previous Action between Third Parties.]—In an action claiming damages arising from the acts of the defendants in causing, during the course of salvage operations, a wrecked vessel to become an obstruction, the defendants, under an order for discovery of documents, stated on affidavit that they had in their possession certain documents, consisting of confidential correspondence, reports, &c., obtained or made by them as agents for an insurance company, in reference to matters arising in litigation “then anticipated and afterwards instituted” by the owner of the vessel against the said insurance company for the purpose of enabling the latter to be advised upon, and to defend, the claim made against them.—*Held*, that the defendants were not entitled to exemption from discovery, as the documents would not have been privileged in the earlier action by the shipowner. *Kerry County Council v. Liverpool Salvage Association*, [1905] 2 Ir. R. 38—K.B. D. Affirmed in C.A.

Documents Containing Matter to Impeach the Case of Party Claiming Protection—Information by Attorney-General.]—It is not necessary in order to establish a claim of privilege against inspection of documents in an information by the Attorney-General claiming a declaration of title to foreshore on behalf of the Crown, that the affidavit by the defendant should state that the documents do not contain anything impeaching the defendant's case. *Morris v. Edwards* (60 L. J. Q.B. 292; 15 App. Cas. 309) followed. *Att.-Gen. v. Newcastle-upon-Tyne Corporation*, 68 L. J. Q.B. 1012; [1899] 2 Q.B. 478; 81 L. T. 311; 48 W. R. 38—C.A.

The affidavit should state that the documents relate solely to the “case” (not the “title”) of the defendant, and do not in any way tend to support the “case” of the Crown. *Ib.*

Report by Defendant's Agent.]—In an action claiming damages for negligence the defendants, by their affidavit of discovery, claimed privilege in respect of a particular document. The document consisted of a report drawn up by an agent of the defendants, who, three days after the occurrence complained of in the action, called upon the plaintiff and took down his evidence in writing. The document was (the defendants alleged) read over on completion to the plaintiff, and was admittedly signed by the plaintiff as a marksman.—*Held*, that the defendants were not entitled to exemption from discovery in respect of the document. *Tobakin v. Dublin Southern Tramways Co.*, [1905] 2 Ir. R. 53—K.B. D. Affirmed in C.A.

Communications between Solicitor and Client—Charge of Evasion of Statute.]—The privilege of a solicitor in respect of confidential communications between him and his client regarding the preparation of conveyances and other instruments is not displaced by a bare allegation that such instruments were prepared “with intent to evade” the duties imposed by a tax-

ing statute. There must be a specific allegation of fraud or illegal conduct of some kind. *Bullivant v. Att.-Gen. for Victoria*, 70 L. J. K.B. 645; [1901] A.C. 196; 84 L. T. 737; 50 W. R. 1—H.L. (E.)

— Bills of Costs—Proceedings in Chambers.]
—Letters passing between a solicitor and his client, written for the purpose of obtaining information or instructions from the client necessary for the conduct of an action, are privileged from discovery, although containing mere statements of fact as to what has been done in chambers. *Ainsworth v. Wilding*, 69 L. J. Ch. 695; [1900] 2 Ch. 315; 48 W. R. 539—*Stirling, J.*

Copies of or extracts from memoranda or notes made by a solicitor of what took place in proceedings at chambers in the presence of the opposite party are not privileged. *Ib.*

Communications between Solicitor and Client for Purpose of Obtaining Advice—Contrivance of Illegality—Evasion of Statute.]—A colonial administration and probate Act provided that if any person thereafter made any conveyance of property with intent to evade payment of duty under the Act, the property comprised in any such conveyance should upon his death be deemed to form part of his estate, and the payment of duty might be enforced accordingly. In proceedings to enforce payment of duty under the Act in respect of certain voluntary conveyances made by a testator, and raising the issue whether the conveyances were made to evade payment of duty under the Act,—*Held*, that confidential communications between the testator and his solicitor for the purpose of obtaining the solicitor's advice in reference to the preparation of the conveyances with a view to evade payment of duty under the Act were not privileged from production. *Reg. v. Bullivant*, 69 L. J. Q.B. 657; [1900] 2 Q.B. 163; 82 L. T. 493—C.A.

Exhibits—Accounts Prepared with a View to Previous Litigation.]—Accounts of transactions between the defendant in an action and a bank, prepared under the direction of the plaintiffs' solicitors for the purposes of the action and also with a view to future litigation, and produced on the examination of the defendant before an examiner, and admitted by such defendant to be correct, and made exhibits to the depositions, which depositions and exhibits were entered as read in an order of compromise of the action, are privileged from production in a subsequent action between the plaintiffs and the bank, the use of the documents on the occasion of the order of compromise not amounting to a waiver of the privilege. *Goldstone v. Williams Deacon & Co.*, 68 L. J. Ch. 24; [1899] 1 Ch. 47; 79 L. T. 373; 47 W. R. 91—*Stirling, J.*

— Examination before Examiner—Office-Copy Depositions.]—Office copies of such depositions in the possession of the plaintiffs are not privileged. *The Palermo* (53 L. J. P. 6; 9 P. D. 6) distinguished. *Ib.*

2. INTERROGATORIES.

Company—Knowledge and Information of Servants and Agents—Not Acquired in Course

of Employment—Sufficiency of Answer.]—The answer to interrogatories of an officer or member of a corporation is the answer of the corporation and can be read as an admission against the corporation, and therefore, though he is bound to enquire of the directors, servants, and agents of the corporation as to knowledge acquired by them in the course of their employment by the corporation, he is not bound to enquire as to knowledge or information which they may possess accidentally not in the course of their employment by the corporation, even though acquired in the course of their employment by predecessors in title of the corporation. *Welsbach Incandescent Gaslight Co. v. New Sunlight Incandescent Co.*, 69 L. J. Ch. 546; [1900] 2 Ch. 1; 88 L. T. 58; 48 W. R. 595—C.A.

Interrogatories, whether administered to an individual or a corporation by its officer, are intended to get the answer of the party through the knowledge of those persons for whose knowledge the individual or corporation is responsible, but not as a channel of information which, if given, would not be binding on the individual or corporation as an admission, however useful it might be to the interrogating party in getting up evidence to support his case. *Ib.*

Ejectment—Title—Superfluous Lands.]—In an action brought to establish title to lands which the plaintiff claimed had become vested in him under section 127 of the Lands Clauses Act, 1845, as superfluous lands, the defendants objected to answer interrogatories on the ground that discovery might disclose facts in consequence of which lands might become forfeited:—*Held*, that the vesting of superfluous lands in the adjoining owners takes place by force of a conditional limitation and not of a forfeiture, and that, having regard to the distinction between a conditional limitation and a forfeiture, the defendants were not entitled to exemption from discovery. *Miller v. Waterford Harbour Commissioners*, [1904] 2 Ir. R. 421—K.B. D.

Seduction—Action for—Admission of Carnal Knowledge—Denial of Paternity of Child—Interrogatories as to Carnal Knowledge of other Persons, and their Names—Admissibility.]—Where, in an action for seduction of the plaintiff's daughter, the defendant, in his defence, admitted carnal knowledge of the daughter but denied the paternity of her child, the plaintiff was not allowed to interrogate the defendant whether he alleged that carnal knowledge had been had of the plaintiff's daughter by any other persons, and asking for the names and addresses of such persons. *Hooton v. Dalby*, 76 L. J. K.B. 652; [1907] 2 K.B. 18; 96 L. T. 537—C.A.

Pollution of River—Proceeding to Restrain—Penalty—Criminal Proceeding.]—An application by a sanitary authority to a County Court Judge for an order under section 10 of the Rivers Pollution Prevention Act, 1876, requiring a person to abstain from the commission of an offence under the provisions of that Act, is not a penal proceeding, inasmuch as until the order has been made and has been disobeyed no question of penalty can arise, and the proceeding is therefore civil and not criminal, and one in which discovery and interrogatories may be allowed. *Derby Corporation v. Derbyshire*

County Council, 66 L. J. Q.B. 701; [1897] A.C. 550; 77 L. T. 107; 46 W. R. 48; 62 J. P. 4—H.L. (E.)

Libel—Privilege—Interrogatory as to Information of Defendant Inducing Belief of Truth of Defamatory Matter—Interrogatory as to Person from whom Information Obtained.]—In an action of libel in respect of an alleged defamatory statement as to the credit of the plaintiffs contained in a book published by the defendants, a trade protection society, the defendants pleaded that the statement was privileged on the ground that it was published in good faith and without malice, and that the book was issued only to subscribers, to whom the pecuniary strength and general credit of the persons whose names appeared in the book were matters of interest. The plaintiffs alleged that the defendants made no enquiries and had no information as to the plaintiffs' pecuniary strength and general credit when they published the statement complained of, and that it was not published in good faith and without malice. The plaintiffs obtained leave to administer to the defendants an interrogatory asking what enquiries they made as to the truth of the statement complained of, and from whom they obtained the information on which they relied in making it:—*Held*, that the interrogatory must be allowed, inasmuch as it was relevant to the issue of malice, and would enable the plaintiffs to prove in answer to the plea of privilege. *Elliott v. Garrett* (71 L. J. K.B. 415; [1902] 1 K.B. 870) followed. *White v. Credit Reform Association*, 74 L. J. K.B. 419; [1905] 1 K.B. 653; 92 L. T. 817; 53 W. R. 369; 21 T. L. R. 337—C.A.

Interrogatory as to Names of Persons to whom Defamatory Matter Published.]—The plaintiffs suggested that the book containing the statement complained of was shewn or issued to persons other than subscribers, and that some of the subscribers had no interest in the statement, and obtained leave to administer an interrogatory asking the defendants to give the names of the persons to whom the book had been supplied or shewn by or through the defendants or their agents:—*Held*, that the interrogatory was oppressive, and ought to be disallowed. *White v. Credit Reform Association*, *supra*.

Fair Comment—Information Inducing Belief—Names of Informants.]—To an action of libel brought against the proprietors and publishers of a periodical trade publication the defendants pleaded (*inter alia*) that in so far as the words complained of consisted of expressions of opinion they were fair comment, made in good faith and without malice, on a matter of public interest. The plaintiffs exhibited two interrogatories—the first, as to what information the defendants had which induced them to believe that the expressions of opinion were true; the second, asking from whom they obtained that information:—*Held*, that, for the purposes of these interrogatories, there was no material difference between the issue raised by a plea of privilege and that raised by a plea of fair comment, and that the first interrogatory was therefore admissible. *Elliott v. Garrett* (71 L. J. K.B. 415; [1902] 1 K.B. 870) applied. *Plymouth Mutual Co-operative and Industrial Society v. Trades Publishing Association*, 75 L. J. K.B.

259; [1906] 1 K.B. 403; 94 L. T. 258; 54 W. R. 319; 22 T. L. R. 266—C.A.

But *held*, that, in the absence of special circumstances, the second interrogatory was not admissible. *Hope v. Brash* (66 L. J. Q.B. 653; [1897] 2 Q.B. 188) followed. *White v. Credit Reform Association* (74 L. J. K.B. 419; [1905] 1 K.B. 658) distinguished. *Ib.*

— **Defence of—Intention to Set up Express Malice.**—Where in an action for libel against a newspaper the defendants plead that the words complained of are true and that they are fair comments, and upon these pleas the plaintiffs join issue, the defendants are not entitled to administer to the plaintiffs an interrogatory in these terms: "Do you intend to set up that the defendants in publishing the words complained of were actuated by express malice towards the plaintiffs? If yea, state generally the facts and circumstances on which the plaintiffs rely as shewing actual malice." *Lever v. Associated Newspapers*, 76 L. J. K.B. 1141; [1907] 2 K.B. 626; 97 L. T. 530; 23 T. L. R. 652—C.A.

— **Interrogatories as to Previous Statements Concerning Plaintiff.**—In an action for damages for libel in respect of a criticism, published in the defendants' paper, of an opera composed by the plaintiff, the defendants pleaded that the words complained of were fair and bona fide criticism of and comment on the opera, and were published without malice. The plaintiff applied for leave to deliver interrogatories to the defendants asking them whether they had not previously published an incorrect statement about the plaintiff, what information they had which induced them to believe that statement was true, from whom they derived such information, whether it was derived from the same source as the article complained of, and what steps they had taken to verify it:—*Held*, that leave to deliver the interrogatories had been properly refused as not being relevant to the question of malice. *Caryll v. Daily Mail Publishing Co.*, 90 L. T. 307—C.A.

Interrogatory as to Person from whom Information Obtained—Improper Motive—Interrogatory Put with a View of Taking Proceedings against Informant.—In an action of libel, to which the defendant pleaded that the defamatory statement was made in the honest conduct of his own business and without malice, and was privileged, the plaintiff applied for leave to administer an interrogatory, asking from whom the information was derived which induced the defendant to make the defamatory statement. The object of the plaintiff in obtaining the discovery was not to rebut the plea of privilege, but to enable him to take proceedings against the defendant's informant:—*Held*, that the interrogatory was oppressive, and ought not to be allowed. *Dictum* of COLLINS, M.R., in *White & Co. v. Credit Reform Association* (74 L. J. K.B. 422; [1905] 1 K.B. 658), followed. *Edmondson v. Birch & Co.*, 74 L. J. K.B. 777; [1905] 2 K.B. 523; 93 L. T. 462; 54 W. R. 52; 21 T. L. R. 657—C.A.

Slander—Action for—Questions as to Words

Spoken and Persons to Whom Spoken.—In an action for slander the plaintiff administered interrogatories to the defendant, asking—first, whether on a certain day he spoke the words complained of as constituting the slander, or "words to that effect"; and secondly, whether the said words were spoken in the presence of two persons named, and other persons, "or any and which of them":—*Held*, that the defendant must answer the interrogatories, the second being taken as in substance a question whether he spoke the words in the presence of the people named, or what others that he knew of. *Dalglish v. Lowther*, 68 L. J. Q.B. 956; [1899] 2 Q.B. 590; 81 L. T. 161; 48 W. R. 37—C.A.

Objection to Answer—Form of.—A person interrogated cannot refuse to answer altogether because he objects to some one question in the interrogatories, but he must take each question by itself, and if he objects to answer he must say why. *Ib.*

Privilege—Issue Raised on Pleadings—Question as to Information of Defendant Inducing Belief of Truth of Words Spoken—Question as to Steps Taken to Ascertain Truth.—In an action by the plaintiff, a member of a Metropolitan borough council, against another member for an alleged slander, by which the defendant accused the plaintiff of having received a bribe in connection with a matter which had been before the council for decision, the defendant pleaded privilege. The plaintiff sought to administer an interrogatory to the defendant asking what information he had to induce him to believe that the words spoken by him were true, or what steps he had taken before speaking them to ascertain whether they were true or not:—*Held*, that the interrogatory ought to be allowed, inasmuch as it was relevant to an issue raised on the pleadings, and would enable the plaintiff to prove an answer to the plea of privilege, and shew that the words were spoken maliciously. *Elliott v. Garrett*, 71 L. J. K.B. 415; [1902] 1 K.B. 870; 86 L. T. 441; 50 W. R. 504—C.A.

Tendency to Incriminate—Relevancy.—It is no objection to an interrogatory and no ground for taking it off the file, if relevant, that the answer might tend to incriminate the person to whom it is exhibited. The objection must be taken on oath. *National Association of Operative Plasterers v. Smithies*, 75 L. J. K.B. 861; [1906] A.C. 434; 95 L. T. 71; 22 T. L. R. 678—H.L. (E.)

3. OTHER MATTERS.

Execution, in aid of.—See EXECUTION.

Patent, Infringement of.—See PATENT.

Secret Recipe, of.—See TRADE.

Ship's Papers.—See INSURANCE (MARINE).

DISENTAILING DEED.

See ESTATE.

DISORDERLY HOUSE.

Music and Dancing Licence to Baths.—*See* 62 & 63 Vict. c. 29; and LOCAL GOVERNMENT, col. 1859.

Music—Room “kept or used for public singing, music, or other public entertainment of the like kind” — **Hotel Landlord Permitting Customers to Sing and Play on Pianoforte in Public Room.**—The landlord of a hotel by merely permitting his customers on many occasions to sing in one of the public rooms of the hotel, and to use the pianoforte which he has there, does not thereby keep or use such room “for public singing, music, or other public entertainment of the like kind,” within the meaning of section 51 of the Public Health Act, 1890, so as to require a music licence. *Brearley v. Morley*, 63 L. J. Q.B. 722; [1899] 2 Q.B. 121; 80 L. T. 801; 47 W. R. 574; 63 J. P. 582; 19 Cox C.C. 371—D.

DISTRESS.

Leaving Possession of Premises—Charge for Man in Possession—Costs.—In the absence of any agreement to the contrary, a collector of taxes who distrains upon the goods of a taxpayer for unpaid income tax not exceeding 20*l.* is not entitled under the Distress (Costs) Act, 1817, and the schedule thereto, which were extended to distresses for unpaid income tax by the Distress (Costs) Act, 1827, to levy upon the taxpayer in addition to the tax due the sum of 2*s.* 6*d.* per day for a man in possession when in fact the man has not been really, but at the most only constructively, in possession of the goods distrained. *Lumsden v. Burnett*, 67 L. J. Q.B. 661; [1898] 2 Q.B. 177; 78 L. T. 778; 46 W. R. 664—C.A.

Income Tax—Non-payment by Former Occupier—Owner not in Possession.—On April 22, 1897, a lease was granted to the plaintiff of premises, beginning December 25, 1896, for sixty years at 65*l.* a year rent. The rent was to be paid quarterly, the first payment being payable on September 29, 1897. He did not take possession until April, 1897, and for several years before he entered the premises had been unoccupied. An assessment for income tax of 9*l.* 3*s.* 4*d.* was made for the year April 1896 to April 1897. In August and again in September 1897 demands were made for payment, and as the defendant refused to pay, on November 17 a distraint was put in. The present action was then commenced against the defendant, a duly appointed collector for the purpose of the Income Tax Acts, for wrongful distress:—*Held*, that this was a lawful entry, and that no action would lie, as it was covered by the Income Tax Act, 1892, s. 70. *Reading v. Chew*, 78 L. T. 681—Bruce, J.

Pound Breach—Tresble Damages.—An action for treble damages for pound breach or rescous of goods distrained for rent, under section 4 of 2 Will. & M. c. 5, is maintainable by the landlord without proof of any special damage suffered by him. *Kemp v. Christmas*, 79 L. T. 233—C.A.

Bankruptcy, in.—*See* col. 134.

Company, in Winding-up of.—*See* COMPANY, col. 467. *See also* LANDLORD AND TENANT, col. 1192, and POOR LAW.

DISTRIBUTION, STATUTE OF.

See EXECUTOR.

DISTRICT REGISTRY.

Setting Aside Judgment.—*See* PRACTICE.

Taxation of Costs.—*See* COSTS.

DISTRINGAS.

See EXECUTION.

DIVIDENDS.

See COMPANY; GAS COMPANY.

DIVORCE.

See HUSBAND AND WIFE.

DOCK.

See SHIPPING.

DONATIO MORTIS CAUSA.

See WILL.

DOG.

Liability of Owner for.—*See* ANIMALS, col. 6.

Carriage of.—*See* RAILWAY.

DOWER.

See HUSBAND AND WIFE.

DRAIN.

See LOCAL GOVERNMENT; METROPOLIS.

DURESS.

See CONTRACT.

EASEMENT.

1. *Prescription*, 717.
2. *Foreshore*, 717.
3. *Light*, 718.
4. *Support*, 726.
5. *Watercourse*, 728.
6. *Way*, 731.
7. *Other Kinds of Easements*, 740.

1. PRESCRIPTION.

Enjoyment for Twenty Years — Consent or Agreement in Writing—“Expressly given or made for that purpose.”—*R. M.*, the owner in fee of a house and the adjoining land, in 1816 conveyed the house in fee-simple to *J. A.*, the predecessor of the plaintiff. At the same time a stone was built into the wall of the house, upon which was inscribed: “1816. This stone is placed by *J. A.* to perpetuate *R. M.*’s right to build within nine inches of this and any other building.” The access of light to the windows of the house over the adjoining land was continuously enjoyed from 1816 to 1901, when the defendant erected a building on the adjoining land which obstructed that access of light:—*Held*, that the inscription could not be construed as a consent or agreement “expressly made or given for the purpose” of the enjoyment of light within the meaning of section 3 of the Prescription Act, 1832; and that the plaintiff had an absolute right to the access of light. *Ruscoe v. Grounsell*, 89 L. T. 426—C.A.

See also *Hyman v. Van den Bergh*, 76 L. J. Ch. 554; [1907] 2 Ch. 516; 97 L. T. 297—Parker, J.; and **LIGHT**, *infra*.

Parol Licence—“Claiming right”—Uninterrupted Enjoyment for Forty Years.—It is not necessary that “any person claiming right” to an easement under section 2 of the Prescription Act, 1832, should, during the whole period of the twenty or forty years, have claimed to be legally entitled against the owner of the servient tenement. Actual uninterrupted enjoyment for the prescribed period without any title or justification is enough. *Gardner v. Hodgson’s Kingston Brewery Co.*, 69 L. J. Ch. 368; [1900] 1 Ch. 592; 82 L. T. 455; 48 W. R. 469; 64 J. P. 344—Cozens-Hardy, J.

A parol licence, whether gratuitous or for a consideration, given before the commencement of the period, would suffice to defeat such an enjoyment in respect of a twenty years’ title, but is insufficient to defeat an uninterrupted enjoyment for forty years, which is absolute and conclusive evidence of title, in the absence of any written consent or agreement. *Ib.*

2. FORESHORE.

Right of Inhabitants to Place Chairs on Foreshore and Let them to Hire—Prescription—Easement in Gross.—In 1904 a portion of the foreshore at *R.* was leased to the Corporation of *R.* by the Board of Trade on behalf of the Crown, under the provisions of a local Act. Inhabitants of *R.*, to the number of seven at a time, had for many years been in the habit of placing chairs and seats, each of the seven on a separate strip, on the part of the foreshore so leased and letting them to hire; and after the lease was granted the seven inhabitants who at the time were placing the chairs and seats continued to do so despite the requests of the corporation that they would discontinue the practice. The corporation brought an action against them for an injunction to restrain them from placing the chairs and seats on the foreshore and letting them to hire.

The defendants pleaded prescriptive rights with regard to the strips of foreshore on which they had respectively been in the habit of placing the chairs and seats, and alternatively a custom for the inhabitants of *R.* to place and let the chairs and seats:—*Held*, that there was no evidence of the custom alleged; that the prescriptive rights claimed being in gross could not be maintained, and were, moreover, unsupported by the evidence; and that the injunction must therefore be granted. *Rams-gate Corporation v. Debbling*, 4 L. G. R. 495; 70 J. P. 132; 22 T. L. R. 369—Buckley, J.

3. LIGHT.

Grant—Implied—Plan Shewing Building-Line—General Words.—A grantee of a new house is not entitled to all the light actually falling on the windows of the house, where that would be inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee—as, for instance, where such circumstances shew an intention on the part of the grantor to erect buildings on the adjoining land which would interfere with the right to light claimed. *Godwin v. Schweppes, Lim.*, 71 L. J. Ch. 438; [1902] 1 Ch. 926; 86 L. T. 377; 50 W. R. 409—Joyce, J.

The expression “lights enjoyed” in the Conveyancing Act, 1881, s. 6, sub-s. 2, is confined to the light enjoyed under such circumstances as would reasonably and properly lead to an expectation that the enjoyment of that light would be continued. *Ib.*

—Derogation—Lease—Building Land.—In the absence of special facts the doctrine that a grantor cannot derogate from his own grant must be applied without limit or restriction to a claim for access of light by the lessee of a house from the owner of building land, as against a subsequent grantee of adjoining land from the same owner. *Pollard v. Gare*, 70 L. J. Ch. 404; [1901] 1 Ch. 834; 84 L. T. 352; 65 J. P. 264—Kekewich, J.

Where such a lease contains no express grant of lights, the general words of section 6 of the Conveyancing Act, 1881, will be read into it. *Broomfield v. Williams* (66 L. J. Ch. 305; [1897] 1 Ch. 602) applied and followed. *Ib.*

—Express or Implied—Derogation—Building Agreement—Lease—Injury to Light.—Under an agreement the defendant had a right to enter upon certain plots of land for the sole purpose of building houses thereon according to plans to be approved by the lessors, the lessors agreeing to demise the houses to the defendant or his nominees when completed to a certain point; and the agreement provided that nothing therein contained was to operate as an actual demise of the land to the defendant. The defendant built a house on one plot, and obtained a lease of it, under which the lessors retained power to erect any buildings whatsoever on the adjoining plot whether such buildings affected the light enjoyed by the lessee or not. The lease of this house was transferred to the plaintiffs. The defendant built another house on the adjoining plot, which

was leased to a nominee of his. It interfered with the access of light to some of the plaintiffs' windows:—*Held*, that the plaintiffs were not entitled to an injunction or damages in respect of the interference with the light, as the defendant was not in a position to make a grant of a right to light over the adjacent land, and in those circumstances no such grant could be implied. *Quicke v. Chapman*, 72 L. J. Ch. 373; [1903] 1 Ch. 659; 88 L. T. 610; 51 W. R. 452—C.A.

Per ROMER, L.J.—In order to see whether a grant of light over adjacent land ought to be implied, two things have to be enquired into—first, the title of the alleged grantor to see whether his interest in the land would support a grant of light by him; and secondly, the surrounding circumstances affecting the two pieces of land known to both parties. *Ib*.

Implied Warranty — Easement — Light—Newly Erected Buildings.—Upon the sale of land with newly erected buildings having windows overlooking an open space, there is no implied warranty that the vendor has not been a party to anything whereby the easement of light over the open space cannot be acquired upon the effluxion of the statutory period from the time when the houses were first erected. *Greenhalgh v. Brindley*, 70 L. J. Ch. 740; [1901] 2 Ch. 324; 84 L. T. 763; 49 W. R. 597—Farwell, J.

Easement of Necessity—Conveyance by Owner of Two Tenements—No Express Reservation.—The owner of two houses conveyed one to a purchaser without reserving any right of light in respect of two windows in the house which he retained. The conveyance contained a covenant by the purchaser to permit the vendor to enter on the premises sold for the purpose of pointing or repairing his buildings. The windows in question overlooked the premises of the vendor; one lighted a pantry on the ground floor, and the other a landing on the first floor, and there was no means of lighting either by any light from outside. The plaintiff, who claimed through the purchaser, blocked up the windows by a wall:—*Held*, that, although the light to these windows might be necessary to the reasonable enjoyment of the vendor's property, that was not enough, according to the distinction drawn in the case of *Union Lighterage Co. v. London Graving Dock Co.* (71 L. J. Ch. 791; [1902] 2 Ch. 557), to create an "easement of necessity," and the plaintiff was therefore entitled to build so as to obstruct the light to these two windows, but not so as to prevent the enjoyment by the vendor of the benefit of the covenant as to pointing and repairing. *Ray v. Haseldine*, 73 L. J. Ch. 537; [1904] 2 Ch. 17; 90 L. T. 703—Kekewich, J.

Prescription—Extent of Light.—The Prescription Act, 1832, has not altered the previous law with respect to ancient lights. *Colls v. Home and Colonial Stores*, 73 L. J. Ch. 484; [1904] A.C. 179; 90 L. T. 687; 53 W. R. 30; 20 T. L. R. 475—H.L. (E.)

The owner or occupier of a dominant tenement is entitled to the uninterrupted access through his ancient windows of such an amount

of light as is required for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind, without regard to the particular purpose for which he has used the light. *Ib*.

An obstruction which will justify the interference of the Court must be of such a character as will constitute a nuisance. *Ib*.

The rule of forty-five degrees is not a rule of law, but may properly be used as *prima facie* evidence. *Ib*.

By LORD MACNAGHTEN.—The period of twenty years' enjoyment specified in the Prescription Act does not create an absolute and indefeasible right immediately on the expiration of the period. The period is not a period in gross, but a period next before some suit or action wherein the claim or matter to which such period may relate has been brought into question. *Ib*.

Mandatory Injunction.—By LORD MACNAGHTEN and LORD LINDLEY.—A mandatory injunction for the removal of a building obstructing ancient lights should not be granted in an ordinary case where damages would be an adequate remedy. *Warren v. Brown* (71 L. J. K.B. 12; [1902] 1 K.B. 15) overruled. *Ib*.

Enjoyment for Twenty Years—Consent or Agreement in Writing—“Expressly given or made for that purpose.”—R. M., the owner in fee of a house and the adjoining land, in 1816 conveyed the house in fee-simple to J. A., the predecessor of the plaintiff. At the same time a stone was built into the wall of the house, upon which was inscribed: “1816. This stone is placed by J. A. to perpetuate R. M.'s right to build within nine inches of this and any other building.” The access of light to the windows of the house over the adjoining land was continuously enjoyed from 1816 to 1901, when the defendant erected a building on the adjoining land which obstructed that access of light:—*Held*, that the inscription could not be construed as a consent or agreement “expressly made or given for the purpose” of the enjoyment of light within the meaning of section 3 of the Prescription Act, 1832, and that the plaintiff had an absolute right to the access of light. *Ruscoe v. Grounsell*, 89 L. T. 426; 20 T. L. R. 5—C.A.

— **Period of Enjoyment by Agreement—Computation of Twenty Years—Agreement Signed by Tenant of Dominant Tenement.**—However long the period of actual enjoyment of the access and use of light, no absolute or indefeasible right to it can be acquired under the Prescription Act, 1832, till the right is brought in question in some action or suit; and until it is so brought in question the right, if any, is inchoate only. In order to establish it when brought in question, the enjoyment relied on must be enjoyment for the twenty years next preceding some such action or suit; and the principle of *Simper v. Foley* (2 J. & H. 555) and *Ladyman v. Grave* (L. R. 6 Ch. 763) ought not to be extended so as to exclude in the computation of those twenty years a period during which the enjoyment of the light has been by some consent or

agreement expressly given or made for that purpose by deed or writing. *Hyman v. Van den Bergh*, 76 L. J. Ch. 554; [1907] 2 Ch. 516; 97 L. T. 297—Parker, J.

An agreement entered into *bona fide* for the purpose of securing the access and use of light to windows, and to which such access and use is actually due, is a sufficient agreement in writing within section 3 of the Prescription Act, 1832, if signed by the tenant in possession of the dominant tenement. *Id.*

— **Dominant and Servient Tenements under Common Landlord.**—Where there are two adjoining tenements held by different leases under a common landlord, one of which for the prescriptive period has enjoyed access of light over the other, such tenement acquires an indefeasible right to such access, both against the other lessee and the landlord and his successors in title. *Freven v. Phillips* (30 L. J. C.P. 356; 11 C. B. (N.S.) 449), which establishes this proposition, has been too long recognised to be disturbed. *Morgan v. Fear*, 76 L. J. Ch. 660; [1907] A.C. 425—H.L. (E.)

— **Acquisition—Disturbance.**—A right to light may be acquired by enjoyment for the statutory period against a statutory company or other servient owner incapable of granting it. *Tapling v. Jones* (34 L. J. C.P. 342; 11 H.L. C. 290) applied. *Jordeson v. Sutton, Southcoates, and Drypool Gas Co.*, 67 L. J. Ch. 666; [1898] 2 Ch. 614; 79 L. T. 478; 47 W. R. 222; 63 J. P. 137—North, J. Affirmed, 68 L. J. Ch. 457; [1899] 2 Ch. 217; 80 L. T. 815; 63 J. P. 692—C.A.

A right to any other easement may be acquired against such company or owner by an enjoyment of not less than the statutory period commencing prior to their ownership, such enjoyment implying a grant not later than its commencement. *Id.*

The disturbance of an easement is a tort for which the disturber, whether principal or agent, is liable to the dominant owner. *Id.*

— **Obstruction—Nuisance—Test of Nuisance—Injunction—Damages.**—The decision of the HOUSE OF LORDS in *Colls v. Home and Colonial Stores* (73 L. J. Ch. 484; [1904] A.C. 179) has left the obstruction of ancient lights still, as it always has been, a question of nuisance or no nuisance, but has readjusted the law in respect to the test of nuisance; and the test now is, not how much light has been taken, and is that enough materially to lessen the enjoyment and use of the house that its owner previously had?—but, how much light is left, and is that enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind? *Higgins v. Betts*, 74 L. J. Ch. 621; [1905] 2 Ch. 210; 92 L. T. 850; 53 W. R. 549; 21 T. L. R. 552—Farwell, J.

There is nothing in *Colls v. Home and Colonial Stores* (*supra*) that overrules the decision in *Shelfer v. City of London Electric Lighting Co.* (64 L. J. Ch. 216; [1895] 1 Ch. 287). *Id.*

— **"Building"—Greenhouse.**—A greenhouse is

a "building" within the meaning of section 3 of the Prescription Act, 1832, and a mandatory injunction will be granted to restrain the interference with the access of light thereto. *Clifford v. Holt*, 68 L. J. Ch. 332; [1899] 1 Ch. 698; 80 L. T. 48; 63 J. P. 22—Kekewich, J.

— **Ancient Lights—Conservatory—Sloping Skylight—"Window"—"Consent or agreement."**—

In 1873 an agreement was made by the plaintiff's predecessor, who owned a conservatory with a sloping glazed top and glazed vertical side, to pay to the defendant the sum of one shilling per year, as an acknowledgment for allowing the windows of the conservatory to open on to and overlook the defendant's property. Portions of the glazed vertical side of the conservatory were movable and opened outwards so as to overhang the defendant's property. The requisite payment was made down to 1888, when the vertical side was bricked up, leaving the sloping glazed top in the same position as a window or skylight to a corridor in the plaintiff's house. In an action by the plaintiff to restrain an alleged obstruction to the skylight as an ancient light, *Held*, that the sloping glazed top of the conservatory was a window overlooking the defendant's property within the meaning of the agreement, so that the access of light thereto had been enjoyed by a "consent or agreement" in writing within section 3 of the Prescription Act, 1832, which prevented the present skylight from being an ancient light. *Easton v. Isted*, 72 L. J. Ch. 189; [1903] 1 Ch. 405; 87 L. T. 705; 51 W. R. 245—C.A.

— **Alteration of Building before Right Acquired—Sloping Skylight Substituted for Vertical Window—Advancement of Plane of Window—New Window Admitting same Columns of Light—Acquisition of Right.**—For the acquisition of a right to light it is not necessary that the apertures through which the light has entered the dominant tenement should remain the same throughout the statutory period of twenty years. It is sufficient if, notwithstanding alterations to the building, including alterations to the plane and size of the windows, a substantial part of the columns of light enjoyed through the original windows has continued to be enjoyed through new apertures in the dominant tenement and to reach the position where the original windows stood. The right to light so acquired is limited to a right to such part of the columns of light as has been continuously enjoyed throughout the period of twenty years. Only such alterations to a building as would involve the loss of an existing right to light would, if made during the currency of the statutory period, prevent time running for the acquisition of a right to light. *Andrews v. Waite*, 76 L. J. Ch. 676; [1907] 2 Ch. 500; 97 L. T. 428—Neville, J.

Scott v. Pape (55 L. J. Ch. 426; 31 Ch. D. 554) followed. The main decision in *Scott v. Pape* as to the effect of alterations to windows has not been affected by the decision in *Colls v. Home and Colonial Stores* (73 L. J. Ch. 484; [1904] A.C. 179). *Id.*

— **Extent of Right Gained by User.**—There is no standard of the light ordinarily required by a house for the purposes of habitation or business,

and if there is an obstruction to the light of a house which causes substantial diminution of the light such as to cause substantial damage to the owner or tenant, that is an interference which entitles the persons injured to relief, although after the obstruction the house may be no worse lighted than the majority of the houses in the neighbourhood, or may have what is, in the opinion of the Judge, abundant light for all ordinary purposes of inhabitancy or business. Statement of the law by MELLISH, L.J., in *Kell v. Pearson* (L. R. 6 Ch. 809, 814) approved and applied. The views to the contrary expressed by MALINS, V.C., in *Lanfranchi v. Mackenzie* (36 L. J. Ch. 518; L. R. 4 Eq. 421) and *Dickinson v. Harbottle* (28 L. T. 186) disapproved. *Warren v. Brown*, 71 L. J. K.B. 12; [1902] 1 K.B. 15; 85 L. T. 444; 50 W. R. 97—C.A.

Actionable Nuisance—Mandatory Injunction—Damages.—The result of the decision in *Colls v. Home and Colonial Stores* (73 L. J. Ch. 484; [1904] A.C. 179) is that the plaintiff in an action for the obstruction of light to his premises must, in order to succeed, establish a nuisance, and a Judge in directing himself or a jury as to what constitutes an actionable nuisance must take the law to be that the owner of ancient lights is entitled to sufficient light, according to the ordinary notions of mankind, for the comfortable use and enjoyment of his house as a dwelling-house if it is a dwelling-house, or for the beneficial use and occupation of it if it is a place of business; and to constitute an actionable nuisance the obstruction must be such as substantially to interfere with that right. The mere proof that a given percentage of light has been taken away is not sufficient, but in considering the sufficiency of the light the locality ought to be borne in mind, and also light coming from quarters other than that where the obstruction is. *Kine v. Jolly*, 74 L. J. Ch. 174; [1905] 1 Ch. 480; 92 L. T. 209; 53 W. R. 462; 21 T. L. R. 128—C.A.

In an action by the owner of a dwelling-house for obstruction of the light to one of the rooms in the house, Kekewich, J., found that the room had been exceptionally well lighted, and still was well lighted, and there was sufficient light to enable it to be used for the purposes for which it was designed; but that there had been a large obstruction of light by the erection of the defendant's house, and a large interference with the cheerfulness of the plaintiff's room, so that the character of the room had been altered, and that it had lost in the obstruction of light one of its chief charms and advantages; and that the obstruction of the light had caused a substantial depreciation in the letting value of the plaintiff's house:—*Held*, by VAUGHAN WILLIAMS, L.J., and COZENS-HARDY, L.J. (*dissentiente* ROMER, L.J.), on these findings, that an actionable nuisance had been committed. *Held*, by ROMER, L.J., as an inference from the findings and on the evidence as a whole, that it was not shewn that an actionable nuisance had been committed. *Id.*

In the opinion of the Court, the defendant had not been guilty of any sharp practice or any high-handed or unneighbourly conduct towards the plaintiff, or shewn any desire to

evade the jurisdiction of the Court; and the case was not one in which damages could not be considered a reasonable and adequate compensation:—*Held*, that the remedy should be in damages, and not by a mandatory injunction. *Id.*

Affirmed on the facts (LORD ROBERTSON and LORD ATKINSON dissenting), *Jolly v. Kine*, 76 L. J. Ch. 1; [1907] A.C. 1; 95 L. T. 656; 23 T. L. R. 1—H.L. (E.)

Light Sufficient for Ordinary Purposes—Enjoyment for Twenty Years of Special Amount of Light.—In an arbitration, in which damages were claimed in respect of interference with the light enjoyed by the plaintiffs, the umpire found as a fact that there remained sufficient light to the plaintiffs' premises for all purposes of ordinary user:—*Held*, that the question was one of fact, and that the Court could not interfere with the umpire's finding. *Ambler v. Gordon*, 74 L. J. K.B. 185; [1905] 1 K.B. 417; 92 L. T. 96; 53 W. R. 300; 21 T. L. R. 205—Bray, J.

Enjoyment for twenty years of a special amount of light by the dominant tenement, even to the knowledge of the owner of the servient tenement, does not give the dominant tenement a right to such special amount of light. *Id.*

Purposes Requiring Special Quantity of Light.—Although less than twenty years have elapsed since an ancient light has been used for a business requiring a special quantity of light, and although such business could not have been carried on but for the enlargement of the ancient light, which enlargement was made within that period,—*Held*, nevertheless, that the light, so far as ancient, must not be substantially interfered with, and that the Court would take into consideration the nature of the business. *Warren v. Brown* (*supra*) discussed. *Parker v. Stanley*, 50 W. R. 282—Farwell, J.

— **Right to Extraordinary Use of Light—Sufficient for Ordinary Business Purposes.**—A prescriptive right to light is limited to a sufficient quantity for ordinary business purposes. Where the light has been interfered with, but not so as to make it insufficient for ordinary business purposes, the plaintiff has no cause of action. *Home and Colonial Stores v. Colls*, 83 L. T. 759—Joyce, J. See col. 719.

Act of Dominant Increasing Burden of Servient Tenement—Destruction of Part of Ancient Lights—Increased Importance of Remainder—Destruction of Easement.—The defendant, being owner of a building which contained ancient lights, in pulling down and rebuilding his house abandoned the greater part of his former sources of light, retaining only a small portion of the ancient apertures. The lights so retained were of material importance to the new building, but to have obstructed them would not have been a material interference with the defendant's rights before the rebuilding, having regard to the other sources of light which then existed:—*Held*, that, the defendant by his own act having blocked out the greater portion of the light which his building had before the

alterations, an interference with the small portion that remained would not be an actionable wrong. *Colls v. Home and Colonial Stores* (73 L. J. Ch. 484; [1904] A.C. 179) applied. *Ankerson v. Connolly*, 76 L. J. Ch. 402; [1907] 1 Ch. 678; 96 L. T. 681; 23 T. L. R. 486—C.A.

New Building—Windows Corresponding with those in Old Building—Abandonment—Portions of Windows Boarded up—Other Portions Covered with Open Shelves—Interruption.—Where certain buildings had been pulled down in 1891, and on their site a building had been erected with windows which corresponded with the windows in the old buildings, and large portions of the old area of the windows had been boarded up and other large portions covered with open shelving used for drying printing work for more than twelve months before action brought, and the shelves, which had been removed before the trial, caused a material interference with the light, although substantial quantities passed into the building, it was held that there had been no abandonment of the right to light which formerly existed, nor any interruption of the enjoyment of the access of light to the building through the portions of the windows not boarded up. *Smith v. Baister*, 69 L. J. Ch. 437; [1900] 2 Ch. 138; 82 L. T. 650; 48 W. R. 458—Stirling, J.

The term "interruption" has the same meaning in section 8 of the Prescription Act as in section 4, and refers to an adverse obstruction, and not to a mere discontinuance of user. *Cooper v. Straker* (58 L. J. Ch. 26; 40 Ch. D. 21) discussed and approved. *Ib.*

The rule laid down in *Hollins v. Verney* (53 L. J. Q.B. 430; 13 Q.B. D. 304) with regard to user in the case of discontinuous easements applies to the user in connection with light. *Ib.*

Non-user which would not be sufficient to establish an abandonment of a right acquired may be enough to prevent the acquisition of that right under the Act. The user or non-user of light cannot be entirely determined by simply considering whether an obstacle opposed to the light is fixed or movable. Fixedness and movability are elements to be taken into consideration, but the decision of each case must turn on all the circumstances. *Ib.*

Threatened Obstruction of Ancient Lights—Damages or Injunction—Judicial Discretion.—Where a plaintiff has a clear legal right to access of light to his tenement through an ancient light, and an adjoining owner is threatening to interfere with such right, as by darkening the windows by the erection of a new building, the Court will not in the exercise of its discretion under the Chancery Amendment Act, 1858 (preserved by the Statute Law Revision Act, 1883), award the plaintiff, against his wish, damages in lieu of an injunction. To do so would be virtually to compel the plaintiff to sell his right to the defendant. *Cowper v. Laidler*, 72 L. J. Ch. 578; [1903] 2 Ch. 337; 89 L. T. 469; 51 W. R. 539—Buckley, J.

Mandatory Injunction—Completion of Building after Notice of Appeal.—If ancient lights are interfered with substantially, and real damage thereby ensues to tenant or owner, the Court

will grant relief by way of mandatory injunction where the obstructing building has been completed after notice of appeal. *Home and Colonial Stores v. Colls*, 71 L. J. Ch. 146; [1902] 1 Ch. 302; 85 L. T. 701; 50 W. R. 227—C.A.

Derogation from Grant—Lease.—See LANDLORD AND TENANT.

4. SUPPORT.

Right of—Acquisition by Prescription—Enjoyment—Nature of Enjoyment.—In order to establish a right to an easement by long enjoyment, the enjoyment must be of such a nature that the servient owners' attention ought reasonably to have been drawn to the existence of the easement. It is not enough that something has been visible from which an expert might have inferred the existence of the easement. The word "*clam*," as applied to the enjoyment by which an easement may be acquired, does not mean surreptitiously or fraudulently, but only in such a manner as could not reasonably be expected to attract the notice of the servient owner. *Union Lighterage Co. v. London Graving Dock Co.*, 70 L. J. Ch. 558; [1901] 2 Ch. 300; 84 L. T. 527—Cozens-Hardy, J.

Grant—Implied Reservation—"Easement of necessity"—Acquisition by Prescription—Enjoyment "Clam."—*Dalton v. Angus* (50 L. J. Q.B. 689; 6 App. Cas. 740) establishes that a prescriptive right to an easement over another man's land can only be acquired when the enjoyment is of such a character that an ordinary owner of land diligent in the protection of his interests would have or must be taken to have a reasonable opportunity of becoming aware of that enjoyment. *Union Lighterage Co. v. London Graving Dock Co.*, 71 L. J. Ch. 791; [1902] 2 Ch. 557; 87 L. T. 381—C.A.

A dock on the bank of the Thames was in 1861 by arrangement with the occupiers of an adjoining wharf belonging to the same freeholder supported by tie-rods carried under the adjoining land and fastened by nuts to piles. In 1877 the wharf was sold to the plaintiffs without any express reservation of the right of support to the dock by the tie-rods. In 1886 the dock was sold to the defendants' predecessors in title. In 1900 the plaintiffs made some excavations to improve their property, and for the first time discovered the existence of the tie-rods, which still supported the dock. The tie-rods were underground and invisible until exposed in 1900, though two of the nuts were visible on the outside of certain piles in the plaintiffs' land. The plaintiffs claimed the right to remove the ties:—*Held* (VAUGHAN WILLIAMS, L.J., dissenting), that the plaintiffs could remove the ties, because, first, the ties could not be treated as part of the dock, and therefore not conveyed to the plaintiffs in 1877; secondly, the support of the tie-rods was not such an easement of necessity that a reservation of the right to it in favour of the grantors could be implied; thirdly, the defendants had not acquired by prescription a right to the support of their dock by the tie-rods, for the plaintiffs were not aware, and had not had a

reasonable opportunity of becoming aware, of their enjoyment of their support, which was therefore *clam*. *Wheelodon v. Burrows* (48 L. J. Ch. 883; 12 Ch. D. 31) followed. *Ib.*

Per STIRLING, L.J. — The “easements of necessity” referred to in the judgment in *Wheelodon v. Burrows* (*supra*) as reserved in favour of a grantor of land without express mention are easements without which the property retained cannot be used at all, and not those merely necessary to the reasonable enjoyment of the property. *Ib.*

Held, by VAUGHAN WILLIAMS, L.J., first, that the tie-rods were reserved with the dock as necessary to its maintenance and as appurtenances thereof; and secondly, that the two nuts which were visible and the general circumstances of the property put the plaintiffs upon such enquiry that the enjoyment of the support by the dock could not be said to be *clam* so as to prevent the defendants from acquiring a prescriptive right to its continuance. *Ib.*

To Land — Adjacent Land — Subsidence — Asphalt — Liquefaction. — The principle that no action will lie against a man who collects or pumps up underground water percolating the earth in no defined channel, though the effect of such working may be to withdraw the water supply from a neighbour's property, does not apply to pitch or any other liquefying substance; and where subsidence or other damage is caused by the withdrawal of the support of adjacent land, and the consequent liquefaction of such substance by the sun's rays, an injunction and damages will be awarded. *Trinidad Asphalt Co. v. Ambard*, 68 L. J. P.C. 114; [1899] A.C. 594; 81 L. T. 192; 48 W. R. 116 — P.C.

To Lateral Support — Minerals — Right to Work Minerals to Prejudice of Adjacent Ground. — A water company in 1821 under statutory authority constructed an aqueduct through certain lands. In 1825 the owner conveyed to the company a strip of ground twenty-five yards wide (including the minerals) “in which the aqueduct pipe is laid”:—*Held*, that the grantees were entitled to lateral support sufficient not only for the ground acquired by them, but also for the pipe running through it, and to interdict against the grantors so working the minerals adjacent to the feu as to interfere with this right of support. *Edinburgh and District Water Trustees v. Clippens Oil Co.*, 3 F. 156 — Ct. of Sess.

Adjoining Buildings — Right to Lateral Support — Knowledge of Support. — Where an easement of support is claimed by the owner of one of two adjoining houses, which have not a common origin, against the owner of the other, it must be shewn that the owner of the servient tenement knew, or had the means of knowing, that his house was affording support to the other. *Gately v. Martin*, [1900] 2 Ir. R. 269 — Q.B. D.

Water-pipe — Compensation — Long Acquiescence — Presumption. — The uninterrupted enjoyment for nearly eighty years of the right of support to a water-pipe, laid under statutory authority with the knowledge of the then

owners of the property affected, held to raise the presumption that all that was necessary to obtain such right had been done. *London and North-Western Railway v. Evans* (62 L. J. Ch. 1; [1893] 1 Ch. 16) approved. *Clippens Oil Co. v. Edinburgh and District Water Trustees*, 73 L. J. P.C. 32; [1904] A.C. 64; 89 L. T. 589 — H.L. (Sc.)

Mines, in case of. — See MINES.

Sewers, for. — See LOCAL GOVERNMENT.

5. WATERCOURSE.

And see WATER.

Artificial Watercourse — Enjoyment of, for Twenty Years — Tenants of Common Landlord.

Prior to 1894 (when they purchased their holdings through the Irish Land Commission) H. and P. were tenants of adjoining farms on the same estate. In 1861 the predecessor of H., for the better drainage of his holding, constructed a drain through his lands to a neighbouring river, and at the same time a weir was constructed on the course of this drain, and a “carry” or conduit, by which some of the water was led in a different direction along H.'s side of the boundary between the two farms to the public road, and thence along that road (which ran through P.'s holding), supplying a tank on P.'s holding with water, and ultimately finding its way to the river at a point lower down its course. In 1896 H. altered the drainage of his lands and removed the “carry,” so that it no longer supplied P.'s tank. P. entered on H.'s land and restored it. H. sued for damage for trespass, obstruction of the watercourse, and for flooding the lands. P. justified under an alleged lost grant and by prescription. At the trial the jury found a lost grant, but found there was no flow of water as of right prior to the drainage operations in 1861, and the Judge directed a verdict for the defendant:—*Held*, by FITZGIBBON, L.J., and WALKER, L.J. (*dissentiente* HOLMES, L.J.), that the drain was merely an artificial drain, not of a permanent character, but open to alteration or removal at H.'s pleasure, and that P.'s enjoyment must be regarded as permissive only. *Held* also, by WALKER, L.J., and HOLMES, L.J., that a lost grant of an easement may be presumed from enjoyment for twenty years between two tenants, whether holding under the same landlord or not. *Held* further, by FITZGIBBON, L.J., following *Bright v. Walker* (1 Cr. M. & R. 211) and *Wilson v. Stanley* (12 Ir. C. L. R. 345), that since the Prescription Act a fictitious grant cannot be presumed as the foundation of a right upon less than forty years' user by a termor against a termor. *Hanna v. Pollock*, [1900] 2 Ir. R. 664 — C.A.

— **Riparian Proprietors — Rights of Adjoining Landowners — Millowner — Evidence — Prescription — Reasonable User.** — The plaintiffs were the owners of an ancient mill on an old artificial watercourse, the inflow of water into which had always been under the control of the millowner, who had also always kept the channel clear and repaired the banks. The defendants owned a factory built on the site of an old tannery higher up the artificial watercourse,

where they carried on the business of fell-mongers, and used the water for the purposes of their business. There was no direct evidence as to the terms on which the watercourse was originally constructed. The plaintiffs sought to restrain the defendants from—first, polluting the water; and secondly, from obstructing its flow to the plaintiffs' mill, to which they set up a prescriptive right:—*Held*, that the proper inference from the evidence was that the watercourse was originally constructed either on the terms that the adjoining landowners should have rights analogous to the rights of riparian proprietors in a natural stream, or on the terms that the water might be abstracted for manufacturing purposes equally by all the riparian proprietors, provided such abstraction was reasonable, and that on the facts an injunction ought to be granted in respect of the first claim, but refused in respect of the second claim. *Baily v. Clark*, 71 L. J. Ch. 396; [1902] 1 Ch. 649; 86 L. T. 309; 50 W. R. 511—C.A.

Per STIRLING, L.J.—In ascertaining the rights of persons in an artificial watercourse the Court must take into account—first, the character of the watercourse, whether it is of a temporary or permanent character; secondly, the circumstances under which it was created; and thirdly, the mode in which it has been actually used and enjoyed. *Ib.*

—**Injury to Adjoining Lands by Escape of Water—Right of Adjoining Landowner to Flow of Water in Watercourse.**—The plaintiffs and defendants were owners of adjoining lands on the bank of the river Tame. Both properties originally belonged to the same owner, who at that time (1803) made a goit or watercourse from the river through the plaintiffs' lands, for the use of a mill erected by him on the defendants' lands. The plaintiffs' lands were subsequently, in 1812, conveyed in fee to their predecessor in title, the goit and sluice gate or shuttle at the head of it being expressly reserved, as well as a right of entry on the lands conveyed for the purpose of repairing the goit and sluice gate or shuttle. The defendants' lands, including the goit, were afterwards, in 1815, conveyed to their predecessors in title. About 1874 the plaintiffs' predecessors in title acquired a right to the flow of water in the goit for the use of a mill which had been erected on the plaintiffs' lands. The defendants' lands, including the goit, were conveyed to them in 1890. In 1895, in consequence of the shuttle at the head of the goit being out of repair, the shuttle was carried away by the flood water from the Tame, and the water overflowing the goit escaped on to the adjoining lands and premises of the plaintiffs. In an action by the plaintiffs to recover damages for the injury to their premises,—*Held*, that the right of repairing the shuttle to which the plaintiffs were entitled, under the doctrine of *Pomfret v. Ricroft* (1 Wms. Saund. 321), for the purpose of securing the enjoyment of their easement to the flow of water in the goit, did not relieve the defendants as the owners of the goit of the duty to repair the shuttle in order to prevent the water in the goit becoming a source of danger to adjoining landowners, and that the defendants were liable. *Buckley v. Buckley*, 67 L. J. Q.B. 953; [1898] 2 Q.B. 608—C.A.

—**Temporary Purpose—Right of Dominant Tenement to Compel Continuous Flow—Right to Enjoy De facto Flow—"Temporary."**—In considering whether the right to the enjoyment of an artificial watercourse on land of the vendor has passed, in the absence of express reference, to the purchaser of land adjoining the artificial watercourse under section 6 of the Conveyancing and Law of Property Act, 1881, it is not sufficient to point to the relative position of the property sold and of the watercourse, and to claim that the enjoyment of the watercourse is obvious. It is necessary to consider whether, having regard to all the circumstances of the case, the enjoyment is one which could ever be erected into a right on the basis of prescription or of a lost or presumed grant. *Burrows v. Lang*, 70 L. J. Ch. 607; [1901] 2 Ch. 502; 84 L. T. 623; 49 W. R. 564—Farwell, J.

In considering the question of a presumed grant it is necessary completely to review the whole of the surrounding circumstances—*e.g.* the purposes for which the artificial watercourse was originally made, the burden of its maintenance, and similar considerations; and on the question of prescription it is material to discover whether the watercourse was constructed for a temporary purpose. *Ib.*

A right to enjoy such water in an artificial watercourse—and such water only—as the owner of the watercourse chooses to allow to flow down the watercourse, is *precario*, and, as such, incapable of constituting a legal easement. *Ib.*

"Temporary," as a legal term, does not mean merely that a thing happens to last in fact, or is intended to last, for only a few years. It means that a thing may, within the reasonable contemplation of the parties, be expected to come to an end some day, sooner or later, and that it is not of the nature of a grant in fee-simple. *Ib.*

Supply to Dwelling-house through Pipe from Reservoir—Demise of House—General Words—Implied Grant—Reservoir Held by Lessors from Year to Year.—By a lease dated March 4, 1880, a dwelling-house was demised to the lessee together with "all waters and watercourses, liberties, privileges, easements, and appurtenances thereto belonging or in anywise appertaining, or usually held and occupied therewith, or reputed to belong or be appurtenant thereto . . ." for a long term. At the date of the lease, and for eighteen years previously, the dwelling-house was supplied with water by means of pipes from a reservoir held by the lessors of the dwelling-house under a yearly tenancy. In 1885 the legal personal representatives of the lessors were authorised by Parliament to become the undertakers for the supply of water in the district, the yearly tenancy of the reservoir being at that time vested in them. In 1902 the water undertaking, including the yearly tenancy of the reservoir, was transferred by a local Act to the district council, who threatened to cut off the supply of water by the pipes unless a water rate were paid for such supply:—*Held*, that the general words of the lease of March 4, 1880, were sufficient to pass the right to the

water flowing through the pipes, and that the circumstance that the lessors were only yearly tenants of the reservoir did not prevent that right from passing; that as the lessors could not have cut off the water at their pleasure after the lease was made and before the passing of the Act of 1885, *a fortiori* neither they nor their successors in the water undertaking could cut it off afterwards. *Watts v. Kelson* (40 L. J. Ch. 126; L. R. 6 Ch. 166) followed. *Burrows v. Lang* (70 L. J. Ch. 607; [1901] 2 Ch. 502) distinguished, *Key v. Neath Rural Council*, 95 L. T. 771; 4 L. G. R. 1174; 71 J. P. 57—C.A.

Flow of Water from Public Highway over Adjoining Land—Pipe under Road connecting Catchpits —“Drain.”—A highway authority for many years prior to 1868 had kept in an efficient condition a pipe which ran through a bank separating the highway from the defendant's adjoining land, and which carried through it and discharged on to the land the rain and storm waters running off the highway into catchpits, and thence through the pipe, but there was no defined channel on the land in question along which such water could flow after it had been discharged through the pipe:—*Held*, that the pipe was a drain within the meaning of section 67 of the Highway Act, 1835, and that, owing to the long period during which it had existed, the Court ought to presume a legal origin to a claim of right on the part of the highway authority to discharge the water through the pipe on to the defendant's land. *Att.-Gen. v. Copeland*, 71 L. J. K.B. 472; [1902] 1 K.B. 690; 86 L. T. 486; 50 W. R. 490; 66 J. P. 420—C.A. *And see* *WAT.*

6. WAY.

And see *WAT.*

Right of Way—User for Premises Extending beyond Dominant Land—Abandonment—Excessive User—Injunction.—The grantee of a right of way is only entitled to use it *bona fide* for purposes of the dominant tenement, and the owner of the servient tenement is entitled to relief if the acts of the grantee of the right of way necessarily involve its use for the purposes of buildings upon other land to which the right of way is not appurtenant, thereby increasing the area of the dominant tenement, and consequently the burden of the servient tenement. *Harris v. Flower*, 74 L. J. Ch. 127; 91 L. T. 816; 21 T. L. R. 13—C.A.

The defendant having a right of way over the plaintiff's land to certain land coloured pink on a plan, and being also the owner of certain adjoining land coloured white, had by his own acts completely landlocked the white land so that the only access thereto was now over the pink land, and had built a factory partly on the pink land and partly on the white land. The factory was all one building and a substantial part of it was on the pink land. The only access to it from the highway was by means of the right of way:—*Held* (affirming *SWINFEN EADY, J.*), that the acts of the defendant did not amount to an abandonment or extinction of the right of way; but (reversing *SWINFEN EADY, J.*) that the proposed user for the purposes of the part

of the building erected on the white land was in excess of the grant. *Finch v. Great Western Railway* (5 Ex. D. 254) distinguished. *Ib.*

Grant—Construction of Deed —“Visitors” —Pupils at Girls’ School.—In 1894 one B. granted to the defendant, her executors, administrators, and assigns, owners for the time being of St. W.’s, “and her and their tenants, visitors, and servants” at her and their will and pleasure to pass and repass on foot over a strip of land between St. W.’s and a street in the rear of it, to the end and intent that the right of way should be appurtenant to the messuage for all purposes connected with the use, occupation, and enjoyment of the same. Before 1894 and up to the present time L. carried on a girl's school at St. W.’s, to which there was also access from the front, and her pupils used the strip of land to the rear with her consent in coming to and going from school. The plaintiffs claimed an injunction against such user by L.’s pupils:—*Held*, that the word “visitors” in the grant ought not to be restricted to those who could come and go as they pleased, but, having regard to the circumstance that the school was so used by the defendant when the grant was made, “visitors” must be given a large interpretation and must include pupils. The explanatory words at the end of the grant, while not operating to enlarge it, might be used for the purpose of interpreting what its meaning was, and there must be a declaration that the way could be used by the defendant's pupils. *Thornton v. Little*, 97 L. T. 24; 23 T. L. R. 357—*Kekewich, J.*

Part of Building—Access to—Entrance Hall.—The defendants, who were the owners of a large building in the City of London containing business offices, granted to the plaintiffs a lease for twenty-one years of a set of offices in the building, and the defendants covenanted to keep in good repair the main walls of the building and the passages and other internal parts used in common by the tenants of the various offices. The building had an entrance door 10 feet wide leading to a hall 17 feet 9 inches wide, which opened by an archway 6 feet wide into an inner hall. The defendants, for the purpose of making shops, proposed to reduce the passage way from the entrance door through the hall to a uniform width of 6 feet. In an action for an injunction to restrain the defendants from so doing, —*Held*, that the plaintiffs had not a right to go over every part of the surface of the hall, but had a right to a reasonable user of the way for the purpose of the reasonable enjoyment of their offices, and that upon the evidence a passage 6 feet wide was not sufficient for the purpose. *Strick v. City Offices Co.*, 22 T. L. R. 667—*Swinfen Eady, J.*

—Incorporeal Hereditament—Licence—Covenant—Rent—Tonnage—Right to Receive—Reversioner.—Where a wayleave over freehold land is granted for a term, with a right to make a railway, in consideration of a covenant to make a periodical payment to the grantor, his heirs and assigns—such periodical payment being regulated by the amount of traffic, although some part of the traffic might not pass over the grantor's land—the interest conferred by the grantor is not a mere licence,

but an incorporeal hereditament capable of being inherited or assigned. The right to receive the sums payable under the covenant accordingly runs with the ownership in fee of the land, and may be enforced by the successors in title of the original grantor. *Hastings (Lord) v. North-Eastern Railway*, 67 L. J. Ch. 590; [1898] 2 Ch. 674; 78 L. T. 812; 47 W. R. 59—Byrne, J.

— **Extent of—Grant to “Lessee, assigns, under-tenants, and servants” —Licensees of Grantee.**—A grant of a right of way extends to all licensees of the grantee, even though licensees are not expressly mentioned in the grant. *Baxendale v. North Lambeth Liberal and Radical Club*, 71 L. J. Ch. 806; [1902] 2 Ch. 427; 87 L. T. 161; 50 W. R. 650—Swinfen Eady, J.

• **Parol Licence — Claiming Right — Uninterrupted Enjoyment for Forty Years—Annual Payment.**—The plaintiff and her predecessors in title had from time immemorial made constant, uninterrupted, and open use of a way over the defendants' yard, that being the only means of access for horses and carts to the plaintiff's premises from the high road. The use of the way was essential for the business carried on upon the plaintiff's premises. The owners for the time being of the plaintiff's premises had also used during the same period the water from a pump on the defendants' premises. Since 1855 they had made an annual payment of 15s. to the owners of the defendants' premises. They had also by arrangement contributed something to the repair of the pump. The defendants, while admitting the plaintiff's right of access to the pump, denied her right of way over their premises. There was no evidence of the origin of the payment of fifteen shillings, nor was there anything to shew that the user of the way was due to any agreement by deed or in writing, or on what terms the enjoyment of the right of road and other easement had begun. There was only one receipt for a payment of fifteen shillings produced, given on January 24, 1899, after the dispute had arisen, which was expressed to be for right of way to September, 1898:—*Held (dissentiente RIGBY, L.J.)*, that the *prima facie* inference to be drawn from the annual payment of fifteen shillings was that the enjoyment of the way was not of right, but each payment was for the use of the way by permission during the preceding year, although such permission was not expressly demanded and given in each year, and the plaintiff had not discharged the onus thus thrown upon her of shewing that the user was of right; and that no lost grant could be presumed. *Gardner v. Hodgson's Kingston Brewery Co.*, 70 L. J. Ch. 504; [1901] 2 Ch. 198; 84 L. T. 873; 49 W. R. 421—C.A.

Plasterers Co. v. Parish Clerks Co. (20 L. J. Ex. 362; 6 Ex. 630) and *Bewley v. Atkinson* (49 L. J. Ch. 153; 13 Ch. D. 283) distinguished by VAUGHAN WILLIAMS, L.J. *Id.*

Held, by RIGBY, L.J., that the user of the way had in fact been as of right in the sense that it was such as a person rightfully entitled would have had, and the mere unexplained payment of the fifteen shillings, which began before the commencement of the period of forty years,

was not an interruption—the principle of *Plasterers Co. v. Parish Clerks Co.* (*supra*) being applicable to cases within section 2 of the Prescription Act, 1832. *Id.*

Lost Grant—Long User — Annual Payment — Prescription—Evidence.—Where there has been long enjoyment of a way in connection with which for many years a payment has been made, the presumption is that such payment is rent, and the burden of establishing that the enjoyment confers an easement lies upon the person who claims it as of right. *Gardner v. Hodgson's Kingston Brewery Co.*, 72 L. J. Ch. 558; [1903] A.C. 229; 88 L. T. 698; 52 W. R. 17—H.L. (E.)

— **Presumption—User—Acquiescence—Disentailment and Resettlement—Tenant for Life in Possession—Implication of Lost Grant as against Reversioner.**—Where there is a tenant for life in possession of settled land, a lost grant of a right of way cannot be implied as against the reversioner merely from the user of the way during the lifetime of the tenant for life, one ground being that reversioner, not being in possession, would have no power to prevent the user; and the circumstance that the reversioner joined with the tenant for life in barring the entail, and in making a resettlement during the period of the user, does not alter the case. *Bradbury v. Grinsell* (2 Wms. Saund. 175 (d) (e)) and *Daniel v. North* (11 East, 372) considered and applied. *Roberts v. James*, 89 L. T. 282—C.A.

Permissive Use—“Enjoyed with” the Land.—In order to shew that the use of a way is “enjoyed with” the land within the meaning of section 6 of the Conveyancing and Law of Property Act, 1881, and that a right to such use passes on a conveyance of the land by virtue of that section, it is *prima facie* sufficient, in the absence of rebutting circumstances, to prove that the use was *de facto* enjoyed at the time of conveyance. *International Tea Co.'s Stores v. Hobbs*, 72 L. J. Ch. 543; [1903] 2 Ch. 165; 88 L. T. 725; 51 W. R. 615—Farwell, J.

The fact that the use was permissive only—whether it were or were not by revocable licence—is not a rebutting circumstance sufficient to defeat this *prima facie* rule of construction. *Kay v. Oxley* (44 L. J. Q.B. 210; L. R. 10 Q.B. 360) followed. *Birmingham, Dudley, and District Banking Co. v. Ross* (57 L. J. Ch. 601; 38 Ch. D. 295) distinguished. *Id.*

Licence — Rent—Right to Receive — Reversioner.—Where a wayleave over freehold land is granted for a term, with a right to make a railway, in consideration of a covenant to make a periodical payment to the grantor, his heirs and assigns—such periodical payment being regulated by the amount of traffic, although some part of the traffic might not pass over the grantor's land—the interest conferred by the grantor is not a mere licence, but an incorporeal hereditament capable of being inherited or assigned. The right to receive the sums payable under the covenant accordingly runs with the ownership in fee of the land, and may be enforced by the successors in title of the original grantor. *Hastings (Lord) v. North-Eastern Railway*, 67 L. J. Ch. 590;

[1898] 2 Ch. 674; 78 L. T. 812; 47 W. R. 59; 63 J. P. 36—Byrne, J. Affirmed, 68 L. J. Ch. 315; [1899] 1 Ch. 656; 80 L. T. 217—C.A.

Of Necessity.—A proprietor of a piece of land has no right to access thereto over the lands of his neighbour merely because he has no other means of access. *Menzies v. Breadalbane* (No. 2), 4 F. 59—Ct. of Sess.

Land-locked Land—Way of Necessity.—By an agreement made November 27, 1897, a farm was let to the plaintiff on a yearly tenancy. The plaintiff, prior to signing the agreement, was aware that on January 5, 1896, the defendants had agreed to purchase six acres forming part of the farm, and on June 25, 1898, the piece of land was conveyed to the defendants. The piece of land was bounded on two sides by the farm land, on one side by a private road leading to the farmhouse, and on the fourth by the public road. There was no gate or opening to the piece of land from either road, and the public road was in a deep cutting about twenty feet below the piece of land:—*Held*, that the way over the private road was not obvious and apparent, and did not pass to the defendants under the general words imported into the conveyance by the Conveyancing Act, 1881, there being no gate or opening into the defendants' land; the way was not a way of necessity, because the defendants could, though at some expense, cut a way from the public road. Injunction granted. *Titchmarsh v. Royston Water Co.*, 81 L. T. 673; 48 W. R. 201; 64 J. P. 56—Kekewich, J.

Passage—Implied Right of Way—General or Limited—Devise—Excessive User—Extinguishment—Way to Railway Station—User by Passengers.—Where rights of way would be implied on a grant of property they will be implied on a devise. The only satisfactory guide as to the extent of the right to be implied is the user of the right. *Pearson v. Spencer* (3 B. & S. 761) and *Phillips v. Low* (61 L. J. Ch. 44; [1892] 1 Ch. 47) applied, *Milner's Safe Co. v. Great Northern and City Railway*, 75 L. J. Ch. 807; [1907] 1 Ch. 208; 95 L. T. 321—Kekewich, J. Compromised in C.A., 76 L. J. Ch. 99; [1907] 1 Ch. 208; 23 T. L. R. 88.

A right of way cannot be properly exercised by the dominant tenement so as to increase the burden originally cast on the servient tenement and to the detriment of the latter. Nor can a change in the character of the dominant tenement increase such burden. Accordingly a railway company who have acquired premises with a right of way for ordinary business purposes cannot use such way for passengers going to and from their railway station. The principle laid down in *Wimbledon and Putney Commons Conservators v. Dixon* (45 L. J. Ch., at p. 356; 1 Ch. D., at p. 368) applied. *Ib.*

The effect of such excess of user is that the original right of way is not for the time being exercisable. *Ib.*

Semble, the right is not extinguished, but only suspended, and is capable of being revived. *Ib.*

Private Road—User—Herbage—Inclosure Act

—Award—Presumption of Grant.—The Court will not presume from long user a lost grant of a right which is contrary to the provisions of an award made under an Inclosure Act, where such Act has been passed, not merely for the purpose of regulating the right of persons having an interest in common lands, but in the public interest, as, for example, in providing a permanent scheme for the drainage of a fen area. *Haigh v. West* (62 L. J. Q.B. 532; [1893] 2 Q.B. 19) distinguished. *Neave v. Peterborough Rural Council*, 71 L. J. Ch. 378; [1902] 1 Ch. 557; 86 L. T. 738; 50 W. R. 549; 66 J. P. 404—C.A.

Road Originally Private—Right of Way—Presumption—Prescription.—In an action of declarator of public right of way over a road, evidence of use of the road by the public as of right for a period short of the prescriptive period will not be sufficient to establish the right, except in circumstances where such use raises a presumption of prior use of the same character, for the requisite period. *Semble*, the presumption does not arise in a case where the road has been a private road, and the use of the public has commenced in tolerance. *Edinburgh Corporation v. North British Railway*, 6 F. 620—Ct. of Sess.

Land Held for Railway Purposes.—*Semble*, A public right of way cannot be acquired by user over lands held by a railway company for the purposes of the railway, and it makes no difference that the lands have been acquired by private agreement, and not by the exercise of compulsory powers. *Ib.*

Servient and Dominant Tenement—Unity of Possession—Yearly Tenant.—Unity of possession by a yearly tenant of the alleged dominant and servient tenements for the twenty years, or for twenty-three out of the forty years, immediately preceding an action in which a claim to a private right of way is sought to be established, is fatal to such a claim under section 4 of the Prescription Act, 1832. *Onley v. Gardiner* (8 L. J. Ex. 102; 4 M. & W. 496) and *Bathshill v. Reed* (25 L. J. C.P. 290; 18 C. B. 696) followed. *Damper v. Bassett*, 70 L. J. Ch. 657; [1901] 2 Ch. 350; 84 L. T. 682; 49 W. R. 536—Joyce, J.

Undefined Right of Way—No User—Unlimited Claim.—In 1862 the Corporation of the City of London, in pursuance of powers conferred on them by the Metropolitan Moat and Poultry Act, 1860 (23 & 24 Vict. c. xciii.), entered into an agreement with the plaintiff and defendant companies by which the companies agreed to construct a railway station for goods traffic only beneath the site of S. Market. In 1878 the corporation, with the privity of the defendant company, leased to the plaintiff company the northern part of the land on which the railway station had been built, for one hundred years, together with a right of way from time to time and at all times over the southern part of the land (which was leased by the corporation to the defendant company) through a circular road. The way was not definitely described, and it was never in fact used by the plaintiff company. The station was now substantially in the same state as it was in 1878. The plaintiff company brought

this action to enforce their right of way:—*Held*, that, until the plaintiff company used the demised premises as a goods station in accordance with the provisions of the Act of 1860, their right of way did not arise; and that the claim to the right of way was so undefined and unlimited that it could not be maintained. *Metropolitan Railway v. Great Western Railway*, 84 L. T. 333—C.A.

Right of Way—Abandonment—Non-user—Excessive User.—In 1891 certain premises were conveyed to M., together with a right of way over land coloured yellow on the plan on the deed. The land coloured yellow was subsequently conveyed to J., who covenanted to permit the use of the right of way. M. owned other adjoining premises, and erected assembly rooms partly on the land to which there was a right of way and partly on the adjoining premises. The licensing magistrates objected to a gateway opening on the right of way, but in 1892, a wall was built with an opening for a gateway 6 feet 9 inches wide, this opening being temporarily closed with sliding scaffold boards. In 1894 the hereditaments formerly belonging to M. were sold to F., together with the right of way, and in December of that year the scaffold boards were removed to enable building material to be taken along the right of way. In 1896 a further application to the magistrates to allow gates to be placed at the gateway was refused, and the magistrates insisted on the gateway being bricked up. In 1898 the premises, together with the right of way, were conveyed to G. M. In 1903 an opening was made in the wall and a gate 4 feet 4 inches wide placed there, and materials for altering the premises were conveyed along the right of way. The only access to the building at the rear of the assembly rooms was over the right of way. The present owners of the land coloured yellow claimed that the right of way had been abandoned, or, if not, as it was used to buildings not wholly erected on the dominant tenement, that the user was excessive. They brought an action against G. M. and his mortgagees, claiming to restrain the use of the right of way:—*Held*, that there had been no abandonment of the right of way; that the user was *bona fide*, although a portion of the building extended beyond the boundary of the land entitled to the right of way; and that the mortgagees were not necessary or proper parties to the action *Harris v. Flower*, 90 L. T. 669; 20 T. L. R. 501—Swinfen Eady, J. Reversed, 74 L. J. Ch. 127; 21 T. L. R. 13—C.A.

Adjoining Houses—Agreement to Convey to Different Persons—Right of Way over One Tenement for Apparent Use of Other Tenement.—By an agreement for the distribution of an estate left to the plaintiff, the defendant, and another, it was agreed that the “freehold house and premises known as Bedeburn, let to A. F.,” should forthwith be conveyed to the plaintiff, and that the “freehold house and premises known as Stanley Villa, let to J. H.,” should forthwith be conveyed to the defendant. These were adjoining houses, and the back of Bedeburn could only be approached by a private road at the side of and forming part of Stanley Villa, by which also the back of Stanley Villa was approached. This way had in fact been used by the tenants of both houses since the

houses were built:—*Held*, that under the agreement the plaintiff was entitled to a conveyance of Bedeburn, together with the ways, rights, and appurtenances to the premises belonging, and that therefore a roadway over a portion of Stanley Villa for the apparent use of Bedeburn would pass to plaintiff. *Nicholls v. Nicholls*, 81 L. T. 811—Stirling, J.

Adjoining Tenements Held under Same Landlord—User and Enjoyment of Right of Way for Forty Years.—Where two tenements are held under one and the same landlord, the tenant of one of them cannot acquire an easement as of right under section 2 of the Prescription Act, 1832, over land in the occupation of the tenant of the other tenement even though the enjoyment and user had existed for the periods mentioned in the section, inasmuch as an easement in the nature of a right of way to a pump can only be acquired under the section by prescription in respect of the fee. Principle laid down in *Bright v. Walker* (3 L. J. Ex. 250; 1 Cr. M. & R. 211) and *Wheaton v. Maple & Co.* (62 L. J. Ch. 963; [1893] 3 Ch. 48) followed. *Kilgour v. Gaddes*, 73 L. J. K.B. 233; [1904] 1 K.B. 457; 90 L. T. 604; 52 W. R. 438; 20 T. L. R. 240—C.A.

Lessees of Same Owner—Forty Years' Enjoyment—Tenements under Lease during Whole Period.—Where the common owner of two tenements demises them by separate leases to two different lessees, and the lessee of one tenement has enjoyed as of right an easement over the tenement of the other for forty years, the right to such easement—subject to the right of the reversioner of the servient tenement to resist the claim within three years after the determination of the lease—becomes absolute and indefeasible, notwithstanding that the tenements were the property of a common owner, and that the reversions were vested during the whole period in one and the same person. *Kilgour v. Gaddes*, 89 L. T. 444—Walton, J.

Statutory Powers—Effect of.—A right of way can exist over a structure erected under statutory powers. An owner may dedicate his land for purposes of recreation. *Tyne Improvement Commissioners v. Imrie*, 81 L. T. 174—Phillimore, J.

Church Way for Inhabitants of Parish—Custom—Prescription—Trespass—Mandatory Injunction.—The regular usage for over twenty years of a church way by the inhabitants of a parish is sufficient to warrant the finding of the existence of an immemorial custom, and, in the absence of proper evidence limiting such usage to a particular class of the parishioners by virtue of a manorial custom or otherwise, the church way will be deemed to be for the benefit of the inhabitants of the parish generally, to enable them to go to their parish church. *Brocklebank v. Thompson*, 72 L. J. Ch. 626; [1903] 2 Ch. 344; 89 L. T. 209—Joyce, J.

Any person within the custom would be entitled to a mandatory injunction to prevent the blocking up of the church way by the owner of the estate through which it passes. *Ib.*

Tramway Agreement—Personal or Real Right—Removal of Tramway.—Where a servitude,

such as a right of way for a tramway, is claimed as having been granted by an instrument in writing subscribed by the proprietor of the land burdened, the fact that the dominant tenement has not been acquired at the date of the instrument cannot, after it has been actually acquired, prevent the servitude from becoming a legal accessory to the dominant tenement, provided the servitude was so used as to give reasonable notice of the burden to any person in whom the property of the land might subsequently become vested. And although the instrument granting the privilege was in terms which might appropriately be employed in the constitution of a personal obligation only, that is not conclusive against the constitution of a proper burden upon the land, if it be matter of reasonable inference from the terms of the document, or the circumstances of the case, that the constitution of a real servitude was what the parties contemplated. An agreement between the proprietor of the estate of W., the feuars of part of that estate, and a railway company, provided for the use and construction by the railway company of a tramway through the lands of W., including the lands of the feuars:—*Held*, that the privilege of working the tramway as long as it continued was intended to bind, and did bind, all singular successors of the feuars in their lands. *North British Railway v. Park Yard Co.*, [1898] A.C. 643—H.L. (Sc.)

Alleged Extinguishment and Partial Abandonment—Obstruction—Mandatory Injunction to Remove Obstruction Refused.—The plaintiffs, as owners of certain lands situate in the borough of Croydon, known as Whitehorse Lane, had a right of way over a strip of land ten feet wide on adjoining property in the occupation of the defendants. Some years before action brought, the plaintiffs erected a summer-house which projected over the strip of land to the extent of 2 feet 4 inches. Before action brought, the defendants erected and eight months prior to the date of the writ they completed the erection of a stable on the strip of land, which obstructed the plaintiff's right of way. The plaintiffs brought an action—first, for a declaration that they were entitled to the right of way; secondly, an order requiring the defendants to remove the buildings in question; thirdly, for an injunction to restrain the defendants, their servants and agents, from obstructing the plaintiffs and their tenants, and the agents of the plaintiffs and their tenants, in the exercise of such right of way. The defendants pleaded extinguishment or abandonment before action brought:—*Held*, first, on the facts, that the plaintiffs had proved their title to and had not abandoned or extinguished their right of way; secondly, that partial abandonment, by the erection of a summer-house projecting across a portion of the strip of land, was not, in the circumstances, sufficient evidence of abandonment; that the plaintiffs were entitled to an injunction and 40s. damages, but that, owing to the fact that the defendants' obstructing building had been completed eight months before action, an order for its removal could not be made. *Young v. Star Omnibus Co.*, 86 L. T. 41—Farwell, J.

Right of Way—Rights of Landlord and Tenant.—*See LANDLORD AND TENANT.*

— **To National Monument.**—*See WAY.*

7. OTHER KINDS OF EASEMENTS.

Water from Well—Right to Take—Twenty Years' User—Landlord and Tenant—Tenants of Same Landlord.—Prior to 1875, two holdings, of which M. was owner in fee, situate upon either side of a country road, were held together, and upon one of them there was a well. In 1875 the premises were divided. The part on one side of the road was let to G., who had since remained in possession and was a judicial tenant to M.; and the other part, containing the well, was retained by M. There was no agreement that G. was to be entitled to use the water of the well. There was a barn on G.'s part of the premises, which in 1878 was converted into a dwelling-house, and this house was at first occupied by P., a cottier tenant of G., and subsequently by the defendant, who had been nineteen years in occupation as cottier tenant. Since 1878 P. and the defendant as his successor, had used the water of the well as of right, and had entered and walked over the portion of the land on which the well was for the purpose of approaching the well. In an action of trespass against the defendant, a cottier tenant of G., the acts of trespass being committed in assertion of defendant's right to take water,—*Held*, first, that it was impossible to presume an implied grant of an easement in 1875 to G. in favour of the defendant and all future tenants of G.; and secondly, that it was impossible to presume a lost grant by M. to G. by reason of the user of the well for twenty years. *Macnaghten v. Baird*, [1903] 2 Ir. R. 731—C.A.

Herbage—Inclosure Award—Presumption of Grant.—Where a local authority has for fifty years let the herbage of a private road, without any restriction as to grazing, the Court will presume a lost grant of a right co-extensive with the usage. It makes no difference that the herbage was given to the predecessors of the local authority by an inclosure award, with the restriction that it was to be grazed by sheep only, or that the usage purported to be in exercise of the right given by the award. *Neaverson v. Peterborough Rural Council*, 70 L. J. Ch. 35; [1901] 1 Ch. 22; 83 L. T. 496; 49 W. R. 154—Cozens-Hardy, J.

Turbary—Profit à Pendre—Enjoyment as of Right—Lost Grant—Mistake.—Sub-tenants of lands held under a lease for lives renewable for ever cut turf, during a period exceeding sixty years, for their own use, on lands of the lessor not included in the demised premises, which comprised bog as well as arable and pasture. They believed that they had a right to do this, as the lease contained words giving leave to cut turf for firing on the lands of the lessor. The lease, in fact, contained no such words, but a lease of adjoining lands, made between the same parties, did contain such words. The cutting was permitted by the lessor, as his agent believed that the right existed under the lease. An injunction was sought to restrain the tenants from cutting turf:—*Held*, that a lost grant should be presumed. *De la Warr v. Miles* (17 Ch. D. 535) applied. *Dawson v. M'Grogan*, [1903] 1 Ir. R. 92—C.A.

Canal—Working Minerals.—*See WATER.*

Executor—Grant of by.]—See LANDS CLAUSES ACT.

Fishery—Easement Appurtenant to.]—See FISHERIES.

Gravel—Right to take from River.]—See CUSTOM.

Mortgagee—Sale by.]—See MORTGAGE.

Prescription—Right by—Merger in Statute.]—See STATUTE.

EASTER OFFERINGS.

Liability to Income Tax.]—See REVENUE.

ECCLESIASTICAL LAW.

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1. STATUTES.

Benefices.]—61 & 62 Vict. c. 48 is the *Benefices Act*, 1898.

Bishoprics.]—4 Edw. 7 c. 30 is the *Bishoprics of Southwark and Birmingham Act*, 1904.

Burial.]—63 & 64 Vict. c. 15 is the *Burial Act*, 1900.

Cremation.]—2 Edw. 7 c. 8 is the *Cremation Act*, 1902.

Deanery.]—6 Edw. 7 c. 19 is the *Deanery of Manchester Act*, 1906.

Manchester Canonries.]—62 & 63 Vict. c. 28 is the *Manchester Canonries Act*, 1899.

Suffragan Bishops.]—61 & 62 Vict. c. 11 is the *Suffragan Bishops Act*, 1898.

Tithe Rentcharge.]—62 & 63 Vict. c. 17 is the *Tithe Rentcharge (Rates) Act*, 1899.

Union of Benefices.]—61 & 62 Vict. c. 23 is the *Union of Benefices Act*, 1898.

2. CHURCH.

(a) Generally.

Enlargement of Chancel of Parish Church—Re-erection of East Window—Military Colours—Consents Required.]—A faculty for the enlargement of the parish church of St. Margaret's, Westminster, by taking down and rebuilding the east wall of the chancel of the church six or seven feet further to the east and for other alterations in the church, including the re-erection and re-leading of the historical painted window at the east end of the chancel erected by the House of Commons, was granted, on the application of the rector and churchwardens with the consent of the parish vestry, on it appearing in evidence that official notice of the application for the faculty had been given to the then Speaker of the House of Commons, and that the assent of the members of the House of Commons to the works proposed by the faculty had been sufficiently shewn. *St. Margaret's, Westminster, In re*, [1905] P. 286—Consist. Ct. of London.

The temporary removal of certain military colours affixed to the walls of the chancel under a previous faculty (see *Vincent and Tomlinson v. Eglton*, [1897] P. 1) was authorised by the Court with the consent of the representative of the regiment to which the colours belonged. *Ib.*

Re-pewing of Portion of New Parish Church originally Appropriated to School Children—Pew-rents.]—The seats in a new parish church were in 1885 allotted by the Ecclesiastical Commissioners as follows: two pews for the vicar of the parish and his family; 315 sittings to be let to pew-renters; 222 sittings as free seats, and seventy-two sittings as seats for children, in the expectation that the population of the parish would in the main be composed of working men. This expectation was not realised, and in 1898 the vicar and churchwardens of the parish applied to the Ordinary to authorise by faculty the substitution of pews for adults in the place of the seventy-two sittings allotted as children's seats as above mentioned, and the letting of the substituted pews at pew-rents to be expended in church improvements and expenses:—*Held*, that the Ordinary had no jurisdiction to grant a faculty appropriating to other purposes seats allotted by the Ecclesiastical Commissioners as free seats or authorising the letting of any seats to pew-renters, but that a faculty might be decreed in his discretion for the substitution of pews for adults in which the churchwardens might seat parishioners in the place of the seventy-two sittings for children, the allotment of such sittings having been made by the Ecclesiastical Commissioners without statutory authority. *Semble*, the churchwardens of a church built under the Church Building Acts may, in seating the parishioners in seats in the church not appropriated to pew-renters or allotted as free seats by the Ecclesiastical Commissioners, give a preference

to applicants who voluntarily subscribe to a fund for church improvements and expenses. *St. Saviour, Westgate-on-Sea (Vicar) v. Parishioners*, [1898] P. 217—Canterbury Consist. Ct.

Dilapidations—Report of Surveyor—Objections to—Order for Payment—Signature of Bishop.—The executor of a deceased incumbent of a benefice, upon being sent a report of the surveyor appointed by the bishop as to the dilapidations in the buildings of the benefice, wrote to the bishop that he had received a communication purporting to be a copy of a report from the diocesan surveyor relative to dilapidations, and that he objected that the communication did not comply with the requirements of sections 29 and 31 of the Ecclesiastical Dilapidations Act, 1871, on the grounds that it was not made within three months of the vacancy and included subsequent dilapidations, that it included tenant's fixtures, and that it did not specify in detail the works which were needed; and the letter went on to say: "I must object to pay any additional costs by reason of an alleged report having been sent to me, and though it will probably be to the advantage of all parties that this matter shall be settled by your Lordship, I write this letter without prejudice and without in any way waiving any right I may have of applying to have the surveyor's present report amended or quashed elsewhere by injunctions or otherwise." The registrar of the diocese wrote to the executor that if he wished to object to the report he must proceed under section 32 of the Act. The executor made no further objection, and the bishop made an order under sections 34 and 35 for payment of the sum found due, the signature of the bishop being placed on the order by means of a stamp:—*Held*, that the letter was not an objection to the report of the surveyor within the meaning of section 32 of the Act, and that the placing of the bishop's signature on the order by means of a stamp was a sufficient signature within section 35. *De Beauvais v. Green*, 22 T. L. R. 816—Lawrance, J.

Chapel—Public Building or Domestic Oratory—Consecration.—A chapel which originally was part of the fabric of a mansion-house, but which became a separate building owing to the mansion-house being pulled down and rebuilt on a different site, had Divine service and baptisms of the children of the owners of the mansion-house performed in it by the vicar of the parish. In an action by the vicar for a declaration that he and his successors was and were entitled to the possession and control of the chapel and to perform Divine service and celebrate the sacraments in the chapel according to the rites of the Church of England,—*Held*, that the chapel was not a consecrated public building, and had never been more than a domestic oratory. *Nevill v. Studdy*, 94 L. T. 391; 22 T. L. R. 349—Buckley, J.

(b) Ornaments.

Architectural Decorations—Crucifixes—Ornaments Rubric.—A crucifix is neither a lawful church ornament nor an architectural decoration the retention of which in a church can be authorized by faculty, and where a crucifix has been introduced into a parish church the

Ordinary has jurisdiction to direct its removal by the churchwardens without proof that it is likely to have superstitious reverence paid to it. *Kensit v. St. Ethelburga (Rector)*, [1900] P. 80—Consist. Ct. of London.

Tabernacle for Reception of Reserved Sacrament.—*Semble*, a tabernacle for the reception of the reserved Sacrament is not a lawful church ornament. *Ib.*

Interest Requisite for Promotion of Faculty Suit—Parishioners having Names on Rate-book.—A parishioner of a parish in the City of London whose name is on the rate-book as occupier of a room in the parish taken solely to enable him to bring a civil suit in the Court, has a sufficient interest to promote a cause of faculty to obtain the removal of unlawful church ornaments out of the parish church of the parish of which he is a parishioner. *Ib.*

Stations of the Cross—Crucifix over Pulpit—Figure of the Good Shepherd.—THE COURT ordered the removal of fourteen pictures, known as the Stations of the Cross, which were hung upon the walls of a church without a faculty obtained for that purpose, upon the ground that, upon the evidence, they were not put up for the purpose of decoration only, but in order to take a place or play a part in devotions paid to the Deity before them, whether in public services or by individuals in private devotions. THE COURT refused to order the removal of an image of the Good Shepherd which was fixed, without a faculty, upon the east wall on the south side of the old chancel arch of the church, it being a mere architectural decoration, and there being no proof of superstitious reverence being paid to it. THE COURT ordered the removal of two crucifixes, which were placed in the church, one over each of the pulpits, upon the ground that they were erected without a faculty. A crucifix ought not to be erected in a church without a faculty first obtained, and a faculty, or a confirmatory faculty, ought not in any case to be granted authorizing its erection unless there is a very general desire on the part of the church-going parishioners that it should be erected. *Holy Trinity, Markham v. Shirebrook (Vicar)*, [1906] P. 230; 22 T. L. R. 278—Southwell Consist. Ct.

Image of the Good Shepherd—Decorations.—A confirmatory faculty was also granted for the retention in the same church of a small figure standing on a bracket under a canopy representing Our Saviour as the Good Shepherd, the whole figure made of oak and uncoloured, and affixed about ten feet from the ground to the east wall of the church on the south side of the chancel arch, it being held to be a mere architectural decoration not liable to give occasion to superstitious reverence in any form. *Ib.*

Crucifixes—Communion Rails—Tables of Ten Commandments, Lord's Prayer, and Apostles' Creed—Chancel Platform—Darkening of Windows in Chancel—Lamps Reflecting Light on Communion Table—Faculty—Communion Table—Reredos—Second Communion Table in Side Chapel.—The incumbent of a parish church having without a faculty, and contrary to the vote of the vestry and the wishes of the

parishioners, introduced into the church pictures representing the "Stations of the Cross" proved to have been used superstitiously, and four crucifixes, placed curtains over the Ten Commandments, the Lord's Prayer, and the Apostles' Creed engraved on the east chancel wall, and darkened the chancel by affixing permanent blinds on the east window and a side chancel window, the Court ordered that within three months the "Stations of the Cross," the crucifixes, and the curtains should be removed out of the church by the incumbent, and the outside blinds over the above-mentioned windows taken down by him. If the incumbent should not comply with the order of the Court within three months of its date, the Court would be prepared to issue a faculty to the parishioners' churchwarden to carry out the order. The erection in the chancel of a communion table with a reredos in substitution for the communion table formerly there, though made by the incumbent in opposition to a vote of the vestry, was sanctioned by a confirmatory faculty from the Court, on the ground of its being an artistic improvement to the church, subject to the platform on which the communion table stood being extended round the north end of the table so as to enable the minister to officiate during the Communion Service standing at the north end. The Court also sanctioned by confirmatory faculty the erection in the church of a side chapel with a communion table in it, though objected to by the parishioners, subject to the chapel being separated from the church on a plan to be approved of by the Court. *Sieveling v. Kingsford* (36 L. J. Ecc. 1) followed. *St. Mark's, Marylebone, In re*; *St. Mark's (Vicar) v. Parishioners*, [1898] P. 114—Consist. Ct. of London.

Figure of Our Saviour in the Act of Blessing.]

—The vicar and churchwardens of a parish church applied for a faculty to authorise them to remove the organ of the church from the east end of the north aisle to another position in the church; to separate the end of the north aisle from which the organ was so proposed to be removed by a screen from the rest of the church; to decorate the portion of the church within the proposed screen in conformity with the decoration of the rest of the church, and, with that view, to place at the east end of the north aisle a figure of Our Saviour represented as standing and in the act of blessing, the figure to be sculptured in stone in high relief, under life-size, about five feet high, and surrounded by a frame in which were to be representations of angels, and the whole to be supported on a single stone pedestal springing from the floor of the church. The application was not opposed, and a faculty was granted as prayed, the Ordinary being of opinion that the alteration of the position of the organ would be an improvement, that the rest of the alterations were desirable and advantageous, and that the proposed figure might be lawfully erected as a representation of an historical event set up for the purpose of decoration only. *Christ Church, Ealing, In re*, [1906] P. 289—Consist. Ct. of London.

Chancel Screen—Crucifix—Rood Loft—Gates.]

—So much of an application for a faculty for a chancel screen and other works in a parish

church as asked that the Court would sanction by faculty the placing above the centre of the chancel screen of a sculptured group of life-size figures in oak, representing Our Saviour upon the Cross and the Virgin Mary and St. John, was refused where it appeared that, if the faculty was granted as prayed, the Court would be thereby authorising the restoration of the pre-Reformation screen and rood formerly in the church. A faculty was also granted for a second communion table; and the Court authorised the chancel screen being provided with gates, on the ground that sufficient necessity for a chancel screen with gates had been shewn in evidence. *Paignton (Vicar) v. Inhabitants*, [1905] P. 111—Consist. Ct. of Exeter.

Chancel Screen with Crucifix and Figures of the Virgin Mary and St. John—Architectural Adornment not Shewn to be Probably Open to Abuse.]

—A chancel screen to the upper portion of the tracery of which is attached over the entrance archway the figure of Our Lord upon the Cross, and on one side of the archway the figure of the Virgin Mary, and on the other side the figure of St. John, is not either from its character or position in itself unlawful in churches or chapels of the Church of England, and may be authorised by faculty, provided the Ordinary is of opinion in his discretion that it is not probable that the figures on it will be abused for superstitious purposes. The mere suggestion that the figures on the screen may cause offence is not a sufficient reason for the ordinary refusing in his discretion to grant the faculty. *St. Anselm, Finner, In re*, [1901] P. 202—Court of Arches.

Faculty—Erection of Communion Table Constructed of Wood and Mounted on Castors, but with the Front and Sides Covered with Detachable Frames of Slate containing Marble Mosaics.]

—A movable marble communion table is not a legal article of church furniture; but a faculty may, in the discretion of the Ordinary, be granted for a movable wooden communion table, on the front and sides of which are suspended slabs of slate decorated with marble mosaics and detachable at will without damage to the table. *St. Luke's, Chelsea v. Wheeler*, [1904] P. 257; 20 T. L. R. 422—Consist. Ct. of London.

The rector and one of the churchwardens of a parish church, who had petitioned the Chancellor of the diocese for a faculty for the introduction into the chancel of the church of a movable communion table of marble, by leave of the Court brought in a supplementary petition whereby they prayed that, instead of a faculty being granted for the communion table proposed by their original petition, they might be authorised to place in the chancel of the church a movable communion table of wood standing on castors, with licence to suspend by wooden screws on the front and sides of the table thin slabs of slate decorated with marble mosaics. The prayer of this supplementary petition was not opposed; and at the hearing of the suit it appeared that the proposed decorated slabs of slate would be detachable at will without damage to the table and be in keeping with the decorations of the rest of the chancel, and that the whole of the surface of the proposed table would be of wood, and no marble mosaic of any kind would rest thereon:—*Held*, that a

faculty could be granted authorising the proposed wooden communion table to be placed in the church with the white slabs decorated with marble mosaics suspended on the front and sides of the table in the manner proposed in the supplementary petition. *Ib.*

— **Erection of Communion Table in Side Chapel—Insertion of Proviso Reserving Power to Order Removal of Communion Table.**—A faculty was granted on the application of the rector of a parish for the erection and use of a second Communion Table in a side chapel of the parish church, though both the churchwardens of the parish and the parish vestry expressed opinions averse to the grant, but the Court directed that a proviso should be inserted in the faculty reserving to the Court, on being satisfied that ornaments other than those sanctioned by the present or any future faculty had been introduced into the chapel or unlawful services performed there, to order the removal of the second Communion Table from the chapel. *St. Anne's, Limehouse (Rector) v. Parishioners*, [1901] P. 73—Consist Ct. of London.

— **Erection of Second Communion Table—Partition of Chapel from Rest of Church not Essential—Discretion.**—A faculty may, at the discretion of the Ordinary, be lawfully granted for the erection of a second communion table in a parish church or chapel of ease. It is not essential to the legal existence of a second communion table authorised by such a faculty that the portion of the church or chapel of ease where the second communion table is placed should be partitioned off from the rest of the church or chapel, but the circumstances which warrant the grant of the faculty and the structural and other arrangements which should be made in any particular church or chapel when a second communion table is sanctioned are matters to be decided by the Court granting the faculty in each case. *St. James the Great (Buxton), In re*, [1907] P. 368; 23 T. L. R. 694—Arches Ct. of Canterbury.

— **Discretion to Refuse Confirmatory Faculty where Opinion of Churchgoing Parishioners Adverse to Retention of Ornaments.**—An application for a confirmatory faculty to authorise the retention in a parish church of church ornaments not illegal of themselves, but placed in the church without the authority of a faculty, cannot be regarded in any more favourable light than an application for a faculty for the first introduction into the church of the same church ornaments, and in all such cases the Ordinary will refuse to grant the confirmatory faculty prayed for unless there is before him sufficient evidence of a general desire of the churchgoing parishioners for the retention in the church of the church ornaments in question. *Markham v. Shirebrook (Vicar)*, [1906] P. 239.

— **Effect of Consecration on Church Ornaments.**—A bishop does not by consecrating or dedicating a church give any episcopal sanction—direct or indirect—for the retention in the church of church ornaments or decorations which may have been in the church at the time of its consecration or dedication. *Ib.*

— **Interest—Parishioner—Non-resident Ratepayer.**—In a cause of faculty for the removal of certain illegal ornaments from a

parish church it was proved that the parish church was a new parish church within a separate ecclesiastical parish formed under Lord Blandford's Act; that the petitioner at the date of his petition, and thenceforth during the proceedings in the suit, was a weekly tenant of a six-roomed house in this ecclesiastical parish, five rooms in which he underlet, keeping in his own occupation one room into which he occasionally went, but where he had never slept; that the house had been taken by him for the sole purpose of giving him a *locus standi* to bring the suit; and that he was entered in the rate-book of the civil parish out of which the ecclesiastical parish had been formed from before the commencement of the suit up to the time of the hearing, and had paid all rates due and payable by him during that period:—*Held*, that the petitioner had a sufficient interest to entitle him to promote the suit. *Davey v. Hinde*, [1903] P. 221—Consist. Ct. of Chichester.

— **Right of Non-Resident Ratepayer to Promote Suit—Parishioner of new Ecclesiastical Parish.**—The tenant of a house within the limits of an ecclesiastical district formed into a separate parish with a new parish church under Lord Blandford's Act, who has his name on the rate-book of the civil parish out of which the separate parish has been formed, and pays the civil parochial rates levied on him, has a sufficient interest to promote a faculty suit for the removal of illegal ornaments set up in the new parish church, notwithstanding that he does not reside in the ecclesiastical district and has become tenant of the house for the sole purpose of qualifying as a parishioner and ratepayer. *Davey v. Hinde*, [1901] P. 95—Chichester Consist. Ct.

— **Illegal Church Ornaments—Effect of Consecration.**—A bishop cannot by a sentence of consecration legalise the retention in a parish church of an ornament which is forbidden by the law to be there. Various ornaments and things ordered to be removed from a parish church as illegal. *Ib.*

— **Criminal Suits against Churchwardens.**—Observations as to the institution of criminal suits against churchwardens for the purpose of obtaining the removal of illegal church ornaments. *Ib.*

— **Monition to Remove Ornaments Introduced into Parish Church without a Faculty—Insufficiency of Interest—Secretary of Archbishop—Sequestrator during Vacancy of Benefice.**—The churchwardens of a parish in the diocese of York, the incumbency of which was vacant by the resignation of the last incumbent thereof, were cited to shew cause why a monition should not be issued calling upon them to remove out of the parish church certain ornaments introduced there without the authority of a faculty. The promoter in the suit was not a parishioner of the parish, but was described in the citation as "Thomas Shepherd Noble, of the city of York, solicitor, secretary to His Grace the Archbishop of York and Ordinary of the Diocese of York." It further appeared, by evidence at the hearing, though not disclosed on the face of the citation, that the promoter had been appointed and was at the time when the citation issued sequestrator of the living during

the vacancy :—*Held*, that the suit must be dismissed, as the promoter had not the interest required by law to entitle him to promote the suit. *Lee v. Fagg* (L. R. 4 A. & E. 135; L. R. 6 P.C. 38) followed. *Noble v. Reast*, [1904] P. 34—Consist. Ct. of York.

(c) *Endowment.*

Investment in Land—Sale by Incumbent—How far Binding on Successor.]—By a private Act of Parliament an endowment consisting of personalty was vested in an incumbent, and liable to be laid out in the purchase of lands, ground rents, or other hereditaments in fee-simple to be conveyed to and settled upon and to the use of the rector for the time being for and towards the maintenance of such rector. An incumbent (I), who had no knowledge of the source from which the endowment came, but merely had a general idea (to use his own expression) that it was "church property," invested it in his own name in the purchase of freehold ground-rents, which were conveyed to him, his heirs and assigns, with a declaration in bar of dower. I. sold a portion of these ground rents, and upon his resignation conveyed the unsold portion to his successor (H.) in fee-simple by deed which contained uses in bar of dower. Neither conveyance satisfied the provisions of the Charitable Uses Act, 1735 (9 Geo. 2, c. 36), with respect to attestation and enrolment. H. sold part of the ground-rents conveyed to him to the defendant. I. joined in the conveyance to the defendant. H. subsequently applied the proceeds of sale to his own use. In an action by the present incumbent, who was H.'s successor,—*Held*, first, that the defendant's title was not invalidated by 13 Eliz. c. 10; and secondly, that, assuming I. or H. to be a trustee of the ground-rents, the present incumbent could not impeach the sale. *Power v. Banks*, 70 L. J. Ch. 700; [1901] 2 Ch. 487; 85 L. T. 376; 49 W. R. 679; 66 J. P. 21—Cozens-Hardy, J.

3. CLERGY.

(a) *Bishop.*

Statute.]—4 Edw. 7 c. 30 is the *Bishoprics of Southwark and Birmingham Act*, 1904.

Confirmation of Election—Opposition—Right of Opposers to be Heard—Mandamus to Archbishop and Vicar-General to Hear Opposers.]—In proceedings for the confirmation of the election of a bishop, to which opposers have been summoned by a citation in the usual form, the archbishop or his vicar-general cannot entertain objections alleging that the bishop-elect has committed ecclesiastical offences; that he has published doctrines contrary to the Articles of the Church of England, and has been connected with societies formed to propagate doctrines and practices contrary to those Articles; and that he is not a prudent and discreet man, or a fit and proper person to fill the office of bishop. *Re v. Canterbury (Archbishop)* (No. 1), 71 L. J. K.B. 894; [1902] 2 K.B. 503; 86 L. T. 79; 50 W. R. 348—D.

Persons claiming to be heard in opposition to the election of a bishop may properly be re-

quired to give written notice of their objections before the actual ceremony of confirmation takes place. *Ib.*

(b) *Dean.*

Deanery of Manchester.]—6 Edw. 7 c. 19 is the *Deanery of Manchester Act*, 1906.

(c) *Archdeacon.*

Jurisdiction to Admit Churchwarden—Inhibition by Bishop during Visitation—Suspension during Inhibition.]—Where a bishop inhibits an archdeacon within his diocese from the exercise of his spiritual and ecclesiastical jurisdiction within his archdeaconry during the bishop's visitation, the jurisdiction of the archdeacon to admit to the office of churchwarden is suspended while the inhibition is in force, and the bishop has exclusive jurisdiction to admit. *Re v. Simpson* (1 Str. 609) explained. *Reg. v. Sowter*, 70 L. J. K.B. 322; [1901] 1 K.B. 396; 84 L. T. 36; 49 W. R. 338; 65 J. P. 355—C.A.

(d) *Incumbent.*

Resignation—Pension—Declaration of Bishop—Jurisdiction to Review.]—The Court has no power to review a declaration by a bishop under the Incumbents' Resignation Act, 1871, fixing the amount of the pension payable to a retiring incumbent out of the revenues of the benefice, though the amount so fixed may be shewn to exceed the maximum allowed by the Act—namely, one-third part of the annual value of the benefice. *Maning v. Hardy*, 20 T. L. R. 776—Darling, J.

(e) *Curate.*

Licence—"Examination and admission" by Bishop.]—In canon 48 of the Canons of 1603 (which provides that "no curate or minister shall be permitted to serve in any place without examination and admission of the Bishop of the diocese . . . having respect to the greatness of the cure and meetness of the party") the words "examination and admission" mean investigating and seeing whether a licence should be granted or not. *Re v. Liverpool (Bishop)*, 20 T. L. R. 485—D.

(f) *Ordination.*

"Brawling"—Reading Protest against Candidate for Ordination—Allegation of Impediment of Doctrinal Nature—"Notable crime" or "Impediment."]—A mere allegation that a candidate for priest's orders has been a party to, or taken part in, the service in a church in which breaches of prescribed ritual have taken place does not constitute a "notable crime" or "impediment" within the meaning of those words in the Service for the Ordering of Priests in the Book of Common Prayer. *Kensit v. St. Paul's Dean and Chapter*, 74 L. J. K.B. 454; [1905] 2 K.B. 249; 92 L. T. 601; 53 W. R. 622; 69 J. P. 250; 21 T. L. R. 426—D.

(g) *Administration of Sacraments.*

Reservation—Criminal Suit by Letters of Request—Monition.—The reservation of the Sacrament of the Lord's Supper is unlawful. In a criminal suit by letters of request promoted by the bishop of the diocese, the Court, being of opinion that the incumbent had been charged with an ecclesiastical offence, and that that offence had been sufficiently proved, directed a monition to issue to him requiring him to abstain from keeping or causing and permitting to be kept in his church, either over the altar or elsewhere, bread and wine which had been consecrated at a celebration of the Holy Communion and not consumed at or immediately after such celebration, and also from keeping, burning, or causing, or permitting to be kept burning, a light in front of the said consecrated bread and wine. *Oxford (Bishop) v. Henly*, [1907] P. 88; 23 T. L. R. 152—Archives Ct. of Canterbury.

(h) *Clergy Discipline.*

Jurisdiction—Charge of having been "convicted by a temporal Court of having committed an act constituting an ecclesiastical offence"—Conviction by Magistrates of Indecent Behaviour in a Church of the Church of England during Divine Service.—Indecent behaviour of a clergyman in a church of the Church of England during the celebration of Divine service, though punishable by magistrates under the Ecclesiastical Courts Jurisdiction Act, 1860, is an offence against the general ecclesiastical law. *Girt v. Fillingham*, [1901] P. 176—Consist. Ct. of St. Albans.

The Consistory Court of the diocese within which a clergyman holds preferment has jurisdiction under section 2 of the Clergy Discipline Act, 1892, to try and sentence him under that Act in case he is convicted by a temporal Court of having committed an act constituting an offence against ecclesiastical law, not being a question of doctrine or ritual, notwithstanding that the offence he is charged with is not an offence against morality. *Ib.*

Pretended Ordination of Priest by Incumbent of Parish Church, not being a Bishop—Sentence—Discretion—Deprivation—Suspension ab Officio et Beneficio.—It is an offence against ecclesiastical law for the incumbent of a parish church, not being a bishop, to purport to ordain a priest without having been given public authority to take upon himself the power of ordination. *St. Albans (Bishop) v. Fillingham*, [1906] P. 163; 22 T. L. R. 293, 332—Archives Ct. of Canterbury.

The Court treated the undoubted and admitted offences of the defendant in officiating in a Nonconformist chapel in the parish of another incumbent and in contumaciously disobeying the lawful commands of his ordinary as merged in, and overshadowed by, the offence of purporting to exercise the power of ordination of a bishop. *Ib.*

In a criminal suit by letters of request brought under the Church Discipline Act, 1840,

against an incumbent for having purported to ordain a layman as a presbyter of the Church of God, the defendant having stated at the hearing that he admitted and regretted his error, the Court did not pronounce sentence of deprivation against him, but decreed that he be suspended *ab officio et beneficio* for two years, and admonished him to abstain in future from the like offences, and condemned him in the costs of the proceedings. *Ib.*

Deprivation of Vicar—Court of Summary Jurisdiction—Separation Order—Persistent Cruelty.—An order made by Justices under the Summary Jurisdiction (Married Women) Act, 1895, for a separation between a clergyman and his wife on the ground of his "persistent cruelty," is not an order for judicial separation made "in a divorce or matrimonial cause" within the meaning of the Clergy Discipline Act, 1892, s. 1, sub-s. 1 (d); and where a bishop, in consequence of such an order having been made against a clergyman, has declared his living vacant in pursuance of the Clergy Discipline Act, 1892, such a declaration will be held to be unauthorised and invalid. *Sweet v. Ely (Bishop)*, 71 L. J. Ch. 771; [1902] 2 Ch. 508; 86 L. T. 679; 50 W. R. 520—Joyce, J.

"Brawling"—Reading Protest against Candidate for Ordination—Allegation of Impediment of Doctrinal Nature—"Notable crime" or "Impediment."—A mere allegation that a candidate for priest's orders has been a party to, or taken part in, the service in a church in which breaches of prescribed ritual have taken place does not constitute a "notable crime" or "impediment" within the meaning of those words in the Service for the Ordering of Priests in the Book of Common Prayer. *Kensit v. St. Paul's Dean and Chapter*, 74 L. J. K.B. 454; [1905] 2 K.B. 249; 92 L. T. 601; 53 W. R. 622; 69 J. P. 250; 20 Cox C.C. 829; 21 T. L. R. 426—D.

Obtaining Money under False Pretences—"Immoral act or immoral conduct."—To collect alms under false and fraudulent pretences is an "immoral act," and therefore an ecclesiastical offence under section 2 of the Clergy Discipline Act, 1892. *Fitzmaurice v. Hesketh*, 73 L. J. P.C. 53; [1904] A.C. 266; 90 L. T. 216; 20 T. L. R. 302—P.C.

"Immoral conduct"—No Indecency.—If the conduct of a clerk in holy orders is "unworthy of the character of ministers of religion," then he is guilty of "immoral conduct" within the meaning of section 2 of the Clergy Discipline Act, 1892, notwithstanding that no act of indecency is proved against him. *Sweet v. Young*, [1902] P. 37; 50 W. R. 96—Consist. Ct. of Rochester.

"Swearing and ribaldry"—"Immoral habit."—The rare use during a period of three years, on occasions of provocation, of objectionable language, does not constitute an "immoral habit" within the meaning of section 2 of the Clergy Discipline Act, 1892. *Moore v. Oxford (Bishop)*, 73 L. J. P.C. 43; [1904] A.C. 293; 90 L. T. 425—P.C.

Officiating without Leave of Incumbent of Parish and Contrary to Inhibition of Ordinary—Unconsecrated Building—Public Performance of

Divine Service—Monition.]—It is an ecclesiastical offence under the Church Discipline Act, 1840, for a clerk in holy orders of the Church of England to publicly perform any of the services of the Church of England without lawful authority in a parish without the consent and against the express wish of the incumbent of the parish, and such offence is aggravated where the accused clerk has in so acting disobeyed the inhibition of the Ordinary. The respondent was admonished from offending in the like manner in the future. *Nesbitt v. Wallace*, [1901] P. 354—Arches Ct. of Canterbury.

Criminal Suit against Lay Rector—Neglect to Repair Chancel—Jurisdiction.]—The Ecclesiastical Courts have no jurisdiction to entertain a criminal suit against a lay rector who has neglected to perform his duty of repairing the chancel of the church of which he is the rector, unless the chancel was out of repair at the time of the institution of the suit. *Neville v. Kirby*, [1898] P. 160—Consist. Ct. of Lichfield.

Leave to Appeal—Petition for—Enlargement of Time.]—In order to obtain an enlargement of time to appeal, as limited by the rules made under the Clergy Discipline Act, 1892, a perfect explanation must be given of the delay incurred. *Lee v. Atherton*, 74 L. J. P.C. 14; [1904] A.C. 805—P.C.

4. CHURCHWARDEN.

Corporate Entity.]—Churchwardens are not a corporation in the full sense of the word—they are not a corporate entity, and cannot sue or be sued by any corporate name—but they are a quasi-corporation for the purpose of holding land and the devolution of property. *Fell v. Charity Lands (Official Trustees)*, 67 L. J. Ch. 385; [1898] 2 Ch. 44; 78 L. T. 474; 62 J. P. 804—C.A.

Liability of Churchwardens and Overseers—Contract made by Vestry.]—The churchwardens and overseers of a parish are not, as such, liable to be sued in respect of a contract made by the vestry of the parish. *Klenck v. Farris*, 69 J. P. 41; 3 L. G. R. 89—C.A.

Vestry—Election of Parishioners' Churchwarden—Right of Minister to Vote.]—In the 89th Canon of 1603, which, being declaratory of the common law, affirms that, if the minister and parishioners of a parish cannot agree as to the appointment of churchwardens, the minister shall choose one and the parishioners another, the term "parishioners" means the parishioners as distinguished from the minister, and does not include the minister. *Rex v. Salisbury (Bishop)*, 70 L. J. K.B. 593; [1901] 2 K.B. 225; 84 L. T. 553; 49 W. R. 529; 65 J. P. 531—C.A.

Section 3 of the Vestries Act, 1818, which provides that every inhabitant of a parish present at a vestry who shall have been assessed and charged by the last poor rate shall be entitled to vote, does not upon its true construction alter the law as declared by the canon so as to entitle the minister to vote upon the election of the parishioners' churchwarden. *Ib.*

5. GRAVEYARD.

Burial.]—63 & 64 Vict. c. 15 is the *Burial Act, 1900*.

Provided by Burial Board—Addition to Burial Ground—Erection of Monuments—Incumbent's Fees—"Payable"—"Laid out and used"—Consecration.]—In 1893 a burial board purchased for burial purposes eight acres of land adjoining, but separated by a wall from, a burial ground of seventeen acres which had been provided by the board in 1854, and in respect of which the vicar of the parish received fees for burials and for the erection of monuments therein. In 1897 the wall was lowered and communication was effected between the eight acres and the seventeen acres, and the eight acres were laid out and adapted for burial purposes. On June 13, 1900, the Home Secretary sanctioned the division of the eight acres into consecrated and unconsecrated portions. On July 2, 1900, a petition for consecration of the former portion was sent to the bishop, but there was no actual consecration of the ground until October 13, 1900. The Burial Act, 1900, was passed on July 10, 1900. The first burial in the eight acres was in November, 1902, in the consecrated part:—*Held*, that the vicar had no right to fees in respect of the erection of monuments in the consecrated portion of the eight acres, inasmuch as before the passing of the Burial Act, 1900, the ground in question had not been actually consecrated, and therefore at the passing of that Act no fees were payable in respect of such ground within the meaning of section 3, sub-section 4 (i) of the Act. *Young v. Kingston-on-Thames, Surbiton, New Malden, and Coombe Joint Burials Committees*, 76 L. J. K.B. 382; [1907] 1 K.B. 416; 96 L. T. 134; 71 J. P. 121; 5 L. G. R. 481; 23 T. L. R. 218—C.A.

The expressions "payable" and "laid out and used" in the section considered. Decision of CHANNELL, J. (75 L. J. K.B. 225; [1906] 1 K.B. 338), affirmed on different grounds. *Ib.*

Purchase of Land—Powers of Local Authority—Approval of Secretary of State—"Provide."]—The expression "providing a burial ground" in the Burial Acts, 1852 and 1853, does not extend to the acquisition by purchase or otherwise of land for a burial ground so as to make the previous sanction of the Secretary of State necessary to the validity of an agreement for purchase. "Providing" is doing something to the land after it has been acquired. *Ward v. Portsmouth Corporation*, 67 L. J. Ch. 489; [1898] 2 Ch. 191; 78 L. T. 771; 46 W. R. 610; 62 J. P. 820—C.A.

Per LINDLEY, M.R.—Section 6 of the Burials Act, 1853, applies to new additions to burial grounds, as well as to new burial grounds. *Ib.*

Enlargement—Land "adjoining to an existing churchyard."]—A piece of land opposite to a churchyard, and separated from it by a public highway twenty feet wide, may be held to be "adjoining to an existing churchyard" within the meaning of section 1 of the Consecration of Churchyards Act, 1867, and can be consecrated under that Act. *Bateman (Baroness)*

and *Parker's Contract, In re*, 68 L. J. Ch. 330; [1899] 1 Ch. 599; 80 L. T. 469; 47 W. R. 516; 63 J. P. 345—Kekewich, J.

Faculty for Erection of Wall with Arcade on Disused Burial Ground—"Building"—Refusal of Faculty for Pictures at East End of Chancel of Parish Church—Discretion—Wishes of Parishioners.]—A faculty for the erection on a disused burial ground of a churchyard wall, one side of which would be so built as to form an arcade or covered way for the protection from the weather of frescoes proposed to be painted on the panels of that side of the wall which would be inside the churchyard, was granted, the Ordinary being of opinion that the wall or structure in question was not a "building" prohibited to be erected on a disused burial ground by the Disused Burial Grounds Act, 1884, and the Open Spaces Act, 1887. *St. Botolph (Vicar) v. Parishioners*, [1900] P. 69—Consist. Ct. of London.

Where the vestry of a parish and the petitioners are unanimous, or substantially so, in favour of accepting a presentation picture of merit for the decoration of their parish church, the introduction of the picture into the church may be properly sanctioned by a faculty, unless the picture appears to be likely to be abused by superstitious reverence, or be otherwise inappropriate in a church, or be such as might reasonably give offence to present or future parishioners; but where it was proposed that such a picture should be introduced into the church of an admirably worked parish, and conscientious objections which might be entertained by members of the congregation, without disparagement to the views of others in favour of it, were taken to it as a church decoration by a substantial minority of resident parishioners who were members of the Church of England, and it appeared that its introduction into the church would offend the religious feelings of that minority and introduce discord into the parish where it had never existed before, it was held to be the duty of the Court to refuse to grant a faculty for its introduction. *Ib.*

Instance of a faculty suit in which memorials and counter-memorials signed by parishioners were admitted in evidence by consent. *Ib.*

Addition—Right to Use for Interment—Approval of Home Secretary—Land Set Apart and in Part Used for Interment—Right to Build on Part not so Used—Disused Burial Ground.]—An addition to an existing burial ground is a new burial ground within the meaning of section 6 of the Burial Act, 1853. *Bosworth and Gravescend Corporation, In re*, 74 L. J. K.B. 810; [1905] 2 K.B. 426; 93 L. T. 226; 54 W. R. 39; 3 L. G. R. 849; 69 J. P. 337; 21 T. L. R. 608—C.A.

An Order in Council made in 1854 under the Burial Act, 1853, provided that no new burial ground should be opened in certain places without the approval of a Secretary of State. In 1859 an owner of a burial ground in a place mentioned in the Order acquired land adjoining the burial ground, and inclosed and set apart the whole of it for the purposes of interment without the approval of a Secretary of State. A part of the added land which had not been

used for interment was capable of being conveniently separated from the part used for interment so as to be available for building:—*Held*, that no part of the added land could be used for purposes of interment by reason of section 6 of the Burial Act, 1853, and that no part of it could be used for building purposes by reason of the prohibition contained in section 3 of the Disused Burial Grounds Act, 1884. *Ward v. Portsmouth Corporation* (67 L. J. Ch. 489; [1898] 2 Ch. 191) followed. *Ib.*

Reservation by Rector of Grave Space—Confirmatory Faculty Authorising Burial of Non-parishioner in Parish Churchyard—Order on Rector to Discontinue Burials of Non-parishioners not Dying in the Parish.]—With the concurrence of the incumbent of a parish church a non-parishioner petitioned the Ordinary to sanction by a confirmatory faculty the exclusive grant of the reservation for the sole use of herself, her executors, administrators, and assigns, of a portion of ground in the parish churchyard as a place of burial. The grant of the faculty was opposed by one of the churchwardens of the parish on the ground that the granting of it would be detrimental to the rights of the parishioners to be buried in the churchyard in preference to non-parishioners. At the hearing of the suit it appeared that the petitioner had paid to the incumbent a considerable extra burial fee for the grant of the reservation according to the custom of the parish; that the population of the parish only amounted to forty-six persons; that on the average the number of burials of parishioners was one per annum, and that there was room for about seventy interments in the churchyard, an addition to which had been consecrated some years back with a view of non-parishioners being buried there. The Court granted the faculty as prayed, but made an order on the incumbent that he should make no further grants of reservations of grave spaces to non-parishioners during his tenure of the living. *De Romana v. Roberts*, [1906] P. 332—Consist. Ct. of London.

Semble, the incumbent of a parish church may make grants of the reservation of grave spaces to non-parishioners on their paying to him, or in some cases to him and the churchwardens, special burial fees, but to complete their title to the grant a faculty from the Ordinary is necessary. *Ib.*

Footpath Across Churchyard for Use of Parishioners and Public—Proviso for Closing Footpath on One Day in the Year.]—In a faculty granted for a fenced-in footpath across a closed parish churchyard for the use of the parishioners with right of way for the public, a proviso was inserted for the footpath to be closed on one day in the year in order to shew that it remained an integral portion of the churchyard with certain limitations on its use. *St. John the Baptist, Cardiff (Vicar) v. Parishioners*, [1898] P. 155—Consist. Ct. of Llandaff.

User as Public Street of Portion of Consecrated Cemetery or Churchyard Closed for Burials.]—The ordinary has jurisdiction to grant a faculty authorising a portion of a consecrated cemetery or churchyard, closed for burials by Order in Council, to be used for widening a public street.

Any faculty granted for this purpose should contain exact particulars of the measurements of the portion of the cemetery or churchyard proposed to be used for the widening. *Bideford Parish, In re*, [1900] P. 314; 64 J. P. 743—Court of Arches.

Erection on Churchyard Closed for Burials—Schools and Parish Hall to be Used for Mission Services.]—The 3rd section of the Disused Burial Grounds Act, 1884, provides that after the passing of that Act it shall not be lawful to erect any buildings upon any disused burial ground (defined by that Act to mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein in pursuance of the Burial Acts, 1852 and 1853), except for the purpose of enlarging a church, chapel, meeting-house, or other place of worship:—*Held*, that the Ordinary had, without infringing the above section, jurisdiction to authorise by faculty the rebuilding and extension by way of enlargement of schools and a parish hall erected on a disused burial ground within the Act, and which were used for mission services for adults and children, and which it was intended to use when rebuilt for the same purposes supplemental to the services in the parish church, and to meet the growing wants of the parish. *St. James the Less, Bethnal Green v. Parishioners*, [1899] P. 55—Consist. Ct. of London.

Tombstone—Inscription—Control of Ordinary.]—Inscriptions proposed to be placed on the tombstones in a parish churchyard are in the first instance subject to the control of the incumbent of the parish, but any decision come to by him may be reviewed by the Ordinary on proper application being made to the Ecclesiastical Court of the diocese. *Pearson v. Stead*, [1903] P. 66—Consist. Ct. of Ripon.

—Onus of Proof.]—The onus of satisfying the Court that an inscription is unobjectionable lies upon the person who has caused the tombstone to be erected. *Ib.*

Court Fees—Duty of Solicitors.]—The solicitors in ecclesiastical suits are as officers of the Court personally responsible for and bound to pay into the registry the Court fees incurred by them on behalf of their respective clients; but the solicitor having so paid the fees is entitled, if his client is successful in the suit, to obtain an order on the unsuccessful party to recoup him for the payments made by him. *Ib.*

Burial within One Hundred Yards of a Dwelling-house — “Already” — Injunction.]—The word “already” in section 9 of the Burial Act, 1855, which provides that “no ground not already used as or appropriated for a cemetery shall be used for burials . . . within the distance of one hundred yards from any dwelling-house” without the consent of the owner, lessee, and occupier, has reference to the date of that Act; and the owner, lessee, or occupier of any dwelling-house is entitled to restrain the user for burials within the prescribed limit of any ground not used as or appropriated for a cemetery at the date of the passing of the Act. *Goddén v. Hythe Burial Board*, 75 L. J. Ch. 595; [1906] 2 Ch. 270; 95 L. T. 129; 4 L. G. R. 787; 22

T. L. R. 631—C.A. Affirming, 70 J. P. 285—Kekewich, J.

Removal of Remains from Consecrated to Unconsecrated Ground Subject to Grant of Licence from Secretary of State.]—The 25th section of the Burial Act, 1857, provides that, except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the Ordinary, it shall not be lawful to remove any body or the remains of any body which may have been interred in any place of burial without licence under the hand of one of her Majesty's Secretaries of State. The superior of St. Edmund's College—one of the Roman Catholic theological colleges in England—applied to the Court for a faculty to authorise the removal of the remains of a former superior of the college from their place of interment in a vault in the churchyard of a parish church in the diocese of London to a vault under the chapel of the college wherein three of the predecessors of the petitioner and the deceased lay buried. It appeared that the owner of the vault from which it was proposed to remove the remains of the deceased could not be discovered, but that the incumbent of the parish church in whom the freehold of the churchyard was vested and the next-of-kin of the deceased consented to the proposed removal. No evidence was given that the vault under the college chapel had ever been consecrated. The Court in its discretion granted the faculty; but, being of opinion that the vault under the college chapel was not a consecrated place of burial within the meaning of the above section, directed that the faculty should issue upon condition that it was not to be acted upon until a licence approving the place of re-interment had been obtained from a Secretary of State. *Talbot, In re*, [1901] P. 1—Consist. Ct. of London.

The removal of remains from unconsecrated places of burial being by the above section placed under the control of a Secretary of State, the Court cannot now, as it would have done before the passing of the Burial Act, 1857, refuse to exercise whatever jurisdiction it might possess to grant a faculty for the removal of remains to unconsecrated ground on account of the objection that the remains when removed would not be sufficiently protected from disturbance. *Ib.*

—Duty of Churchwardens — Preventing Vaults becoming Dangerous to Public Health.]—The churchwardens of a parish church wholly closed for burials, who, purporting to act under the provisions of an Order in Council under section 23 of the Burials Act, 1857, directing the removal and re-interment elsewhere of human remains underneath the church, do or cause to be done the acts therein directed without obtaining a faculty from the Ordinary, are guilty of an offence against the laws ecclesiastical, in respect of which they may be cited to appear to answer articles to be administered to them in a criminal suit. Section 23 of the Burials Act, 1857, provides (*inter alia*) that it shall be lawful for her Majesty, upon the representation of one of her Majesty's principal Secretaries of State, by and with the advice of her Privy Council from time to time, to order such acts to be done by or under the direction

of the churchwardens or such other persons as may have the care of any vaults or places of burial, for preventing them from becoming or continuing dangerous or injurious to the public health, and such churchwardens or other persons shall do or cause to be done all acts ordered as aforesaid. Orders in Council issued under the above section and served on the churchwardens of a parish church ordered that the churchwardens or the persons having the care of the vaults under the church should adopt or cause to be adopted the following measures—namely, that the whole of the human remains lying beneath the floor of the church should be removed, and reburied in a specified cemetery or in some other legal burial ground. In consequence of the service of these Orders in Council, the churchwardens, without having obtained any faculty from the Ordinary, pulled down all the pews in the church, took up the flooring and monumental slabs in the same, and removed certain coffins and human remains buried thereunder, for the purpose of re-interring them elsewhere. It appeared that burials in the parish had been by law wholly discontinued in the year 1853, and that since that year no burial was recorded to have taken place there:—*Held*, that the acts of the churchwardens, not having been authorised by a faculty, were illegal, and the Orders in Council afforded no justification for what had been done by them: such Orders being either wholly *ultra vires* or to be construed as merely directing an application for a faculty to carry out their terms. *Held, also*, that, on the petition of the rector of the parish church and the churchwardens, a faculty might issue authorising for sanitary reasons the removal of the remains and their re-interment in consecrated ground. *Lee v. Hawtrey*, [1898] P. 63—Consist. Ct. of London.

— **Use of Strip of Closed Churchyard for Widening of Public Highway**—Joint Petition by Incumbent and Churchwardens and Highway Authority—Practical Necessity for Proposed Works—Issue of Faculty to Incumbent and Churchwardens.]—Where it appeared that the widening of a public highway abutting on a churchyard of a parish church would be a benefit both to the congregation attending the church and to the public in general, and that in the opinion of the highway authority—a municipal corporation—it was practically necessary that the widening should be effected by including therein a strip of the churchyard closed for burials by Order in Council, a faculty was granted to the incumbent and churchwardens of the church authorising the removal of human remains interred in the portion of the churchyard required for the widening and the setting back of the churchyard fence so as to throw such portion of the churchyard into the highway, on the Ordinary being satisfied that an adequate consideration would be paid by the corporation in return for the rights sanctioned. The corporation had joined in petitioning for the faculty, but was omitted from the grant, the Ordinary being of opinion that it was preferable that the grant should be made to individuals. *St. Nicholas, Leicester v. Laughton*, [1899] P. 19—Consist. Ct. of Peterborough.

Contents of Coffin—Examination of—Ex parte

Application—Licence of Secretary of State—Jurisdiction of Consistory Court.—It is within the jurisdiction of the Consistory Court of London to entertain an *ex parte* application for a faculty for the examination of the contents of a coffin buried in consecrated ground. *Reg. v. Tristram*, 67 L. J. Q.B. 857; [1898] 2 Q.B. 371; 79 L. T. 74; 46 W. R. 653—D.

Section 25 of the Burial Act, 1857, does not make the licence of the Secretary of State a condition precedent to the granting of such an application. *Ib.*

Disinterment — Jurisdiction of Consistory Court.—A Consistory Court has no jurisdiction to order the disinterment of a body, or to issue a citation to a cemetery company to come before the Court and shew cause why an order should not be made on the company for the disinterment of a body. *Reg. v. Tristram*, 80 L. T. 414; 47 W. R. 639; 63 J. P. 391—D.

— **Acceptance of Letters of Request Granted in Aid of Probate Action—Opening Vault and Coffin—Licence of Secretary of State.**—The Chancellor of the Diocese of London, in the exercise of his judicial discretion, may accept letters of request, signed by the President of the Probate, Divorce, and Admiralty Division, requesting that in aid of the trial of an issue in a probate action a faculty may be granted authorising the opening of a vault in a consecrated burial-ground in the diocese, and the opening and inspection of a coffin there buried, for the purpose of identification, and issue a faculty to give effect to such letters of request:—*Seem*, that a faculty issued according to the tenor of such letters of request may be lawfully acted upon without a licence of one of her Majesty's principal Secretaries of State having been obtained. *Druce v. Young*, [1899] P. 84—Consist. Ct. of London.

Faculty Authorising Erection of Building in Contravention of Disused Burial Grounds Act, 1884—Meaning of Exemption Permitting Building to be Erected “for the purpose of enlarging a church, chapel, meeting-house or other places of worship.”—Section 3 of the Disused Burial Grounds Act, 1884, provides that after the passing of that Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship. The Ordinary sanctioned by faculty the erection on a portion of the churchyard of a parish—a disused burial ground within the above Act of 1884—a large hall capable of seating 240 persons, abutting on the church on its north side immediately behind the chancel, and communicating with the church by means of a door or doors, together with two vestries on the east side of the church, and lavatories and a kitchen on the sides of the hall, the hall to be used when required as a vestry and for Sunday schools and mission services and other parochial purposes. Citations to lead these faculties had been duly served, but no appearance had been entered thereto, and the decrees in pursuance of which they had been granted were not appealed against. The statutory authority to enforce the Disused Burial Grounds Act shortly afterwards instituted a suit in the Consistory Court of London, and in their peti-

tion prayed that the faculty should be revoked or amended in such manner that no authority should be given therein to contravene section 3 of the Act of 1884:—*Semble*, that the faculty sought to be revoked authorised an infringement of the Disused Burial Grounds Act, 1884, in so far as it sanctioned the erection of the parish hall and the lavatories and kitchen connected with it, and was to that extent a nullity; that section 3 of that Act did not extend to render lawful the erection of buildings which, though under the same roof as the church and in physical communication with it, were intended to be used for ecclesiastical purposes for which the church would not be used in ordinary course, and that so far as section 3 of the Act related to churches it only permitted buildings to be erected which were in physical communication with the church and enlarged it for the main and primary purpose of religious worship. *London County Council v. Dundas*, [1904] P. 1—Archers Court.

Burial Fees—Right of Incumbent of Parish to—Interment of Nonconformist without Rites of Church of England—Absence of Sanction of Secretary of State to Consecration of Part of Cemetery.—Where ground is consecrated in due form by the bishop of the diocese it is equally consecrated whether the sanction of the Secretary of State has been obtained under section 7 of the Burial Act, 1853, or not. But a vicar of the parish who performs no services in respect of the burial of a Nonconformist person, which takes place with the rites of the community to which he belongs, is not entitled under section 3, sub-section 4 of the Burial Act, 1900, to any fees in respect of the burial. *Williams v. Briton Ferry Burial Board*, 74 L. J. K.B. 840; [1905] 2 K.B. 565; 92 L. T. 696; 54 W. R. 187; 3 L. G. R. 859; 69 J. P. 313—D.

Incumbent's Fees—Burial Ground Provided by Burial Board—Addition to Burial Ground—"Laid out and used."—In 1854 a burial board purchased a site of seventeen acres for the purpose of providing a burial ground, and the incumbent of the parish received fees for burials and for the erection of monuments therein. In 1893 the board purchased eight acres of land adjoining the burial ground for burial purposes. The eight acres were separated from the burial ground by a wall, which in 1897 was lowered and communication effected between the old and new portions of the burial ground, and the eight acres were laid out and adapted for burial purposes. The area of eight acres was divided into consecrated and unconsecrated parts, in manner sanctioned by the Home Secretary, and in October, 1900, the former was in fact consecrated. No portion of that area was used for the purpose of burial until November, 1902:—*Held*, that the area of eight acres had not been "laid out and used" before the passing of the Burial Act, 1900 (July 10, 1900), within the meaning of section 3, sub-section 4 of the Act, and that the incumbent was therefore not entitled to receive fees in respect of the erection of monuments therein. *Young v. Kingston-on-Thames, Surbiton, New Malden, and Coombe Joint Burials Committee*, 75 L. J. K.B. 225; [1906] 1 K.B. 338; 94 L. T. 196; 54 W. R. 507; 70 J. P. 107; 4 L. G. R. 121; 22 T. L. R. 163—Channell, J.

Burial Board—Mandamus to.]—See *MANDAMUS*.

Churchyard—Liability to be Rated.]—See *POOR LAW*.

Disused Burial Ground—Preventing Acquisition of Easement.]—See *METROPOLIS*.

6. GLEBE.

Agreement for Sale—Purchase not Completed—Purchase-money Payable to Ecclesiastical Commissioners—Right of Commissioners to Bring Action.]—Where the Ecclesiastical Commissioners have approved of a sale of glebe lands under the Ecclesiastical Leasing Act, 1858, and the purchase has not been completed, they have a right, and it is their duty, to bring an action to obtain payment of the purchase-money. *Ecclesiastical Commissioners v. Pinney* (No 1), 68 L. J. Ch. 30; [1899] 1 Ch. 99; 79 L. T. 604; 47 W. R. 186—C.A.

Patron—Consent—Infant Tenant in Tail of Advowson—Trustees with Power of Presentation.]—Where an advowson is settled to the use of an infant as tenant in tail, with a power for the trustees of the settlement to present during his infancy, the trustees are not patrons, and cannot give the consent of the patron required by a private Act of Parliament to the sale of glebe. Such consent must be given by the person appointed by the Act—that is, in this case, the infant's guardian. *Leigh v. Leigh*, 71 L. J. Ch. 195; [1902] 1 Ch. 400; 86 L. T. 219; 50 W. R. 380—Swinfen Eady, J.

Purchase of New Vicarage House—Borrowing of Purchase-money—Security—Mortgage of Revenues of Living.]—It is essential under the Clergy Residences Repair Act, 1776—first, that money borrowed for the purposes of the Act—for example, purchase of a new residence—should be borrowed, and security given, before the money is applied—that is, before the purchase; and secondly, that the money when borrowed should be paid to and applied by, not the incumbent, but a nominee appointed by the bishop, patron, and incumbent. *Lidbetter v. Hatch*, 76 L. J. Ch. 202; [1907] 1 Ch. 404; 96 L. T. 880; 23 T. L. R. 260—Warrington, J.

A vicarage house, being deemed unsuitable, was sold with the consent of the bishop and patron, and the proceeds paid to Queen Anne's Bounty, and a new vicarage house was, with the approval of the bishop, patron, and Queen Anne's Bounty, purchased with the proceeds and a further sum of 875*l.* which was borrowed by the incumbent from the plaintiffs. After the purchase was completed the bishop and patron executed a form of consent purporting to be in compliance with the form in the schedule to the Clergy Residences Repair Act, 1776, and a mortgage, purporting also to be in accordance with the form in the schedule, was executed of the revenues of the living to the plaintiffs to secure the 875*l.*:—*Held*, that the mortgage, being subsequent to the application of the money (and no nominee having been appointed to receive and apply it), did not comply with the requirements of the Act, and was invalid. *Id.*

Lien on Vicarage House.]—The new vicarage had been sold, another had been bought with a portion of the proceeds, and the balance was in the hands of Queen Anne's Bounty:—*Held*, that the plaintiffs had not a lien on the house or balance. *Ib.*

Compulsory Purchase—Payment out to Limited Owner.]—*See LANDS CLAUSES ACT.*

7. TITHES

Apportionment—Map—Custody—Right of Incumbent—Resolution of Parish Council—Confirmation by County Council—Jurisdiction of Justices.]—Where a parish council has passed a resolution that documents relating to tithes, in the possession of the incumbent of the parish, shall be placed in their custody, and such resolution has been confirmed by an order of the county council, Justices have power, under section 28 of the Tithe Act, 1860, to make an order that the documents shall be removed from the custody of the incumbent and shall be deposited with the parish council. *Lewis v. Poole*, 67 L. J. Q.B. 73; [1898] 1 Q.B. 164; 77 L. T. 369; 46 W. R. 93; 61 J. P. 776—D.

Liability of Occupier under Contract before Passing of Tithe Act, 1891—Payment by Landowner—Remedy against Occupier—Distress.]—Where an owner of land has paid tithe-rent charge, which by lease executed before the passing of the Tithe Act, 1891, his tenant covenanted to pay, his remedy to recover the sum so paid by him from his tenant is by distress alone, section 1, sub-section 3 of the Act being an absolute bar to the maintenance of an action for its recovery. *Church v. Maasted*, 67 L. J. Q.B. 823—Day, J.

Collectors—Refusal by Inhabitants to Appoint—Proper Remedy.]—Where under a local Act the inhabitants of a township were required to nominate yearly certain persons as tithe collectors, and they refused to make any nomination except under conditions not permitted by the Act, the Court granted a *mandamus* requiring them to fulfil their statutory duty. *Reg. v. Lancaster Inhabitants*, 64 J. P. 280—D.

Agreement by Tenant to Pay—Validity.]—*See LANDLORD AND TENANT.*

8. FACULTY.

Irrevocability of Faculty except for Fraud.]—A faculty granted by the Ordinary after citation, and unappealed against, cannot, in the absence of the consent of all the parties interested, be revoked for any cause other than fraud. *London County Council v. Dundas*, [1904] P. 1—Arches Court. *And see CHURCH (ORNAMENTS) AND CHURCHYARD.*

9. CONSISTORY COURT.

Chancellor of Diocese—Jurisdiction—Defect on Face of Proceedings—Prohibition—Letters Patent—Construction—Reservation—Validity.]—By letters patent in ancient form a bishop for himself and his successors conferred on the

chancellor of the diocese authority, in the absence of the bishop, to determine all spiritual and ecclesiastical causes in the Consistory Court, "nevertheless first consulting us and our successors and having our consent in case either party earnestly crave our judgment." The patent also reserved to the bishop and his successors "equally to examine and determine every cause in our proper person in our Court of Consistory." A suit having been brought for the removal of certain ornaments from the parish church, the respondents to the suit pleaded in their answer that they earnestly craved the judgment of the bishop. The petitioner pleaded in his reply that the consent of the bishop was not necessary to the determination of the cause. The chancellor held that he had jurisdiction, and, without consulting the bishop or obtaining his consent, determined the cause in favour of the petitioner:—*Held*, first, that assuming the reservation in the patent was valid, the jurisdiction of the chancellor was conditional upon his consulting the bishop and obtaining his consent to the determination of the cause, and that, not having done this, the chancellor had acted without jurisdiction; secondly, that the want of jurisdiction appeared upon the face of the proceedings in the cause, and that a prohibition would lie; thirdly, that the reservation in the patent was valid. *Res. v. Tristram*, 71 L. J. K.B. 418; [1902] 1 K.B. 816; 86 L. T. 515; 50 W. R. 477—C.A.

The Chancellor of the diocese of Chichester, who by his patent was empowered to hear and decide ecclesiastical suits "nevertheless first consulting us" [the bishop] "and our successors and having our consent in case either party earnestly craves our judgment," heard a cause in which one of the parties earnestly craved the judgment of the bishop, sitting alone, the bishop not being present, and determined it, delivering judgment without consulting the bishop, and decreeing a faculty to issue for the removal of the illegal ornaments referred to in the petition, holding that the validity of the reservation in his patent in favour of the bishop was a matter for the determination of the temporal Courts; it being within the province of these Courts alone to decide whether a custom for the bishop to exercise the right reserved to him by the patent was valid in law. *Semble*, the custom in question—that is, a custom for the bishop to veto a judgment come to after the hearing of a suit by the Chancellor, would be unreasonable and bad in law and not a legal custom, as no trace of its exercise could be found in recent times or since the Reformation. *Davey v. Hinde* (No. 1), [1901] P. 95—Chichester Consist. Ct.

10. APPEAL.

Leave—Enlargement of Time for Appealing.]—An order of deprivation under the Clergy Discipline Act, 1892, having been made by the bishop against the petitioner, more than six months elapsed between the judgment and the lodging of a petition for an enlargement of the time to appeal under rule 90. No adequate explanation was given of the delay:—*Held*, that the petition must be dismissed. *Lee v. Atherton*, 74 L. J. P.C. 14; [1904] A.C. 805—P.C.

Practice—Dismissal of Appeal without Hearing

Argument—Surrogate.—Where on an appeal by promoters it appeared from the process transmitted to the Arches Registry that the Court below had no jurisdiction over the cause in which the appeal was asserted and might be liable to be stopped by a writ of prohibition if it entertained the appeal, the Court of Arches, having before it an application by the appellants for leave to proceed with the appeal, notwithstanding the proper time for filing the appellants' proxy had elapsed, dismissed the appeal with costs without hearing arguments from either the appellants or the respondent. *Ib.*—Court of Arches.

—**Special Leave to Appeal.**—The mere suggestion that evidence might be given which would qualify the evidence acted upon by the Consistory Court is no ground for granting special leave to appeal in a case in which, under the Clergy Discipline Act, 1892, the defendant did not avail himself of the opportunity of testifying on his own behalf. *Evans v. Woods*, 69 L. J. P.C. 82; [1900] A.C. 338—P.C.

11. OTHER MATTERS.

Advowson — Trust to Present — Charitable Trust.—See CHARITY.

Advowson in Gross—General Words of Devise.—See *Hodgson, In re*; *Taylor v. Hodgson*, 67 L. J. Ch. 591; *post*, WILL.

Burial—Transfer of Powers to Urban Council—Charge on Poor Rate.—See *Rex v. Connah's Quay Overseers*, 70 L. J. K.B. 651; *post*, LOCAL GOVERNMENT.

Churchyard—Liability to be Rated.—See POOR LAW.

Clergy—Income Tax.—See REVENUE.

Disused Burial Ground—Open Space—Erection of Hoarding.—See METROPOLIS.

Easter Offerings—Liability to Income Tax.—See REVENUE.

Ecclesiastical Charity.—See CHARITY.

Inhabitants of "Parish"—Several Townships.—See CHARITY.

Land Vested in Bishop—Settled Land Act.—See SETTLED LAND.

Queen Anne's Bounty.—See APPORTIONMENT.

Rector's Rate—"House."—See POOR LAW AND METROPOLIS.

Repairs to Chancel—Application of Purchase-Money.—See LANDS CLAUSES ACT.

Transfer of Property of Vicar and Church-wardens to Borough Council.—See METROPOLIS.

Vestry—Qualification.—See LOCAL GOVERNMENT.

EDUCATION.

See SCHOOL.

ELECTION (PARLIAMENTARY).

1. *Statute*, 766.
2. *Qualification*, 766.
 - (a) *Generally*, 766.
 - (b) *Owner*, 767.
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7. *Voting*, 780.
8. *Court*, 780.
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10. *Personation*, 781.
11. *Petition*, 781.
12. *Other Matters*, 782.

1. STATUTE.

63 & 64 Vict. c. 8 is the *Electoral Disabilities (Military Service) Removal Act*, 1900.

2. QUALIFICATION.

(a) Generally.

Payment of Rates—Tender.—Actual payment of poor rates due is an essential ingredient for obtaining the franchise; tender is not equivalent to payment so as to support the qualification. *Kennedy v. Buchanan*, [1903] 2 Ir. R. 484—C.A.

Borough Voter Possessing One Qualification Claiming Another—Double Qualification—Notice of Selection—Appeal.—A borough voter, entered on the list of parliamentary voters as qualified to vote in respect of his place of abode, preferred a claim for a qualification in respect of his business premises situate elsewhere in the borough. At the opening of the first Revision Court he delivered a notice of selection under section 28, sub-section 14 of the Parliamentary and Municipal Registration Act, 1878, requiring the Revising Barrister to retain his name on the list of voters in respect of the qualification set out in his claim—that is, his business premises—and after it had been allowed applied that his former qualification—that is, his place of abode—should be marked with a note that he was not entitled to vote in respect of it:—*Held*, that the notice of selection was invalid, for when it was given the claim had not been adjudicated upon, and therefore the voter was not then possessed of a double qualification; and, further, that section 42 of the Registration Act, 1843, conferred no right of appeal against the refusal of the Revising Barrister to act upon the notice. *Jones v. Munro*, 68 L. J. Q.B. 28; [1899] 1 Q.B. 109; 79 L. T. 500; 47 W. R. 109—D.

Alteration of Boundaries—Lands Transferred by Local Act to City of London except for Rating Purposes.]—By the Metropolitan Meat Market Act, 1860, the Corporation of the City of London were empowered to acquire certain lands then in the parish of S., which was and is outside the City. The Act provided that the lands when acquired by the Corporation should, except for the purposes of rating, as therein mentioned, be deemed to be in the City; but that they should continue to be assessed to the land tax, tithes, and rates of the parish of S. upon their existing assessable value; and that they should not be otherwise assessed in respect of those charges to the parish of S. or to any other parish:—*Held*, that the lands acquired were, for the purposes of the registration of electors, part of the City of London and not of the parish of S. *Pickard v. Preston*, 1 Smith, 296; 51 W. R. 156; 67 J. P. 13; 1 L. G. R. 110—D.

(b) *Owner.*

Freehold Cottage Inhabited by Servant having Service Vote—Right of Master to Freeholder's Vote in Respect of Cottage so Occupied.]—The owner of a freehold in a borough resided on the premises, and in respect of such residence was on the occupation list of the register for the borough; but a cottage in the grounds was occupied by a servant, who was an inhabitant occupier within the meaning of section 3 of the Representation of the People Act, 1884, by virtue of his service. On a claim by the owner to a freehold qualification in the county in which the borough was situated in respect of the cottage,—*Held*, that the owner did not, by virtue of section 3 of the Act of 1884, cease to occupy the cottage within the meaning of section 24 of the Representation of the People Act, 1882, even though his servant was an "inhabitant occupier" within the meaning of section 3 of the Act of 1884, and that he therefore was not entitled to a freehold vote for the county. *Brooks v. Baker*, 75 L. J. K.B. 41; [1906] 1 K.B. 11; 94 L. T. 97; 54 W. R. 195; 70 J. P. 24; 4 L. G. R. 111; 1 Smith, 465; 22 T. L. R. 36—D.

Tithe Rentcharge.]—A person is not entitled to have his name inserted in the parliamentary list of ownership voters as the owner of "freehold tithes" or "tithe rentcharge" unless he is the owner of the whole of the tithe rentcharge of a rectory, vicarage, chapelry, or benefice to which an apportionment of tithe rentcharge shall have been made in respect of any portion of tithes. *Reade v. Richards*, 63 J. P. 759—D.

Freehold Tithes.]—A person was entered in the Parliamentary list of ownership voters in respect of a qualification described as "freehold tithes," and the qualifying property was entered in the fourth column as "Bullock and others." Upon objection taken, the Revising Barrister found the qualification proved, and amended the entry by altering the third and fourth columns respectively to "Tithe rentcharge" and "Tuffley Court." Upon appeal it appeared from the conveyance, dated January 13, 1888, under, which the voter held the property, and which was made part of the Case stated by the Revising Barrister, that the voter's interest

comprised a portion only of a tithe rentcharge formerly payable to the Dean and Chapter of Gloucester, and that it was not an apportionment to a rectory, vicarage, chapelry, or benefice:—*Held*, that, as the case fell within the prohibition and not within the exception of section 4, sub-section 1 of the Representation of the People Act, 1884, and did not come within the saving clause of section 10 of the Act, the vote must be disallowed. *Reade v. Richards*, 1 Smith, 236—D.

Borough Franchise—County of a Town—New Borough including County of a Town—Right of Freeholders to Borough Vote.]—Previously to the passing of the Redistribution of Seats Act, 1885, freeholders in the county of the town of H. were entitled to vote in respect of their freeholds. By section 11 of that Act a new borough of P. and H. was constituted comprising the places previously included in the distinct constituencies of P. and of H. The name of the appellant, who had been entitled to vote as a freeholder in H., appeared on the list of electors for the new borough of P. and H., the nature of his qualification being described in the third column as "freehold house":—*Held*, that the appellant's qualification did not confer upon him the right to vote for the borough of P. and H. *James v. Iveney*, 70 L. J. K.B. 263; [1901] 1 K.B. 193; 83 L. T. 587; 64 J. P. 791; 1 Smith, 249—D.

Pew Rents—Collection by Churchwardens—Payment to Vicar.]—Where the pew rents of a church were more than 40s. per annum and were collected by the churchwardens as agents for the vicar, and were handed over to and received by him for his own absolute use and benefit,—*Held*, this could constitute a freehold interest so that the vicar was entitled to have his name inserted in the list of voters. *Vickers v. Selwyn*, 89 L. T. 747; 52 W. R. 153; 68 J. P. 9; 1 Smith, 325—D.

Haverfordwest.]—Freeholders within the county of the town of Haverfordwest are not as such entitled, since the passing of the Redistribution Act, 1885, to be registered as voters for the borough of Pembroke and Haverfordwest. *James v. Iveney*, 64 J. P. 791—D.

(c) *Occupation.*

Occupation of Land without a Building.]—Land by itself without a building is a qualifying subject for the burgh occupation franchise as enacted by section 5 of the Representation of the People Act, 1884. *Bogie v. McGowan*, [1907] S.C. 391—Ct. of Sess.

"Other building."]—The words "other building" in the collocation "house, warehouse, counting-house, shop, or other building" (*cf.* section 27 of the Representation of the People Act, 1832, and section 31 of the Municipal Corporations Act, 1882), are to be construed as including only such buildings as are *ejusdem generis* with the buildings specifically enumerated—that is—buildings for residential or for commercial (including agricultural) purposes. *Duncan v. Jackson*, 8 F. 323—Ct. of Sess.

Occupation by Husband of House Owned by

Wife.]—A husband resided with his wife in a house of which she was the owner. Every four weeks he paid her a fixed sum as rent, for which she gave a receipt and which was entered in a rent-book, and he also paid the rates:—*Held*, that the husband occupied the house as tenant, and was entitled to have his name inserted in Division I. of the occupiers' list of voters for the county. *Hall v. Michelmores* (86 L. T. 17; 50 W. R. 172; 1 Smith, 269) distinguished. *Pear v. Merriman*, 73 L. J. K.B. 183; [1904] 1 K.B. 80; 89 L. T. 745; 52 W. R. 141; 68 J. P. 37; 2 L. G. R. 139; 1 Smith, 318; 20 T. L. R. 48—D.

Ordinary Dwelling-house—Inhabitant Occupier—Lodger—Landlord Resident in House—Prima Facie Proof of Ground of Objection—Evidence to Rebut Objection.]—Where the name of a person has been inserted in Division I. of the occupiers' list by the overseers, and an objection has been made to the claim on the ground that the claimant (who also claimed a lodger's vote) has not occupied the qualifying premises as an inhabitant occupier of a dwelling-house for twelve months preceding July 15, but was in fact within such period a lodger in apartments, and did not occupy them free from the control of the landlord, the Revising Barrister—who has found as facts, first, that the house was an ordinary dwelling-house; secondly, that the landlord resided in the house; and thirdly, that such landlord was rated for the entire house as a separate tenement, and has held that the facts so found were *prima facie* proof of the ground of objection—is not, in the absence of any other evidence, bound to accept a document signed by the claimant and his landlord and containing statements to the effect that the landlord has no control over the claimant's rooms, as evidence rebutting the *prima facie* proof of the objection. The question is a question of fact for the decision of the Revising Barrister, and under section 65 of the Parliamentary Registration Act, 1843, no appeal lies from such decision. *Kent v. Fittall* (75 L. J. K.B. 310; [1906] 1 K.B. 60) explained and held applicable. Decision of the Divisional Court (76 L. J. K.B. 114; [1907] 1 K.B. 126) affirmed. *Douglas v. Smith*, 76 L. J. K.B. 969; [1907] 2 K.B. 568; 96 L. T. 826; 71 J. P. 433; 5 L. G. R. 1004; 2 Smith, 12; 23 T. L. R. 612—C.A.

Part of House—Prima Facie Evidence of Objection—Landlord Living in House.]—Proof of the fact that the landlord lives in the same house as the tenants of the various rooms in it is not in every case necessarily *prima facie* proof of the ground of objection to the overseers' list that the tenants did not occupy the rooms respectively as owners or tenants. Apart from any other facts, they generally afford *prima facie* proof of the ground of objection; but there may be circumstances peculiar to a particular town or place which, in the opinion of the Revising Barrister, who has investigated the facts, prevents that from being *prima facie* proof. It is in each case a question of fact for the Revising Barrister. *Rex v. Bell*; *Kent, ex parte*, 71 J. P. 542—D.

Receipt of Pew-rents—10% in Amount—"Occupation" of Church.]—The receipt of pew-rents of an amount of 10% and upwards annually by

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the vicar of a district parish, in whom, on induction, the freehold of the site of the church becomes vested, does not, either by itself or taken in connection with the fact that the legal possession of the land and church is in the vicar, make him an "occupier" of land within the meaning of section 24 of the Representation of the People Act, 1832, so as to disqualify him from being registered as a county voter in respect of his freehold benefice. *Wolfe v. Surrey County Council (Clerk)*. *Reeve v. Same*, 74 L. J. K.B. 161; [1905] 1 K.B. 439; 92 L. T. 114; 53 W. R. 264; 69 J. P. 22; 3 L. G. R. 407; 1 Smith, 378; 21 T. L. R. 153—D.

"Occupier as owner or tenant"—Wife Owner—Husband Ratepayer.]—A. resided with his wife B. in a house of which B. was the owner. A. paid all rates and taxes of the house and provided for the household generally. There was no other evidence that A. occupied as B.'s tenant. A. applied to be put on the register of voters as "resident occupier as . . . tenant" of the house, within section 3 of the Representation of the People Act, 1867:—*Held*, that, while if A. and B. had not been husband and wife the evidence might be sufficient to give rise to a presumption that A. occupied as tenant of B., the fact that A. and B. were husband and wife explained why A. resided in B.'s house and prevented any such presumption from arising. *Hall v. Michelmores*, 86 L. T. 17; 50 W. R. 172; 65 J. P. 759; 1 Smith, 269—D.

Claim by Husband as Sub-tenant of his Wife.]—A. claimed to have his name inserted in the roll of voters for a county as sub-tenant of a dwelling-house. The house in respect of which the claim was made belonged to a railway company, and was occupied by A.'s wife in return for her services as gatekeeper at a level crossing close to the house. A. lived in the house with his wife, and the furniture belonged to him. The manager of the railway company in a letter to A.'s solicitor stated that, with a view to enabling men in his client's position to exercise the franchise, there would be no objection "to let the houses occupied by them to their wives, with power to them to sub-let the houses to their husbands, subject to the conditions contained in the missive, one of which would be a condition that, should they cease at any time to be servants of the company, they and their sub-tenants will immediately vacate the houses." No such missive by the railway company to his wife was in fact granted. The wife, by an agreement, let the house to her husband, and he paid rent to her:—*Held*, that A. did not occupy the house as sub-tenant to his wife, and was not entitled to have his name inserted in the roll of voters. *Milne v. Murray*, [1907] S.C. 396—Ct. of Sess.

"Promotion to an office"—Wesleyan Minister.]—The appellant, a Wesleyan minister, was, in August, 1901, appointed by the Wesleyan Conference to the ministry of the Gloucester circuit in succession to a previous Wesleyan minister, and the appellant, in August, 1901, entered as such minister into the occupation of the manse, in the city of Gloucester, vacated by the outgoing minister. The manse, which was vested in trustees, was occupied by each successive

minister rent free, but the minister in occupation was personally liable for the rates. The appellant's name was entered in Division III. of the occupiers' list of voters of the city of Gloucester in respect of the said manse as a dwelling-house, and was objected to, on the ground that the appellant had not in fact occupied the qualifying premises during the whole of the qualifying period. The appellant contended that he had succeeded to the qualifying property by "promotion to an office"—namely, the ministry of the Gloucester circuit, and that the occupancy and rating of the preceding minister was equivalent to the occupancy and rating of himself within section 33, subsection 1 of the Municipal Corporations Act, 1882. Save as aforesaid, no evidence was produced at the revision Court of the terms of the deed of trust under which the qualifying property (the manse) was held. The Revising Barrister held that the appointment to the ministry of the Gloucester circuit was not "promotion to an office" within the section, and accordingly allowed the objection and expunged the appellant's name. The appellant duly appealed, and the Revising Barrister, in stating a Case, appended to the Case as an exhibit the deed of trust under which the qualifying property was held, and added a note that this document was not produced in evidence at the revision Court:—*Held*, that the Court could not regard anything which was not in evidence before the Revising Barrister at the Revision Court, and that upon the evidence before him there was nothing to shew that he had come to a wrong conclusion, and consequently that his decision must be affirmed. *Foster v. Mulhall* (10 Ir. C.L. R. 592) discussed and explained. *Williams v. Blakeway*, 1 Smith, 304; 88 L. T. 231; 1 L. G. R. 69; 51 W. R. 127; 67 J. P. 11—D.

Occupation as Owner or Tenant—"Breadwinner."—A claimant to a vote on the Occupiers' List occupied with his wife and family a house of which his mother, who had no other means of support, was owner. The mother also lived in the house, and in respect of it she was entered in the rate-book as occupying owner. The son was the breadwinner, and maintained the household, and paid the rates and taxes out of his earnings:—*Held*, upon these facts, that there was no evidence that the claimant occupied as owner or tenant, and that he was not entitled to a vote. *Loveridge v. Gardom*; *Gillo's Case*, 1 Smith, 186—D.

A son after the death of his father continued to live with his mother (who was incapable of supporting herself), and his wife and family, in a house of which his father had been tenant, but in respect of which his mother's name had been and remained on the rate-book. The son was the breadwinner, and paid the rent, rates, and taxes, and maintained the household out of his earnings, but his name was not substituted for his father's on the rent-book:—*Held*, that there was evidence to support the Revising Barrister's decision that the son occupied as tenant, and was entitled to a vote. *Loveridge v. Gardom*; *Matthew's Case*, 1 Smith, 186—D.

"Dwelling-house joint"—Household Fran-

chise—Occupation Franchise.—Where the entry of qualification in division 1 of the occupiers' list of voters for a county is stated to be "dwelling-house joint," it need not necessarily be taken to be a claim for household franchise, which would be bad, but may be treated as a claim for occupation franchise. *Townshend v. St. Marylebone Overseers* (41 L. J. C.P. 25; L. R. 7 C.P. 143) and *Druitt v. Gosling* (58 L. J. Q.B. 109) approved and followed. *Bagley v. Butcher*, 67 L. J. Q.B. 326; [1898] 1 Q.B. 67; 77 L. T. 525; 46 W. R. 189; 1 Smith, 137—D.

Claim of Two Joint Occupiers—Value of Premises only 20l.—Third Person already on Overseers' List, Unobjected to.—K. and W. claimed to have their names inserted in Division I. of the occupiers' list in a Parliamentary county, in respect of a 10l. occupation qualification, the nature of their qualification as described in their claims being "offices (joint)." The qualifying premises consisted of a house of the clear yearly value of only 20l., of which the claimants were lessees, and they used, for the purpose of their business, three rooms and a cellar in the said house, and also one bedroom occasionally. The remainder of the house, consisting of three rooms, was, as the Barrister found, "occupied" by G. and his wife, G.'s wife being employed and paid by the claimants as their caretaker. G.'s name had been entered by the Overseers in Division II. of the occupiers' list in respect of the said house, and no objection had been taken to that entry. There was no evidence or finding of fact that G. occupied by virtue of service merely:—*Held*, that the claims of K. and W. were inadmissible. *Kirby v. Barber*, 54 W. R. 119; 70 J. P. 20; 4 L. G. R. 395; 1 Smith, 403—D.

Absence on Military Service—Absence "during the continuance of" the South African War.—The Electoral Disabilities Removal Act, 1891, and the Electoral Disabilities (Military Service) Removal Act, 1900, together preserved the qualification of an occupier who was absent during the whole qualifying period as a volunteer on military service in South Africa, for the greater part of the time before the declaration of peace, but for less than four months during the latter part of the time, after the declaration of peace. *Per LORD ALVERSTONE, C.J.*—The qualification was preserved by the Act of 1900 taken by itself, inasmuch as the expression "during the continuance of the present war" was capable of including a period during which military service consequent on the war continued after the declaration of peace. *Marsh v. Bantoff*, 1 Smith, 289; 88 L. T. 230; 51 W. R. 155; 67 J. P. 12; 1 L. G. R. 106—D.

Compulsory Absence During Part of the Qualifying Period—Militiaman—Imprisonment—Confinement to Camp for Military Offence.—A sergeant in a militia regiment ordinarily resident in Londonderry, while on training with his regiment at Buncrana, was sentenced to be a prisoner at large for forty-eight hours on a charge of drunkenness. The effect of the sentence was that he was not allowed outside the camp lines during the period:—*Held*, that he was not thereby disqualified as an inhabitant occupier in respect of his residence in Londonderry. *O'Connell v. Holland*, [1900] 2 Ir. R. 448—C.A. *And see infra*, SERVICE FRANCHISE.

(d) *Service Franchise.*

Separate Bedroom — Dwelling-house.]—The claimant was, along with several other men, in the employment of a drapery company. His contract was to be paid a yearly salary, to be boarded by the company, and to have a bedroom so long as he remained in their service, the service being determinable on notice. There was a bolt inside to fasten the door of the bedroom, but the claimant had not the key. The manager could change an employee from one bedroom to another if necessary. There were rules understood in the house regulating the occupation of bedrooms; that the claimant could not leave his business in the shop to go there without permission; that on Saturday the bedrooms were closed up to 2 P.M. for cleaning. There was no printed rule preventing an assistant being in his bedroom between 11 A.M. and 1 P.M. on Sunday, but there was an understanding to that effect, and if an employee violated this understanding the superintendent would consider it his duty to correct him:—*Held*, that the claimant was not entitled to the franchise. *Stridling v. Halse* (55 L. J. Q.B. 15; 16 Q.B. D. 246) discussed. *M'Quade v. Charlton*, [1904] 2 Ir. R. 383—C.A.

Bedroom Occupied by Coachman—Coachman Obligated to take Meals in House.]—A coachman occupied a room over his master's stable, no part of the building which contained the stable and room being inhabited by the master. As part of the terms of his service the coachman was obliged to, and did in fact, take his meals with his master's other servants in the house which was inhabited by his master:—*Held*, that the coachman inhabited the room as a dwelling-house by virtue of his service within section 3 of the Representation of the People Act, 1884, so as to entitle him to be on Division II. of the list of voters. *Stridling v. Halse* (55 L. J. Q.B. 15; 16 Q.B. D. 246) followed. *Laskey v. Michelmore*, 71 J. P. 559; 24 T. L. R. 61—D.

Tenant of Dwelling-house Inhabited by Servant with Service Franchise.]—A farmer whose farm (held on lease) included two houses within the limits of a burgh claimed to be entered on the roll of voters for the burgh in respect of his occupancy of these houses as tenant. The houses were inhabited by two servants of the claimant, and the servants had, under section 3 of the Representation of the People Act, 1884, the service franchise in respect of their inhabitant-occupancy of the houses:—*Held*, that the claimant was not entitled to be enrolled, in respect that the servants were, for the purposes of the Representation of the People Acts, to be deemed to be the tenants of the houses. *Jack v. Edie*, 8 F. 329—Ot. of Sess.

Householder or Servant—Schoolmaster.]—A schoolmaster, occupying a particular house, which during his term of service he is merely permitted, but not required to occupy, occupies the house not in virtue of service, but as a householder, and is therefore entitled to have his name inserted in Division I. of the occupation list of voters for the county as being both a parliamentary and county elector. *Dover v. Prosser*, 73 L. J. K.B. 13; [1904] 1 K.B. 84;

89 L. T. 724; 52 W. R. 140; 68 J. P. 37; 2 L. G. R. 156; 1 Smith, 813; 20 T. L. R. 49—D.

Religious Educational Community — College Bedroom—Dwelling-house.]—Each teacher and lay brother in a college conducted by a religious community had as such, during the qualifying period, the exclusive use of a separate bedroom in the college, which was managed by a resident principal under the supreme control of the Superior-General of the community, who himself lived in Paris. It appeared that there was no contractual right to a particular room; the occupants might be ordered at any moment to cease sleeping in the allotted rooms at the command of the resident principal, subject to appeal to the higher officials of the Order; it was against the rules of the community for the occupants of the bedroom to receive guests or to dine in these rooms; the furniture in the rooms belonged to the college; the occupants did not pay the servants who attended to the rooms:—*Held*, that the bedroom separately occupied by each of the claimants was not his dwelling-house, and that therefore they were not entitled to the franchise. *Ladd v. O'Toole*, [1904] 2 Ir. R. 389—C.A.

Convent — Nuns — Office, Service, or Employment.]—The claimants were nuns residing at a convent in the town of E. Each of them occupied a separate bedroom, and was subject to the control of the lady superioress, who could at any time change the occupants from one room to another or arrange to have more than one occupant of a single room. She could refuse to allow a nun to receive a visitor in her room, demand admission to the room, and require the nuns to give up the keys. The nuns took their meals together in the refectory, and occupied in common other general rooms in the convent; they received no remuneration, and were under no contract of employment. The premises were vested in the Roman Catholic Bishop of Clogher, the parish priest, and the senior curate of E., all for the time being, upon trust for the benefit of the Roman Catholic inhabitants of E. The convent was governed by rules subject to the supreme authority of the bishop:—*Held*, that the nuns were not inhabitant occupiers of separate dwellings within the meaning of section 3 of the Representation of the People Act. *Semble*, the nuns did not occupy their rooms by virtue of any office, service, or employment. *Bannon v. Hanrahan*, [1900] 2 Ir. R. 455—C.A.

Part of House Separately Occupied as a Dwelling.]—The claimant was, along with several others, in the employment of P., who carried on an extensive drapery business in Londonderry. Each of the claimants was to have a yearly salary and board, and a room to himself, and the sole control over the room. Each of them had a key for his room, and a latchkey for the outside door. They had to reside in the rooms allotted to them, but they would not be changed. The employer did not reside on the premises:—*Held* (HOLMES, L.J., dissenting), that there was evidence to support the finding that the employees were inhabitant occupiers, and, as such, entitled to the service franchise. *M'Dauid v. Balmer*, [1907] 2 Ir. R. 345—C.A.

Compulsory Absence on Duty.]—The Electoral Disabilities Removal Act, 1891, applies equally to a person claiming to be entitled to the service franchise as to a person entitled as an inhabitant occupier of a dwelling-house. *Larcombe v. Simey*, 76 L. J. K.B. 107; [1907] 1 K.B. 139; 95 L. T. 874; 71 J. P. 13; 5 L. G. R. 17; 2 Smith, 1; 23 T. L. R. 51—D.

A coachman, who occupied a cottage by reason of his service, was absent from his home for more than four months at a time in the performance of his master's orders:—*Held*, that he was not entitled to be registered as a service franchise voter under section 3 of the Representation of the People Act, 1884, as he was not within the protection given by the Electoral Disabilities Removal Act, 1891. *Ib.*

(e) *Lodger Franchise.*

Landlord Residing in House.]—Where the rooms in a house are let out as separate dwelling-houses the mere fact that the landlord resides in a separate set of rooms in the house does not of itself make the occupiers of the rooms lodgers. Whether they are lodgers or not depends upon whether the landlord has a right of control over the rooms let to the tenants. The landlord of a house let most of the rooms in the house to weekly tenants, each tenant having the exclusive use of the rooms let to him, and having the right of free ingress and egress to and from the house and his rooms, and such use of the passages and staircase as was necessary and convenient for that purpose. Each tenant had a key of the house. There was also let to the tenants the use in common of the courtyard, w.c., and wash-house situate therein. The landlord occupied and resided in a separate set of rooms in the house. The Revising Barrister found that, so far as the relationship of the landlord and tenants as residents were concerned, the former occupied no different position than he would if he were not the landlord and did not reside in the house; that the landlord had no right to enter or interfere with or exercise any control over the rooms let, or the joint user of the portion of the premises used in common, his use of and right of control over the parts of the premises used in common being identical with that of his tenants, and that he did not reserve to himself or exercise any general control or dominion or mastership over the premises or the tenants; that the cleansing of the passages and staircase was shared in common by those using the same, and no service was rendered by the landlord to the tenants; that the landlord was rated and not the tenants; and that he was under covenant to his lessor to keep the house in repair. There were 2,595 other tenants who occupied rooms under similar circumstances. The Revising Barrister held that the tenants were inhabitant occupiers of a dwelling-house, and were entitled to be on the register as such:—*Held*, that upon the facts found by the Barrister the tenants were inhabitant occupiers of the rooms as tenants, and not lodgers, and were entitled to be on Division I. of the occupiers' list. *M'Laughlin v. Chambers* ([1896] 2 Ir. R. 497) approved. *Kent v. Fittall*, 69 J. P. 428; 22 T. L. R. 63—C.A.

Interrupted Residence.]—A shipping clerk

claimed to have his name entered on the roll of voters of the burgh of Leith as a lodger. Under a contract with his father he had, during the period required by the statute, the exclusive right of occupancy of a room in his father's house in Leith of the value required by the Act, and he had occupied this room from Friday evening until Monday morning of each week. During the rest of the week he occupied lodgings in Dundee, where he was employed by Leith shipowners, who had an agency in Dundee; but he occasionally occupied the room in Leith for a night in the middle of a week. During his absence this room was unoccupied. He was not enrolled, and had not claimed to be enrolled, as a voter in Dundee:—*Held* (LORD KINCARNEY *dubitante*), that the claimant had not sufficiently complied with the condition as to residence contained in the statute to entitle him to have his name inserted on the roll of voters. *Miller v. Bruce*, 2 F. 265—Ct. of Sess.

Value of Lodgings—Evidence—Disallowance of Claim—Refusal to State Case—Order Nisi for Mandamus.]—J. claimed to vote as an old lodger. It appeared in the body of his claim that he occupied as lodgings two unfurnished rooms on the top floor of a house, for which rooms he paid 5s. 6d. weekly, and in the declaration annexed to the claim the claimant declared that his lodgings were of the clear yearly value, if let unfurnished, of 10l. or upwards. The claim was duly objected to on the ground that the lodgings were not of sufficient value. It was proved that the whole house was only rated at 14l., and there were also other circumstances in evidence before the Revising Barrister which raised a strong doubt in his mind as to whether the lodgings were of sufficient value. The Revising Barrister adjourned the hearing to an evening sitting of the Court, and meanwhile sent a written notice to the claimant that his claim would or might be disallowed unless he produced, or caused to be produced, at the evening sitting, his rent book or other sufficient evidence that his lodgings were of the requisite value. The claimant having altogether ignored this notice, the Revising Barrister disallowed the claim, on the ground that he was not satisfied that the claimant's lodgings were of the requisite value, and refused to state a Case. An order *nisi* for a *mandamus* having been obtained *ex parte*:—*Held*, that the case raised a question as to the true construction of section 28, sub-sections 10 and 11 of the Parliamentary Registration Act, 1878, and that the order *nisi* should be made absolute. *Rea v. Nepean; Jenkins, ex parte*, 52 W. R. 264—D.

Claim—Objection—Prima Facie Proof of Objection.]—Section 28, sub-section 11 of the Parliamentary and Municipal Registration Act, 1878, which provides that if *prima facie* proof, as prescribed by sub-section 10, is given by the objector, then, unless the person objected to proves that he was entitled to have his name inserted in the list, the Revising Barrister shall expunge his name, does not prevent the Revising Barrister from considering any other proper evidence in support of the objection, and if he thinks it just, giving effect thereto by a decision adverse to the claim. *Jenkins v. Grocott*, 73 L. J. K.B. 215; [1904] 1 K.B. 374; 90 L. T. 90; 52 W. R. 267; 68 J. P. 75; 2 L. G. R. 202; 1 Smith, 335; 20 T. L. R. 148—D.

3. DISQUALIFICATION.

Permanent Maintenance of Voter's Wife as Pauper Lunatic—Maintenance, whether Ordinary Relief or Medical Assistance—Question of Fact.]—The appellant claimed to be placed on the occupiers' list (division 1) for a parish. During the whole of the qualifying period his wife had been maintained out of the poor rate for the parish as a pauper patient of the county lunatic asylum, the appellant contributing nothing towards her maintenance. He contended that the maintenance of his wife in the asylum was medical assistance within the meaning of the Medical Relief Disqualification Removal Act, 1885, and that he was not by reason thereof deprived of his right to vote. The Revising Barrister, however, was of opinion that such maintenance was ordinary parochial relief, and that the appellant was disqualified, and rejected his claim:—*Held*, that as the maintenance was more or less of the nature both of ordinary relief and medical relief, a question of fact arose for the decision of the Revising Barrister as to which kind of relief was merely incidental to the other, and what was the true character of the maintenance; that there was evidence to support his finding that it was ordinary relief; and that that finding ought not to be disturbed. *Kirkhouse v. Blakeway*, 71 L. J. K.B. 130; [1902] 1 K.B. 306; 86 L. T. 19; 50 W. R. 206; 66 J. P. 38; 1 Smith, 281—D.

Non-payment of Education Rate.]—Where a poor rate includes the expenses of education under the Education Act, 1902, an occupier who has failed to pay the part of the rate which is to be applied to education, though he has paid the rest of the rate, has not paid the poor rate for the purposes of the Registration Acts, and is not entitled to have his name inserted in the occupiers' list as a Parliamentary or municipal elector. *Ash v. Nicholl*; *Cox v. Merriman*, 74 L. J. K.B. 74; [1905] 1 K.B. 139; 91 L. T. 803; 53 W. R. 173; 69 J. P. 6; 3 L. G. R. 11; 1 Smith, 355; 21 T. L. R. 62—D.

4. LIST.

Occupation as Servant.]—A person who occupies premises as a servant is only entitled to be on division 2 of the occupiers' list. *Kent v. Fraser*, 61 J. P. 359; 1 Smith, 127—D.

5. NOTICE OF OBJECTION.

Division of District or Borough into Wards—Omission of Notice to Specify Ward of Person Objected to.]—A notice of objection to the overseers objecting to the name of a person being retained on the occupiers' list of voters of a Parliamentary division and borough in which the lists are made out in divisions and also in wards, need not specify the ward on the list of voters whereof the name of the person objected to appears, in addition to specifying the division in which such name appears. *Sagar v. Clare*, 82 L. T. 599; 1 Smith, 243—D.

Ownership Electors—By Post—Name and Place of Abode of Person Objected to—Form.]—A notice of objection, sent by post to an ownership

elector, complies sufficiently with form 5 (a) of the Registration Order, 1895, if his name and place of abode appear on the outside of the notice, and his name alone appears in the body of the notice without the addition of his place of abode. *Linforth v. Butler*, 68 L. J. Q.B. 3; [1899] 1 Q.B. 116; 79 L. T. 498; 47 W. R. 141; 1 Smith, 162—D.

By Post—Name and Place of Abode of Person Objected to—Form.]—A notice of objection, sent by post to an ownership elector, complies sufficiently with form 5 (a) of the Registration Order, 1895, if his name and place of abode appear on the outside of the notice, and his name alone appears in the body of the notice without the addition of his place of abode. *Linforth v. Butler*, 68 L. J. Q.B. 3; [1899] 1 Q.B. 116; 79 L. T. 498; 47 W. R. 141—D.

Substitution of Place of Business for Place of Abode of Objector—Power to Amend—"Mistake."]—A Revising Barrister has power, under sub-section 2 of section 28 of the Parliamentary and Municipal Registration Act, 1878, to amend a mistake in a notice of objection, provided that there has been no attempt or intention on the part of the objector to deceive, and that all the information required by law to be given was given before the amendment was made. *Prescott v. Lee*, 68 L. J. Q.B. 79; [1899] 1 Q.B. 102; 79 L. T. 447; 47 W. R. 139; 62 J. P. 824—D.

In a notice of objection by an objector whose place of abode was correctly stated in the overseers' list, the objector deliberately inserted his place of business after his signature, instead of his place of abode, under the erroneous impression that that was the address which he was required to give, and without having any intention of misleading the person objected to or any one else. The notice was otherwise good in substance and correct in form:—*Held* (WILLS, J., dissenting), that the substitution by the objector of his place of business for his place of abode in the notice was a mistake, within the meaning of the sub-section above referred to, which the Revising Barrister had power to amend. *Id.*

Double Qualification—Notice of Selection—Appeal.]—A borough voter, entered on the list of parliamentary voters as qualified to vote in respect of his place of abode, preferred a claim for a qualification in respect of his business premises situate elsewhere in the borough. At the opening of the first Revision Court he delivered a notice of selection under section 28, sub-section 14 of the Parliamentary and Municipal Registration Act, 1878, requiring the Revising Barrister to retain his name on the list of voters in respect of the qualification set out in his claim—that is, his business premises—and after it had been allowed applied that his former qualification—that is, his place of abode—should be marked with a note that he was not entitled to vote in respect of it:—*Held*, that the notice of selection was invalid, for when it was given the claim had not been adjudicated upon, and therefore the voter was not then possessed of a double qualification; and, further, that section 42 of the Registration Act, 1843, conferred no right of appeal against the refusal of the Revising Barrister to act

upon the notice. *Jones v. Munro*, 68 L. J. Q.B. 28; [1899] 1 Q.B. 109; 79 L. T. 500; 47 W. R. 109; 1 Smith, 151—D.

Revising Barrister's Power to Amend—"Mistake."—A notice of objection to the name of a voter being retained on the occupiers' list of voters in a Parliamentary borough was correct in form except that the place of abode of the objector was incorrectly given as 106 Drury Lane, which was his business address, his true place of abode being, as was correctly stated in the second column of the overseers' list, 50 Nelson Road, Wimbledon. The business address was inserted by a mistake on the part of the objector, who thought that he ought to give his address within the borough, and not an address outside it. No one was affected in any way by the incorrect statement of the objector's place of abode. The Revising Barrister amended the notice by adding the true place of abode of the objector:—*Held*, that the misstatement of the objector's place of abode was a mistake which the Revising Barrister had power to correct under the powers of section 28, sub-section 2 of the Parliamentary and Municipal Registration Act, 1878. *Prescott v. Lee*, 68 L. J. Q.B. 906; [1899] 2 Q.B. 273; 81 L. T. 43; 47 W. R. 690; 1 Smith, 197—C.A.

6. REVISING BARRISTER.

Duty of—Parochial Electors—Separate List—List of Ownership Claims.—It is the duty of the Revising Barrister to revise the list of parochial electors provided for by section 44 of the Local Government Act, 1894, including the separate list of such electors, and to revise the list of ownership claimants to be entered thereon. *Reg. v. Nash*; *Gardom, ex parte*, 69 L. J. Q.B. 77; [1900] 1 Q.B. 103; 81 L. T. 489; 48 W. R. 188; 64 J. P. 104; 1 Smith, 217—D.

Right to Compel Personal Attendance of Claimant.—A Revising Barrister has no power to compel the personal attendance of a person claiming to be entitled to vote who has not been summoned to give evidence. *Jenkins v. Grocott*, 73 L. J. K.B. 215; [1904] 1 K.B. 374; 90 L. T. 90; 52 W. R. 267; 68 J. P. 75; 1 Smith, 335.

Old Lodger Claim—Omission of Declaration—Mistake—Jurisdiction of Revising Barrister to Amend.—A person on the old lodger list of electors sent in a lodger claim in respect of the same lodgings within the time within which old lodgers are required to send in their claims, but by mistake the form omitted the declaration in Form H, No. 2, of the Registration Order, 1895, that the claimant was on the old lodger list in respect of the same lodgings:—*Held*, that this omission was a mistake which the Revising Barrister had jurisdiction to correct by inserting the declaration. *Francis v. Metcalfe*, 75 L. T. 380—D.

Statement of Revising Barrister in Answer to Order Nisi—Affidavit.—As a general rule a statement made by a Revising Barrister in answer to an order *nisi* should be on affidavit. *Rees v. Nepean*; *Jenkins, ex parte*, 52 W. R. 264—D.

Amendment of Claim—Mistake in Fourth Column—Power to Amend.—Where in the fourth column of the list of claimants the description of the qualifying property of a claimant of a parliamentary vote has by mistake been entered as No. 31 M. Street instead of No. 33 M. Street (adjoining houses), the Revising Barrister is warranted in amending the description in that column. The substitution of No. 33 for No. 31 is not a change of description of qualification contrary to sub-section 13 of section 28 of the Parliamentary and Municipal Registration Act, 1878. *Kitchen v. Johnson*, 68 L. J. Q.B. 11; [1899] 1 Q.B. 95; 79 L. T. 422; 47 W. R. 110; 63 J. P. 20; 1 Smith, 171—D.

Omission of One of Two Christian Names—Power to Amend.—Where the correct name of a voter for a borough in respect of the occupation of a dwelling-house is "Herbert Ambrose Green," but his name is entered in division 1 of the list of voters as "Herbert Green," the omission of the second Christian name is a "mistake" within the meaning of section 28, sub-section 1 of the Parliamentary and Municipal Registration Act, 1878, which the Revising Barrister ought to correct. Section 24 of the Act, which gives the voter power to take steps to have an error set right, by making and sending to the town clerk a declaration in the form prescribed, does not deprive the Revising Barrister of the power, under section 28, to correct the mistake. *Green v. Wanklyn*, 75 L. J. K.B. 216; [1906] 1 K.B. 394; 93 L. T. 770; 54 W. R. 197; 70 J. P. 19; 4 L. G. R. 80; 1 Smith, 410; 22 T. L. R. 31—D.

Misdescription—Declaration—Power of Revising Barrister to Amend List.—Where a person who is entered on the list of voters for a borough, and the nature of whose qualification is not correctly stated in the list, duly makes a declaration under section 24 of the Parliamentary and Municipal Registration Act, 1878, the Revising Barrister has power to amend the list by substituting for the qualification therein stated the qualification alleged in the declaration to be correct. *Dicta in Foskett v. Kaufman* (55 L. J. Q.B. 1; 16 Q.B. D. 279) followed. *Lord v. Fox* (61 L. J. Q.B. 60; [1892] 1 Q.B. 199) not followed. *Goodrich v. Great Grimsby Town Clerk*, 71 L. J. K.B. 99; [1902] 1 K.B. 301; 85 L. T. 583; 50 W. R. 170; 65 J. P. 758; 1 Smith, 273—D.

7. VOTING.

Ballot Papers—Marks Placed by Voter Outside Ruled Spaces.—A ballot paper is validly marked if the voter has so placed his mark as to make it clear for which particular candidate he intended to vote, although the mark as placed is outside the ruled space or parallelogram printed on the paper for its reception. *Pontardawe Rural Council Election Petition, In re*, 76 L. J. K.B. 702; [1907] 2 K.B. 313; 71 J. P. 371; 5 L. G. R. 1060; 23 T. L. R. 538—D.

8. COURT.

Registration Appeal Court—Previous Decision of, how far Binding.—The Court has power to

review, and if necessary refuse to follow, a decision of its own in a registration appeal. *Ladd v. O'Toole*, [1904] 2 Ir. R. 389—C.A.

Return Respecting Election Expenses—Penal Action against Candidate Sitting before Return “Transmitted” to Returning Officer—Return Posted to, but not Received by, Returning Officer at Time of Sitting—Error in Return for which Authorised Excuse not obtained.]—A return respecting election expenses is transmitted to the returning officer within the meaning of section 33, sub-section 1 of the Corrupt and Illegal Practices Prevention Act, 1883—which provides that “within thirty-five days after the day on which the candidates returned at an election are declared elected the election agent of every candidate at that election shall transmit to the returning officer a true return” of the candidate's election expenses—if the return is posted to the returning officer before, although it may not be actually received by him until after, the expiration of the thirty-five days. *Mackinnon v. Clark*, 67 L. J. Q. B. 763; [1898] 2 Q.B. 251; 79 L. T. 83; 47 W. R. 19—C.A.

A return is transmitted within the meaning of the enactment, notwithstanding that the return actually sent contains errors. *Ib.*

9. CORRUPT PRACTICES.

Prosecution—Acquittal of Defendant—Costs against Private Prosecutor.]—Section 12 of the Corrupt Practices Prevention Act, 1854, is to be read into the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, and its provisions extend to any private prosecution on indictment for the offence of any corrupt practice within the meaning of that Act. Accordingly, where a prosecution of a corrupt or illegal practice at a municipal election has been instituted by a private prosecutor, and there is a verdict of acquittal, the defendant is entitled to recover from the private prosecutor the costs sustained by him by reason of the indictment; and the Court cannot in the exercise of its discretion deprive him of such costs. *Reg. v. Law*, 69 L. J. Q.B. 348; [1900] 1 Q.B. 605; 82 L. T. 145; 48 W. R. 411; 19 Cox C.C. 452—Bucknill, J.

10. PERSONATION.

Felony—Misdemeanour.]—The prisoner was indicted for that he did unlawfully personate and falsely assume to vote in the name of another person at an election for a county councillor for the borough of Dublin, on January 15, 1900, the count concluding “against the statute and against the peace.” In a second count he was indicted for an attempt to commit the said offence:—*Held*, that the first was a good count by statute, and, *semble*, would have been good at common law. *Reg. v. Clarke*, [1900] 2 Ir. R. 304—Palles, C.B.

11. PETITION.

Scrutiny—Particulars.]—Where a petitioner claims a seat for an unsuccessful candidate at a parliamentary election solely upon the ground that he had a majority of lawful votes, the

delivery of particulars by the parties to the petition is regulated exclusively by rule 7 of the Parliamentary Election Petition Rules, 1868, and the petitioner cannot be ordered to give particulars under rule 6. *Munro v. Balfour* ([1898] 1 Q.B. 113) approved. *Furness v. Beresford*, 67 L. J. Q.B. 417; [1898] 1 Q.B. 495; 78 L. T. 137; 46 W. R. 359—C.A.

12. OTHER MATTERS.

County Council and District Council.]—See LOCAL GOVERNMENT.

Municipal Elections.]—See CORPORATION.

Peer—Right of to Vote.]—See PFRAGE.

School Boards.]—See SCHOOL.

ELECTION, EQUITABLE DOCTRINE OF.

Appointment, Limited Power of—Exercise by Will—Limitations Void for Perpetuity—Illegality.]—Where a testator has by will exercised a limited power of appointment in such a way as to contravene the rule against perpetuities, and has also given benefits out of his own property to the persons entitled in default of appointment, the limitations in the will being illegal and void cannot be used to raise any case of election. The Court is bound on finding illegality to refuse to assist in carrying it out. *Wollaston v. King* (38 L. J. Ch. 392; L. R. 8 Eq. 165) and *Warren's Trusts, In re* (53 L. J. Ch. 787; 26 Ch. D. 208), followed; and *Handcock's Trusts, In re* (23 L. R. Ir. 34), approved. *Bradshaw, In re; Bradshaw v. Bradshaw* (71 L. J. Ch. 230; [1902] 1 Ch. 436), not followed. *Oliver's Settlement, In re; Evered v. Leigh*, 74 L. J. Ch. 62; [1905] 1 Ch. 191; 53 W. R. 215; 21 T. L. R. 61—Farwell, J.

—Remoteness.]—A case of election cannot be raised on an appointment void for remoteness by reason of the rule against perpetuities. *Bradshaw, In re; Bradshaw v. Bradshaw* (71 L. J. Ch. 230; [1902] 1 Ch. 436), not followed. *Oliver's Settlement, In re; Evered v. Leigh (supra)*, followed. *Beale's Marriage Settlement, In re*, 74 L. J. Ch. 67; [1905] 1 Ch. 256; 92 L. T. 268; 53 W. R. 216; 21 T. L. R. 101—Warrington, J.

Alternative Remedy—Judgment Signed against One of Two Defendants—Joint Liability Negatived.]—In an action against a husband and wife for goods supplied to the household, the plaintiff, on certain admissions made by the wife, obtained judgment against her under Order XIV. for part of the amount claimed. The husband was given unconditional leave to defend, and the action was remitted for trial to the County Court. At the trial the jury gave a verdict for the plaintiff; they found (*inter alia*) that the plaintiff gave credit to the husband only, and they expressly negatived the joint liability of husband and wife:—*Held* (JELF, J., dissenting), that the County Court Judge was right in entering judgment for the plaintiff against the husband for the claim less the amount for which judgment had been signed

against the wife, the fact of signing judgment for part of the claim against the wife not being an election by the plaintiff to treat her as liable for the debt to the exclusion of the liability of the husband. *Morel Bros. v. Westmorland (Earl)* (72 L. J. K.B. 66; 73 L. J. K.B. 93; [1903] 1 K.B. 64; [1904] A.C. 11) distinguished. *French v. Howie and Wife*, 74 L. J. K.B. 853; [1905] 2 K.B. 580; 93 L. T. 202—D.

Settlement—Testamentary Power of Appointment—Perpetuity—Limitations in Will Void for Remoteness—Bequest of Property not Subject to Power.—A case of election cannot be raised on an appointment void by reason of remoteness. *Oliver's Settlement, In re*; *Evered v. Leigh* (74 L. J. Ch. 62; [1905] 1 Ch. 191), and *Beales' Marriage Settlement, In re* (74 L. J. Ch. 67; [1905] 1 Ch. 256), followed. *Bradshaw, In re* (71 L. J. Ch. 230; [1902] 1 Ch. 436), not followed. *Wright, In re*; *Whitworth v. Wright*, 75 L. J. Ch. 500; [1906] 2 Ch. 288; 94 L. T. 696; 54 W. R. 515—Buckley, J.

A testatrix, having testamentary powers of appointment among her issue over the funds comprised in two settlements of 1871 and one of 1882, gave her own property and the settled property to trustees for the benefit of her son and three daughters. Part of the son's share was to be paid to him on his attaining twenty-five, and the remainder, and the daughters' shares, were to be held on trust for them for life with remainder to their children. All the testatrix's children were born after the settlements of 1871 and before that of 1882:—*Held*, that the gifts to the son at twenty-five and to the testatrix's grandchildren being void for perpetuity as regarded the property comprised in the settlements of 1871, no case of election arose as against the testatrix's children; and that a rateable proportion must be taken between that property and the property comprised in the 1882 settlement and the testatrix's own property, as to which the gifts were good, and that the trusts of the will failed or succeeded accordingly. *Id.*

Company—Conversion of Profits into Capital—Bonus.—When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividends or of converting the profits into capital, and the company validly exercises this power, such exercise is binding on all persons interested under the testator or settlor in the shares; and consequently what is paid by the company as dividend goes to life-renters, and what is by the company paid as capital, or appropriated, as an increase of the capital stock in the concern, enures to the benefit of those who are interested in the capital. *Gunnis's Trustees v. Gunnis*, 6 F. 104—Ct. of Sess.

Disentailing Deed—Fraud on Tenant in Tail in Remainder—Right of Action—Parties—Heir or Devisee of Tenant in Tail.—The Court will not entertain an action brought by a tenant in tail in remainder to set aside a disentailing deed alleged to have been entered into in fraud of the plaintiff's rights, unless the heir-at-law or devisee of the tenant in tail who executed the disentailing deed is represented at the hearing. Whether such an action will

lie, *quære*. *Cornwall v. Prioleau*, 20 T. L. R. 606—Walton, J.

Married Woman—Election—Restraint on Anticipation—Subsequent Discoverture—Gift by Will—Compensation.—The doctrine of election does not apply in the case of a married woman to whom an interest with a restraint on anticipation attached thereto is given by the same instrument as that which gives rise to a question of election, even though at the time when the question of election arises the married woman has become discovert. *Hamilton v. Hamilton* (61 L. J. Ch. 220; [1892] 1 Ch. 396) distinguished. *Haymes v. Foster*, 70 L. J. Ch. 302; [1901] 1 Ch. 361; 84 L. T. 139; 49 W. R. 327—Kekewich, J.

Compensation—Election against an Instrument—Compensation under same Instrument—Compensated Party Liable to Compensate others.—Where by one instrument—for example, a will—a person is given property to which he is already entitled under another instrument—for example, a deed—and elects to take under the deed and against the will, he is not by so electing precluded from claiming and receiving compensation from another person who by making a similar election deprives him of benefits given by the will. The compensation he thus receives is a benefit taken under the will, and will be part of the fund for providing any compensation he may be liable to make to other persons who, claiming only under the will, have been disappointed by his election. *Booth, In re*; *Booth v. Robinson*, 75 L. J. Ch. 610; [1906] 2 Ch. 321; 95 L. T. 524—Swinfen Eady, J.

— Date for Ascertaining Amount—Testator's Death.—The amount of compensation to be made to the disappointed legatees by a devisee under a will, who elects to take a certain estate as against the will, must be ascertained as at the date of the testator's death, and not as at the date of election. *Hancock, In re*; *Hancock v. Pawson*, 74 L. J. Ch. 69; [1905] 1 Ch. 16; 91 L. T. 737; 53 W. R. 89—Kekewich, J.

Agent—Judgment against—Rights against Principal.—*See PRACTICE.*

Alternative Remedy—Liquidated Damages and Injunction.—*See INJUNCTION.*

Co-defendants—Entering Judgment against.—*See HUSBAND AND WIFE.*

Exception in Conveyance—Ascertainment by Election.—*See DEED.*

Partner—To Affirm Sale from.—*See PARTNERSHIP.*

— Contract with before Partnership—Novation.—*See PARTNERSHIP.*

Power of Appointment.—*See POWERS.*

Trust for Sale—Election by Beneficiaries.—*See TRUST.*

— To Take in Specie.—*See VENDOR AND PURCHASER.*

Will, under.—*See WILL.*

ELECTRIC LIGHTING.

1. *Statutes*, 785.
2. *Supply*, 785.
3. *Areas of Supply*, 787.
4. *Laying Lines*, 787.
5. *Damage*, 788.
6. *Inspection*, 789.
7. *Purchase of Undertaking by Local Authority*, 790.
8. *Transfer of Powers*, 791.
9. *Other Matters*, 792.

1. STATUTES.

62 & 63 Vict. c. 19 is the *Electric Lighting (Clauses) Act*, 1899.

4 Edw. 7 c. 13 is the *London Electric Lighting Areas Act*, 1904.

2. SUPPLY.

Right of Lighting Company to Cut off—Default of Consumer in Payment for Supply—Arrears—Change of Occupation—Company—Receiver for Debenture-holders—Order for Possession.—No one is entitled to demand a supply of electric energy under section 19 of the *Electric Lighting Act*, 1882, from the undertakers who have authority to supply the energy, unless and until he has made a contract with the undertakers for the supply. *Husey v. London Electric Supply Corporation*, 71 L. J. Ch. 313; [1902] 1 Ch. 411; 86 L. T. 166; 50 W. R. 420—C.A.

The defendants had been supplying electric light to an hotel under a contract with the owners, a limited company. In an action by holders of debentures of the limited company to enforce their security the plaintiff was appointed receiver, the order directing delivery of possession to him of the assets of the company. He entered into possession of the hotel. At that time 437l. was owing by the limited company to the defendants for electricity supplied at the hotel. The defendants asked the plaintiff to sign an undertaking to pay the arrears, and also future charges in respect of light supplied during his receivership. He declined to sign this, but expressed his willingness to become liable for energy supplied after his appointment. The defendants threatened to cut off the supply. The plaintiff brought an action for an injunction to restrain them:—*Held*, that the plaintiff was not entitled to an injunction, as, if the old contract were in force, the defendants were entitled to cut off the supply until the arrears were paid; but, if the plaintiff were a new occupier, he was not entitled to a supply of energy until he had entered into a contract with the defendants as required by the *Electric Lighting Act*, 1882. *Ib.*

Quære, whether section 47 of the Provisional Order relating to the defendants in the schedule to the *Electric Lighting Orders Confirmation* (No. 2) Act, 1889, applies in a case where there is an existing supply of electric energy to

premises, or only to the case of a first contract for a supply—*STIRLING, L.J.*, stating that he was not satisfied that it was limited to the case of a first contract. *Ib.*

Motive for Enforcing Legal Right—Jurisdiction of Court to Consider.—*Held* also (by VAUGHAN WILLIAMS, L.J., and STIRLING, L.J.), that the defendants were entitled to enforce their legal right, although one of their motives might be to get the collateral advantage of making the debenture-holders pay arrears for which they were not really liable. *Ib.*

Exclusive Right—Revocable Licence—Revocation.—A corporation granted a permission to certain persons to erect poles for the establishment of a system of electric light under certain specified conditions. Subsequently, by a by-law, confirmed by an Act of Parliament, the corporation granted to another person an exclusive privilege to construct an electric railway, and also for thirty-five years to establish a system of lighting and heating by electricity or otherwise; and the exclusive rights thus given were to be such as the city “possesses and as it has the right to grant this day.” In an action by the latter person to obtain the revocation of the previous licence,—*Held*, that the two concessions were not necessarily incompatible. The first was revocable at the city’s pleasure, but not otherwise; and the second only amounted to an undertaking by the city not to convert the permission given by the first into a right. *Hull Electric Co. v. Ottawa Electric Co.*, 71 L. J. P.C. 58; [1902] A.C. 237; 86 L. T. 208—P.C.

Contract to Take Whole of Electric Energy from Specified Company—Absence of Negative Stipulation—Breach of Contract—Injunction Granted—“Undue preference.”—In 1898 the defendant signed a request to the plaintiff company for a supply of electric energy. The request was made subject, among other terms and conditions, to the following: (1) “The consumer agrees to take the whole of the electric energy required for the premises mentioned below from the company for a period of not less than five years”; (2) the charge was fixed at 4½d. per Board of Trade unit. On the margin it was noted that in the event of the company’s standard rate being reduced below the price therein quoted the defendant was to have the benefit of such reduction. In 1901 the defendant gave the plaintiff company notice to disconnect. The company had entered into similar contracts with other consumers for different terms of years, and in the case of one consumer at a different rate of payment. In an action by the company for an injunction to restrain the defendant from taking any electric energy from any person other than the company,—*Held*, first, that the contract implied a contract by the defendant not to take energy from any one except the company, which in a case of this kind—a trade contract for supply and not for personal services—could be enforced by injunction. *Held*, secondly, that the contract was not void under sections 19 and 20 of the *Electric Lighting Act*, 1882, on the ground that undue preference had been given by the company to other consumers; that the relevant words of section 19 were “under similar circumstances to a corresponding supply,” and that the section left a latitude to the company

to make bargains with its customers, where the circumstances differed or the supply did not correspond, for different terms, and that on the facts of the case no undue preference was shewn. *Held*, thirdly, that the injunction asked ought therefore to be granted. *Metropolitan Electric Supply Co. v. Ginder*, 70 L. J. Ch. 862; [1901] 2 Ch. 799; 84 L. T. 818; 49 W. R. 508; 65 J. P. 519—Buckley, J.

3. AREAS OF SUPPLY.

County of London — Undertakers — Prohibition against Supplying beyond "area of supply" — Limited Liability Company — Restriction on General Trading Powers.]—A limited company incorporated under the Companies Acts, 1862 to 1886, and having for its objects the production and supply generally of electric, magnetic, or other force for lighting and other purposes, undertook to supply certain statutory "areas of supply," within the administrative county of London, with electric energy, under special powers conferred upon it by Act of Parliament, and by Provisional Orders confirmed by Act of Parliament, all of which contained a prohibition against the undertakers supplying energy, or erecting or laying down any electric lines or works beyond their statutory areas of supply, without the authority of Parliament or the licence of the Board of Trade:—*Held*, that the prohibition did not operate merely in connection with and relation to the particular area in question, but was of universal application, so that the company could be restrained from carrying on its business and supplying energy in any other place whatsoever, however far removed from its areas of supply, and although such business was carried on and supply furnished quite independently of any of the company's special statutory powers. *Att.-Gen. v. Metropolitan Electric Supply Co.*, 74 L. J. Ch. 384; [1905] 1 Ch. 757; 92 L. T. 544; 53 W. R. 418; 69 J. P. 169; 3 L. G. R. 625; 21 T. L. R. 355—C.A.

4. LAYING LINES.

Requirement by Neighbouring Owners—Default of Complying with Requirement—Arbitration—Award of Full Compensation—Subsequent Liability to Penalty—Summary Proceedings.]—Though operators who have made default in complying with any of the requirements of section 18 of the schedule to the Electric Lighting (Clauses) Act, 1899, have made full compensation to an owner affected thereby, in arbitration proceedings pursuant to the section, they are not in consequence necessarily relieved from being made subsequently liable in summary proceedings to the penalties imposed by the section. *Chepstow Gas and Coke Consumers Co. v. Chepstow Electric Light and Power Co.*, 74 L. J. K.B. 28; [1905] 1 Ch. 198; 92 L. T. 27; 69 J. P. 72; 3 L. G. R. 49; 21 T. L. R. 35—D.

— Validity of Conviction Imposing Penalty and also Daily Penalty.]—Operators who have made default in complying with any of the requirements of section 18 of the schedule to the Electric Lighting (Clauses) Act, 1899, are on conviction for such default, under sub-section 5

of that section, primarily liable only to the penalty imposed by that sub-section, and not to the additional daily penalty until after such conviction; but a conviction for such default which adjudges the operators to pay both the penalty and the daily penalty is not invalid in its entirety, but only as to the daily penalty. *Ib.*

Limitation of Time for making Complaint—Time of Matter of Complaint Arising.]—On October 2, 1903, a gas company wrote to an electric light company who were laying down new electric lines, making requirements pursuant to section 18 of the schedule to the Electric Lighting (Clauses) Act, 1899, for protecting from injury and securing access to the mains of the gas company. The work of laying the electric light was finished on October 31, 1903. The electric light company disputed the reasonableness of the requirements, and the differences between the two companies were referred to arbitration under the section. By his award dated February 12, 1904, the arbitrator found that the electric light company did not conform with the requirements, and that the electric lines had been laid in undue proximity to the gas mains, which were more liable to injury and difficult of access by reason of such proximity, and he awarded the gas company compensation. On April 29, 1904, the gas company again called upon the electric light company to comply with the requirements. On May 31, 1904, the gas company made a complaint before the Justices that "on and since the 2nd day of October, 1903," the electric light company had made default in complying with section 18 of the schedule to the Act, in that they had not conformed with the requirements of the gas company. The Justices convicted the electric light company of the offence alleged in the complaint, and imposed upon them, in respect thereof, the penalty of 1*l.* mentioned in the section. On a Case stated by the Justices,—*Held*, that the conviction was valid, the complaint having been made within six months from the time when the matter of complaint arose, as required by section 11 of the Summary Jurisdiction Act, 1848. *Ib.*

5. DAMAGE.

Negligence — "Leak" — Statutory Powers—Right of Action.]—The respondent companies were incorporated by Acts of Parliament, and authorised to work lines of tramway by electric power. Each statute contained a provision that the company "specially undertakes that, in the event of any electric leak taking place and any damage being caused thereby by electrolysis or otherwise, it will make good . . . all costs, damages, and expenses; and provided that nothing in this Act contained shall entitle the company to use the rails as a part of its system of conductors for the return electric current without the consent of the council." A short section of the tramway lines was not included in the lines authorised by the Acts, but the road authority had granted permission to lay tramway lines on that section. Consent was obtained for the use of the rails for the return electric current; but it was found that, without any negligence, there was necessarily an escape of electricity from the rails into the

earth, which affected a telegraph cable belonging to the appellant company and interfered with the transmission of messages. The appellants were put to considerable expense in devising means to counteract it:—*Held*, that, there being no tangible or sensible injury to person or property, the respondents were not liable at common law for the affection of the peculiar apparatus of the appellants, within the principle of *Rylands v. Fletcher* (37 L. J. Ex. 161; L. R. 3 H.L. 330), although the principle of that case does not obtain in the Roman law; secondly, that the necessary escape of the electricity from the rails was not a "leak" within the meaning of the statute so as to make the respondents liable for the resulting damage to the appellants. *Eastern and South African Telegraph Co. v. Cape Town Tramways*, 71 L. J. P.C. 122; [1902] A.C. 381; 86 L. T. 457; 50 W. B. 657—P.C.

Contract to Instal—Contractors and Local Authority—Indemnity for Accident—Earthing Metal Tubes—Fire-office Rules.—A contract between contractors and a local authority for the installation of electric light in public baths and washhouses belonging to the latter, incorporated a rule of the Phoenix Fire Office that "when a system of metal tubes is employed the metal tubes should be earthed except in those cases where earthing would not be desirable." In carrying out the works a system of metal tubes was employed, but the metal tubes were not earthed. After the completion of the works two members of the public who were using the baths were accidentally killed by an electric shock from a wire forming part of the works. The representatives of the persons so killed recovered damages from the local authority, who claimed to be indemnified by the contractors. An arbitrator, before whom the claim was heard, stated his award in the form of a Special Case, finding as facts that the accident was due to the fact that the metal tubes were not earthed, that there had been no negligence on the contractors' part in not earthing the tubes, and that the earthing of the tubes would not have been desirable so far as risk of fire was concerned, but would have been desirable so far as risk of accident to bathers was concerned:—*Held*, that the rule of the Phoenix Office was incorporated in the contract with a view to the prevention of risk of fire, and that, inasmuch as the earthing of the tubes was not desirable with reference to that object, there had been no breach of contract on the contractors' part, and that they were not liable. *Fulham Borough Council and National Electric Construction Co., In re*, 4 L. G. R. 115; 70 J. P. 55—Bigham, J.

6. INSPECTION.

Inspector—Reasonable Expenses.—The "fees and reasonable expenses" of an electric inspector which, in the absence of any agreement to the contrary, are to be paid by the undertakers by section 47 of the Electric Lighting Orders Confirmation (No. 15) Act, 1890, are confined to the expenses incurred by the inspector in making tests and inspections, and do not include the salary of the inspector or the expenses of his laboratory. *Crawford v. City of London Electric Lighting Co.*, 67 L. J. Q.B. 942; 78 L. T. 841; 47 W. R. 45—D.

7. PURCHASE OF UNDERTAKING BY LOCAL AUTHORITY.

Notice to Treat—Reference to Arbitration—Award—Action for Specific Performance—Capital Expenditure since Date of Purchase—Compensation for Bad Titles.—The plaintiff company before 1901 had established in Marylebone and elsewhere an undertaking of electric supply. By section 2 of the Electric Lighting Order Confirmation (No. 1) Act, 1901, it was provided that the company should sell, and the defendant council might and should purchase, "the St. Marylebone undertaking and business of the company," which was by the same section defined as comprising that part of the undertaking and business of the company which was "at the date of purchase" in the area of supply under a certain Order, and, with certain exceptions, all lands, property, plant and effects, rights and privileges of the company in that area, at a price and upon terms to be determined, in default of agreement, by arbitration. It was common ground that the "date of purchase" was the date when there was a contract to purchase between the company and the council. Notice to treat was given on November 1, 1901. The company and the council failed to agree as to the amount of the purchase-money and compensation to be paid, and there was therefore a reference to two arbitrators and an umpire. The arbitrators disagreed, and the umpire made his award on February 4, 1903, which recited that it had been agreed that for the purpose of assessing compensation the notice to treat should be deemed to have been given on December 31, 1901, and the umpire thereby awarded the sum of 1,212,000*l.* as the amount of the purchase-money and compensation payable by the council to the company. After the notice to treat the company went on with its undertaking, and spent considerable sums in what was said to be capital expenditure. Under its Acts and Orders the company was compellable to provide supplies, and also to give a supply of electric energy to persons requiring the same, and it also proceeded with a scheme to which it was committed before the Act for changing the system under which electricity was supplied, and for erecting as part of this change of system a new transforming station. The umpire was of opinion that the matter referred to him did not include the adjustment of the rights of the parties in respect of capital expenditure for the purpose of the undertaking and business after December 31, 1901. Part of the property consisted of leaseholds, as to some of which it was not admitted that the company had shewn or could shew a good title. In an action by the company for specific performance,—*Held*, that the Court, and not the umpire, was the proper tribunal to deal with the adjustments of the capital expenditure, and that a day must be fixed for completion and an enquiry be directed as to the capital expenditure between the date of the notice to treat and the date fixed for completion. *Held*, also, that the contract stood whether there was or was not a good title shewn to the leaseholds, but if there was not, the council would be entitled to compensation. *Metropolitan Electric Supply Co. v. St. Marylebone Borough*, 1 L. G. R. 673; 67 J. P. 382—Buckley, J.

Specific Performance—Failure of Local Authority to Obtain Sanction for Loan—Promotion of Bill in Parliament to Obtain Borrowing Powers—Extension of Time.]—A Metropolitan borough council obtained a special Act by which they became bound to purchase the undertaking of an electric supply company in their borough. Notice to treat was duly given, but the parties being unable to agree on the amount of the compensation to be paid, the matter was referred to arbitration. The arbitrators having disagreed, the umpire by his award adjudged that the sum of 1,212,000*l.* should be paid by the council to the company as compensation. As this would involve the levying of a rate of 20*s.* in the pound, the council applied to the London County Council for liberty to raise this sum by a loan, but this application was refused. The council then resolved to appeal to the Local Government Board against this decision. Before this appeal could be heard, an order was made on August 7, 1903, against the council for specific performance of the contract created by the Act, the notice to treat, and the award. The order fixed December 31, 1903, for the completion of the contract, but gave liberty to the council to apply for an extension of time in the event of their being unable to find the necessary money. Subsequently to the order the council applied to the Local Government Board by way of appeal and also to the Board of Trade, but both applications were refused. As a last resource the council proposed to promote a bill in Parliament to obtain the necessary borrowing powers. To do this, an extension of time was necessary in order to enable them to obtain the consent of the parochial electors under the Borough Funds Acts to the promotion of the bill. Under these circumstances the Court extended the time till February 29, 1904, upon terms, including payment by the council to the company of the bulk of the capital expenditure they had incurred in carrying on the undertaking since the date of the contract. And, the consent of the parochial electors having been obtained, and the bill read a second time in the meantime, the Court afterwards further extended the time upon terms including a further payment by the council to the company towards capital expenditure. *Metropolitan Electric Supply Co. v. St. Marylebone Borough Council*, 2 L. G. R. 419—Buckley, J.

8. TRANSFER OF POWERS.

Transfer of Powers by Local Authority—Approval of Board of Trade—Collateral Agreement not Approved by Board of Trade—Validity.]—A local authority were empowered to supply electrical energy for lighting purposes within their area, and, with the approval of the Board of Trade, they could transfer their powers. The local authority proposed to transfer their powers to a company, one of the terms being that the company should erect and maintain a dust destructor. The Board of Trade having refused to approve a deed embodying this agreement, two deeds were then drawn up, one transferring the powers as to electric lighting from the local authority to the company—this the Board of Trade approved—and the second for the erection and

maintenance of the dust destructor:—*Held*, that as the execution of the second deed was a term of the first deed, it required the approval of the Board of Trade, and, not having been approved by that Board, was invalid. *Lambeth Borough Council v. South London Electric Supply Corporation*, 70 J. P. 27; 4 L. G. R. 457; 22 T. L. R. 78—Bigham, J.

Provisional Order—Assignment of Order—Assignment by Local Authority to Company—Approval of Board of Trade—Collateral Agreement as to Erection of Dust Destructor—Latter Agreement not Approved by Board of Trade.]—By a Provisional Order under the Electric Lighting Acts duly confirmed, a local authority were constituted undertakers for the supply of electricity in their district, and were empowered, with the consent of the Board of Trade, to transfer their powers under the Provisional Order by deed to be approved by the Board of Trade. The local authority made an arrangement to transfer their powers under the Provisional Order to a company, upon terms, *inter alia*, that the company should erect a dust destructor in connection with the works for the generation of electricity, and should by means thereof destroy the house refuse of the local authority's district. The arrangement was embodied in a deed of transfer of the local authority's powers under the Provisional Order, which was presented to the Board of Trade for their approval; but the Board refused to sanction the embodiment in the deed of transfer of the arrangement as to the dust destructor and the destruction of refuse, on the ground that the Board were not concerned with that matter. Two deeds of the same date were thereupon executed by the parties—the first, which was approved by the Board of Trade, transferring the powers of the local authority under the Provisional Order to the company, and the second, which was not approved by the Board, but which was expressed to be executed in pursuance of the agreement between the parties for the transfer of the powers, embodying the arrangement as to the dust destructor and the destruction of refuse:—*Held*, that the bargain as to the dust destructor was an independent transaction which did not require the approval of the Board of Trade, and that it was not *ultra vires*, and that consequently the second deed was not invalid, and the plaintiffs could sue the defendants for a breach of its terms. *Davis v. Leicester Corporation* (63 L. J. Ch. 440; [1894] 2 Ch. 208) distinguished. *Lambeth Borough Council v. South London Electric Supply Corporation*, 96 L. T. 440; 71 J. P. 233; 5 L. G. R. 526; 23 T. L. R. 347—C.A.

9. OTHER MATTERS.

Boxes in Street—Notice to Local Authority.]—*See* METROPOLIS.

Explosion—Nervous Shock.]—*See* NEGLIGENCE.

Failure to Supply—Penalty Clause—Action for Damages.]—*See* STATUTE.

Leakage—Liability for Nuisance.]—*See* STATUTE.

ELEGIT.

See EXECUTION.

EMBEZZLEMENT.

See CRIMINAL LAW.

EMBLEMMENTS.

See LANDLORD AND TENANT.

ENFRANCHISEMENT.

• See COPYHOLDS.

ENGRAVING.

See COPYRIGHT.

ENTRIES.

See EVIDENCE, col. 814.

EQUITY TO A SETTLEMENT.

See HUSBAND AND WIFE.

ERROR.

See MISTAKE.

ESCHEAT.

See CROWN.

ESCROW.

See DEED.

ESTATE.

1. *Tenant for Life*, 793.
2. *Tenant pur Autre Vie*, 795.
3. *Tenant for Life and Remainderman*, 795.
4. *Estate Tail*, 798.
5. *Tenant in Common*, 799.
6. *Gavelkind*, 799.
7. *Other Matters*, 799.

1. TENANT FOR LIFE.

Surrender of Lease—Payment for Acceptance of Surrender—Right of Tenant for Life to Retain.]
—In a case falling outside the provisions of the Settled Land Acts, a legal tenant for life, if his

bona fides is not impeached, is entitled to retain to his own use any sum of money paid to him in consideration of his accepting a surrender of a lease of the settled property, unless prevented from so doing by the terms of the instrument under which he claims. *Hunloke, In re; Fitzroy v. Hunloke*, 71 L. J. Ch. 530; [1902] 1 Ch. 941; 86 L. T. 829—Swinfen Eady, J.

Equitable Tenant for Life—Land Purchased under Trusts of Will—Repairs—Liability—Payment out of Capital.]—A testator gave all his personal estate to trustees upon trust to convert and invest; and to pay the annual produce thereof to his daughter during her life; and, subject thereto, and to the power (which was afterwards exercised) to appoint an estate for life to the daughter's husband, in trust for her children. And the testator declared that the trustees should, with the consent of his daughter, invest any of the trust moneys in (amongst other securities) the purchase of freehold lands. And in case any of his personal estate should be laid out in the purchase of lands, such lands should be liable to a trust for sale, in order that his personal estate so laid out might, notwithstanding such investment, retain for the purposes of his will the character of personal estate. The bulk of the trust moneys was laid out, with the consent of the daughter, in the purchase of freehold land. After the death of the daughter, and during the life of her husband, some of the buildings on the land were very much out of repair:—*Held*, that the tenant for life was not bound to put the property in repair, but that such repairs as were necessary should be done by the trustees, and the costs thereof defrayed out of the residuary personalty, by mortgage of the land or otherwise. *Freeman, In re; Dimond v. Newburn*, 67 L. J. Ch. 14; [1898] 1 Ch. 28; 77 L. T. 460—North, J.

Powers of — “Opened” — Mines — Colliery — Seams of Coal not Actually Worked — “Mineral estate” — Intention of Settlor.]—A testator who died in June, 1897, devised all his real estate to the use of his trustees in trust for the plaintiff for life, with remainder to his first and other sons in tail male, with remainder to each of his brothers in seniority for life and their sons successively in tail male, with remainder to his own right heirs for ever. The testator gave his personal estate to other persons. The testator expressly empowered his trustees at their discretion to carry on so long as they should think proper his mining, manufacturing, and other businesses, and to increase or diminish any such businesses or his capital therein, or otherwise to deal with and manage the same as they in their absolute discretion should think proper. The will did not exempt the persons thereby made tenants for life of the real estate of the testator from impeachment for waste. Part of the real estate was the freehold portion of a mining estate known as the S. Colliery. The testator purchased that property, which was in part leasehold, in 1894, as a going concern. The colliery was being worked when the testator purchased it. The coal and ironstone therein lay in eight seams. Two of the seams had not been actually worked, though a cross-heading passed through one of them. The testator, since he purchased the property, had expended a large sum in providing new machinery, and had put working capital to a larger amount

into the business. The question was whether the plaintiff was entitled, as tenant for life under the will, to work for his own benefit all seams of coal and ironstone comprised in the freehold portion of the colliery:—*Held*, that the whole course of dealing with the property indicated an intention on the part of the owner to treat all the seams as mines which were opened; that, therefore, all the eight seams of coal, including the two which had not been actually worked, were to be treated as opened at the time of the testator's death; that this view was confirmed by the words of the will, which not only shewed that all the seams were treated as one commercial entity, but also got over the difficulty arising from the fact that the freehold and leasehold parts were differently dealt with in the will, a conclusion which was fortified by the powers thereby conferred on the trustees. *Chaytor v. Trotter*, 87 L. T. 33—C.A. And see SETTLED LAND ACTS.

2. TENANT PUR AUTRE VIE.

Devise of Whole Estate and Interest—Omission of "Heirs"—Special Occupant—Personal Representatives.]—In order that an estate *pur autre vie* may pass on the death of its owner intestate to his heir as special occupant, it is necessary that "heirs" should have been expressly named in the last grant, whether by deed or will, affecting the devolution of the estate. It is not sufficient for the purpose that "heirs" should have been named in some previous grant, and that all subsequent grants should have conveyed the whole estate as thereby limited without creating any fresh limitations. *Inman, In re; Inman v. Inman*, 72 L. J. Ch. 120; [1903] 1 Ch. 241; 88 L. T. 173; 51 W. R. 188—Swinfen Eady, J.

The Irish cases of *Blake d. Blake v. Jones* (1 Hud. & Br. 227n), *Wall v. Byrne* (2 Jo. & Lat. 118), and *King, In re; King v. King* ([1899] 1 Ir. R. 30), not followed. *Philpotts v. James* (3 Dougl. 425) distinguished. *Doe d. Lewis v. Lewis* (11 L. J. Ex. 305; 9 M. & W. 662) applied. *Id.*

Devolution—Special Occupant—Intestacy.]—A lessee of lands, which had been demised to him, his heirs, executors, administrators, and assigns, for lives and thirty-one years concurrently, by his will devised same to trustees in trust for A B, without any words of limitation in relation to either the legal or equitable interest. A B died intestate. One of the lives mentioned in the lease was still in existence; the term of years had long since expired:—*Held*, that the heir-at-law and not the personal representative of A B was entitled to the estate *pur autre vie*. *King v. King*, [1899] 1 Ir. R. 30—C.A.

3. TENANT FOR LIFE AND REMAINDERMAN.

Leasehold Houses—Repairs—Dangerous Structure—Sanitary Works—Liability.]—An equitable tenant for life of leaseholds, although not receiving the full rack-rent of the property, is liable as between himself and the remaindermen for the expenses of complying with a sanitary notice under the Public Health (London) Act,

1891, and a dangerous structures notice under the London Building Act, 1894. *Copland's Settlement, In re; Johns v. Carden*, 69 L. J. Ch. 240; [1900] 1 Ch. 326; 82 L. T. 194—Byrne, J.

Leaseholds—Permissive Waste.]—The estate of a tenant for life of leaseholds is not liable to the remainderman in respect of permissive waste, although there may have been a breach of covenants to repair during the continuance of the life tenancy. *Cartwright, In re; Avis v. Newman* (58 L. J. Ch. 590; 41 Ch. D. 532) followed. *Parry and Hopkin's Arbitration, In re*, 69 L. J. Ch. 190; [1900] 1 Ch. 160; 81 L. T. 807; 48 W. R. 845; 64 J. P. 137—North, J.

Bequest of Leasehold House—Covenants—Liability.]—Where a testator has bequeathed a leasehold house, held under a lease granted to him, to a beneficiary for life, with a gift over on death, the tenant for life will not be bound to fulfil any of the covenants in the lease as to payment of rent, repairs, or otherwise. The liability under the covenants is a burden cast upon the testator's estate. *Courtier, In re; Coles v. Courtier* (56 L. J. Ch. 350; 34 Ch. D. 136), considered and followed. *Tomlinson, In re; Tomlinson v. Andrew*, 67 L. J. Ch. 97; [1898] 1 Ch. 232; 78 L. T. 12; 46 W. R. 299—Kekewich, J.

Breach of Covenant to Repair—Liability.]—As between the equitable tenant for life of leaseholds and the remaindermen, the tenant for life is liable for breaches of covenant to repair committed during the existence of the life estate; the liability for such breaches cannot be thrown by the tenant upon the corpus of the estate. *Waldron and Bogue's Contract, In re*, [1904] 1 Ir. R. 240—Barton, J.

Fines for Renewal—Leases for Lives.]—Where a tenant for life of a manor who is unimpeachable for waste, and under no obligation to renew, has nevertheless renewed leases for lives of copyholds according to the custom of the manor, upon the payment of arbitrary fines, such fines will be considered as casual profits, and belong to the tenant for life as against the remainderman. And this will be so in a case where the tenant for life holds under a settlement which only empowers him to grant leases for twenty-one years, provided that the renewals have been granted in a customary and reasonable manner. *Medows, In re; Norie v. Bennett*, 67 L. J. Ch. 145; [1898] 1 Ch. 300; 78 L. T. 13; 46 W. R. 297—Kekewich, J.

Will—Leaseholds—Equitable Interest—Liability for Rent and Covenants.]—An equitable tenant for life of leaseholds under a will is bound, as between himself and the testator's estate, to bear the obligations imposed by the covenants in the lease, during the continuance of his interest, but he is not liable for repairs necessary at the commencement of his interest, or for breaches of covenant committed during the testator's life. *Courtier, In re; Coles v. Courtier* (56 L. J. Ch. 350; 34 Ch. D. 136), considered. *Baring, In re; Jeune v. Baring* (62 L. J. Ch. 50; [1893] 1 Ch. 61), and *Tomlinson, In re; Tomlinson v. Andrew* (67 L. J. Ch. 97; [1898] 1 Ch. 232), differed from. *Betty, In re; Betty v. Att.-Gen.*, 68 L. J. Ch. 435; [1899] 1 Ch. 821; 80 L. T. 675—North, J.

The legatee for life of a leasehold house subject to a mortgage is liable to keep down the interest on the mortgage, and to pay the rent and observe the covenants contained in the lease under which the house is held. *Betty, In re; Betty v. Att.-Gen.* (68 L. J. Ch. 435; [1899] 1 Ch. 821), followed in preference to *Tomlinson, In re; Tomlinson v. Andrew* (67 L. J. Ch. 97; [1898] 1 Ch. 232). *Gjers, In re; Cooper v. Gjers*, 68 L. J. Ch. 442; [1899] 2 Ch. 54; 80 L. T. 689; 47 W. R. 535—Kekewich, J.

Compensation for Loss of Income—Will—Construction—Trust for Conversion—Power to Postpone—Reversionary Interest—Management—Exercise of Discretion.—Where a will directs conversion of residuary personal estate and investment of the proceeds, and contains a discretionary power for the trustees to postpone the conversion during such period as they think expedient, and a direction that till conversion the annual produce of the outstanding personal estate shall be deemed annual income for the purpose of the trusts of the will, the rule in *Howe v. Dartmouth (Earl)* (7 Ves. 137; 1 Wh. & Tu. L.C. 68) is excluded for all purposes, so that where the conversion of a reversionary interest is properly postponed in exercise of such power the tenant for life is not entitled to any compensation for loss of income. *Mackie v. Mackie* (5 Hare, 70) approved. *Rowlls v. Bebb; Rowlls, In re. Walters v. Treasury Solicitor*, 69 L. J. Ch. 562; [1900] 2 Ch. 107; 82 L. T. 633; 48 W. R. 562—C.A.

Apart from the proper management of the estate, trustees have no right under such a power to benefit remaindermen at the expense of the tenant for life, and where the trustees had not in fact exercised any discretion, but had simply overlooked the question whether a reversionary interest, expectant on the death of the tenant for life herself, ought to be converted, and there was in fact no outstanding personal property which should have been converted for the benefit of remaindermen according to the rule in *Howe v. Dartmouth (Earl)* (*supra*),—*Held*, that on the death of the tenant for life her estate ought to be compensated out of capital for loss of income during her life, according to the rule in *Chesterfield's (Earl) Trusts, In re* (52 L. J. Ch. 958; 24 Ch. D. 643). *Ib.*

Interest—Rate.—In applying the rule in *Chesterfield's (Earl) Trusts, In re (supra)*, interest should now be calculated at the rate of 3l. and not 4l. per cent. per annum. *Ib.*

Waste—Timber—Proceeds of Sale—Will—Construction—Full and Absolute Control.—A testator by his will devised an estate to his wife for life with remainder to his brother in fee, and appointed his wife sole executrix with full and absolute control over all the testator's property during her life. The wife having cut and sold timber, including oak, ash, and elm of twenty years of age and upwards, this action was brought claiming a declaration that this constituted waste, and for an injunction:—*Held*, that on the true construction of the will the words "with full and absolute power over all my property" did not render the defendant punishable for waste, but merely conferred large powers of management, and that waste

had been committed. That the defendant was only entitled to cut timber in a due course of management for the benefit and preservation of the estate, and must account for the proceeds of sale that had taken place. *Pardoe v. Pardoe*, 82 L. T. 547—Stirling, J. See also **TENANT FOR LIFE AND REMAINDERMAN.**

4. ESTATE TAIL.

Rule in Shelley's Case.—A devised fee-simple lands in trust for B. and his assigns for the term of his natural life, and after his decease to the use of B.'s second son C. and his assigns for the term of his natural life and his issue male in succession, so that every such son might take an estate for life, with remainder to his first and every subsequent son successively, according to seniority, in tail male. The will contained a proviso that C. and his issue should take the name of P. when he or they became entitled, and in case of refusal the estate or estates limited for the life of such person so refusing should cease, and the subsequent limitations be accelerated. B. died in 1882. C. died in 1889, leaving two sons, D. and E., who were both living at the death of A. D. executed a disentailing deed:—*Held*, applying the rule in *Shelley's Case* (1 Co. Rep. 93b), that C. took an estate tail. *Keane's Estate, In re*, [1903] 1 Ir. R. 215—Ross, J.

When Barrable—Grant for Services.—A grant of an estate tail from the Crown—stated to be "for divers good causes and considerations"—where the beneficiary is known to have rendered services to the Crown, must be regarded as a "recompense for the services of such donees," unless that consideration can be displaced, and the estate tail is not barrable by reason of section 18 of the Fines and Recoveries Act, 1833. *Robinson v. Giffard*, 72 L. J. Ch. 757; [1903] 1 Ch. 865; 88 L. T. 348; 51 W. R. 551—Farwell, J.

The King *de jure*, kept out of his rights by an usurpation, may, upon his restoration, reward a subject for services rendered during the usurpation, and this reward will be "a recompense for the services" of the subject within the meaning of 34 & 35 Hen. 8. c. 20. *Ib.*

Strict Settlement of Realty—Residuary Personality—"Subject to be invested in the purchase of lands" after the Death of a Certain Person—Disentailing Deed Executed in His Lifetime—Validity.—The words "money subject to be invested in the purchase of lands to be settled" in section 71 of the Fines and Recoveries Act, 1833 (which section enables a tenant in tail to acquire the absolute interest in such money), when read in conjunction with the interpretation clause (section 1) of the same Act, mean money subject either presently or at any future time to be laid out in the purchase of lands. Where, therefore, by will lands were settled in strict settlement and the testator's residuary personality was given to trustees upon trust to pay the income thereof to a certain person for his life, and after his death to convert the same and invest the proceeds in the purchase of lands to be settled to the same uses as the settled realty, a disentailing deed executed in the lifetime of such person by the tenant in tail in remainder of the settled realty with the consent

of the tenant for life thereof is effectual to buy the estate tail of the tenant in tail in the residuary personalty. *Fordham v. Fordham* (34 Beav. 59) approved and followed. *Harvey, In re*; *Harvey v. Harvey*, 70 L. J. Ch. 694; [1901] 2 Ch. 290; 85 L. T. 36; 49 W. R. 695—Byrne, J.

Equitable Estate Tail—Limitation “after the determination or in defeasance of such estate tail”—**Alternative Gift—Barring Entail.**—A testator devised real estate in trust for A. for life, and directed the trustees after A.’s decease to convey the same to the use of G. in tail male, but, if G. should be then dead, to the use of the person who should then be the first heir male of the body of G. in tail male, with remainder to the use of C. in tail male, with remainder to his own right heirs for ever. By a codicil the testator revoked the devise to G., and devised the estate after the death of A. to R. in tail male, with all the limitations as in his will mentioned:—*Held*, that R. took a vested equitable estate in tail male expectant on the decease of A., and that the limitation to the first heir male of G. or R. was an estate to take effect in a certain event after the determination or in defeasance of R.’s estate tail, and could be barred under section 15 of the Fines and Recoveries Act, 1833. *Cardigan v. Curzon-Howe*, 70 L. J. Ch. 763; [1901] 2 Ch. 479; 49 W. R. 715—Byrne, J.

Recovery by Tenant in Tail—Declaration of Uses—Resulting Use.—When uses are declared upon a recovery by a tenant in tail, which do not exhaust the fee, the use so far as unexhausted results to the recoveror. *Lynch v. Clarkin*, [1900] 1 Ir. R. 178—C.A.

5. TENANCY IN COMMON.

Gift of Residue without Words of Severance—Power of Advancement—Joint Tenancy.—A power of advancement given to trustees of a will to whom the residue of the property was devised by a testator for the benefit of his children, is inconsistent with a joint tenancy, and shews the children to be tenants in common. *L’Estrange v. L’Estrange*, [1902] 1 Ir. R. 467—C.A.

6. GAVELKIND.

Extent of Partibility among Collaterals—First Cousins—Generality.—The rule of partibility with respect to gavelkind lands in Kent extends to all collaterals, however remote. Gavelkind is the common law of the land in Kent, and not a mere custom contrary to the common law of England. *Chenoweth, In re*; *Ward v. Dwelley*, 71 L. J. Ch. 739; [1902] 2 Ch. 488; 86 L. T. 890; 50 W. R. 663—Farwell, J.

7. OTHER MATTERS.

Ancient Demesne—Tenure of.—*See* COMMONS.

Minerals—Tenant for Life.—*See* MINES.

Reverter—Possibility of.—*WILL.*

Settled Estates.—*See* SETTLED LANDS.

ESTATE DUTY.

See REVENUE.

ESTOPPEL.

1. *General Principles*, 800.
2. *By Record*, 800.
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4. *By Conduct*, 803.
5. *Other Matters*, 810.

1. GENERAL PRINCIPLES.

Equitable.—Equitable estoppel is not applied in favour of a volunteer. *Citizens’ Bank of Louisiana v. First National Bank of New Orleans* (43 L. J. Ch. 269; L. R. 6 H.L. 352) discussed. *Lovett v. Lovett*, 67 L. J. Ch. 20; [1898] 1 Ch. 82; 77 L. T. 650; 46 W. R. 105—Romer, J. *And see* s.c. sub-title SETTLEMENT.

Married Woman—Restraint on Anticipation.—The doctrine of estoppel cannot be so used as to enable a married woman to deprive herself of income settled to her separate use with a restraint on anticipation. *Bateman (Lady) v. Faber*, 67 L. J. Ch. 130; [1898] 1 Ch. 144; 77 L. T. 576; 46 W. R. 215—C.A.

2. BY RECORD.

Res Judicata—Beyond Statutory Jurisdiction.—The decision of a Court on a question which is beyond its statutory jurisdiction is not *res judicata*, and cannot be pleaded as an estoppel. *Toronto Railway v. Toronto Corporation*, 73 L. J. P.C. 120; [1904] A.C. 809; 91 L. T. 541; 20 T. L. R. 774—P.C.

Action for Seduction—Previous Order of Quarter Sessions Quashing Bastardy Order.—An order of quarter sessions quashing a bastardy order is not a bar to an action for seduction by the employer of the woman who had obtained the bastardy order. *Anderson v. Collinson*, 70 L. J. K.B. 620; [1901] 2 K.B. 107; 84 L. T. 465; 49 W. R. 623—D.

Certiorari to Quash Order of Inferior Court—Rule Discharged—Effect of.—Where an order, bad upon its face for want of jurisdiction, is sought to be enforced in a civil Court, the failure to obtain relief on a collateral application for *certiorari* to quash the order does not conclude the party from shewing that the order was void. *O’Grady v. Synan*, [1900] 2 Ir. R. 602—C.A.

Settlement of Pauper—Order Adjudicating—Judgment in rem—Abortive Appeal—Conclusiveness of Order.—An order adjudicating on the settlement of a pauper is conclusive as a judgment *in rem* as to the settlement of such pauper, and is none the less conclusive because an abortive appeal has been made against such order, which appeal failed because the notice of appeal was out of time and so was not heard on its merits. *Unbridge Union v. Winchester Union*, 91 L. T. 533; 68 J. P. 525; 2 L. G. R. 969—D.

Covenant to Keep Premises in Repair—Judgment for Damages for Breach—Subsequent Claim for not Delivering up Premises in Proper State of Repair.—In 1894 the plaintiffs recovered damages from the defendant for 1,305*l.* in respect of breaches of covenant to repair, which sum was not expended in repairing the premises. In 1898 the defendant's lease expired, whereupon the plaintiff claimed a sum sufficient to put the premises into such state as the defendant would be bound to leave them, making due allowance for the sum recovered in 1894:—*Held*, that the previous action was no estoppel, and that the plaintiff was entitled to recover. *Ebbetts v. Conquest*, 82 L. T. 560—D.

Order Nisi for Foreclosure on a Principal Charge and Four Supplementary Charges—Omission of Fifth Supplementary Charge—Action for Foreclosure on the Six Charges—Costs—Set-off—Independent Proceedings—Consolidation Order.—The defendant charged her property with repayment of 100*l.* and interest to the plaintiff, and subsequently gave him four supplementary charges to secure further advances. She then gave him another supplementary charge to secure a further advance and his professional costs. The plaintiff brought an action on the first five charges, omitting the sixth, which was mislaid, and obtained an order for foreclosure *nisi*. He afterwards found the sixth charge, and applied for an order extending the relief to that charge, but his application was dismissed with costs. He then brought a fresh action for foreclosure on all the six charges. The defendant took out a summons asking that the proceedings might be stayed on the ground that the plaintiff was estopped by the foreclosure order:—*Held*, that the subject-matter of the fresh action was not the same as that in the first action, and that in the circumstances the plaintiff was not estopped from setting up his present case, and that the defendant's application must be dismissed with costs. *Bake v. French* (No. 1), 76 L. J. Ch. 299; [1907] 1 Ch. 428; 97 L. T. 131—Warrington, J.

Judgment—Mistake by Plaintiff in Amount of Claim—Res Judicata.—In an action in *detinue* in the County Court the plaintiff by mistake claimed too small a sum. The defendant paid into Court the amount claimed without denial of liability, and it was taken out by the plaintiff. Upon discovering his mistake the plaintiff asked leave to amend his particulars, which was refused, and judgment was given in the action for the defendant. The plaintiff then began a new action for the larger amount, giving credit to the defendant for the sum previously paid into Court:—*Held*, that the matter was *res judicata*, and the action was not maintainable. *Sanders v. Hamilton*, 96 L. T. 679; 23 T. L. R. 389—D.

Summons Dismissed—Second Summons—Res Judicata.—An urban district council served a summons on J. under section 3 of the Public Health (Buildings in Streets) Act, 1888. No previous notice had been given to J. by the urban authority as required by the section, and the stipendiary magistrate dismissed the summons upon the ground that it was defective in that no offence to which a penalty was attached was set out. Notice was then served on J., and a second summons taken out, under which

the magistrate convicted. J. appealed upon the plea that, as the first summons had been dismissed, the matter was *res judicata*:—*Held*, that, as the matter had not been decided at all on the first summons, it was not *res judicata*, and that therefore the magistrate was entitled to convict. *Jenkins v. Merthyr Tydfil Urban Council*, 80 L. T. 600—D.

Scheme of Urban Authority—Objection of Owners that Street is a Highway Repairable by Inhabitants at Large—Objection Allowed by Justices—Second Proposal for same Street.—The Justices of the city of Wakefield in 1898 disallowed, on the objection of the owners, a scheme of the corporation for private street works in a street in the city, on the ground that the street was a highway repairable by the inhabitants at large, and no appeal was taken from the order. In 1901 a fresh scheme was prepared, and the same objection taken. A Court of summary jurisdiction refused to hear an application on the matter on the ground that it was *res judicata*:—*Held*, that the decision of the Court of summary jurisdiction was correct. *Reg. v. Hutchings* (50 L. J. M.C. 35; 6 Q.B. D. 300) distinguished and explained. *Wakefield Corporation v. Cooke*, 73 L. J. K.B. 88; [1904] A.C. 31; 89 L. T. 707; 52 W. R. 321; 68 J. P. 225; 2 L. G. R. 270; 20 T. L. R. 115—H.L. (E.)

Rating Decision.—An occupier of lands formerly liable for the repair of a certain highway, and on that ground exempt from highway rates, paid the composition provided for in section 35 of the Highway Act, 1862, on the conversion of the highway into a parish highway. He was subsequently rated in respect of his lands for the repair of the highways in his parish. He appealed to quarter sessions on the ground that he was exempt from all contributions towards the repair of the highways, and the rate was quashed:—*Held*, that on an appeal against a subsequent rate made for the same purpose against the same occupier in respect of the same lands, the rating authority was not estopped from denying that the occupier was entitled to the exemption which he claimed. *North-Eastern Railway v. Dalton Overseers*, 67 L. J. Q.B. 715; [1898] 2 Q.B. 66; 78 L. T. 524; 46 W. R. 582; 62 J. P. 484—D.

Action in Probate Division to Establish Will—Will Disposing of Real Estate—Heir-at-Law a Party to Action—Judgment in Favour of Will—Subsequent Action by Heir-at-Law to Recover Real Estate Disposed of by Will.—Where in an action in the Probate Division for the purpose of establishing a will relating to real and personal estate the heir-at-law of the testator is made a defendant, and is present and represented by counsel at the trial, he cannot, if the Court pronounces in favour of the validity of the will, afterwards maintain an action to recover possession of real estate devised by the will to another person. *Beardsley v. Beardsley*, 68 L. J. Q.B. 270; [1899] 1 Q.B. 746; 80 L. T. 51; 47 W. R. 284—D.

Citation of Person to see Proceedings—Compromise—Res inter alios acta—Will.—A person, although cited to see proceedings, is not estopped by judgment therein as the result of a compromise, to which he is not a party and of

which he knew nothing; and he is not estopped from questioning the validity of a will proved in solemn form as the result of such verdict or compromise. *Ritchie v. Malcolm*, [1902] 2 Ir. R. 403—Andrews, J.

Co-defendants—Judgment by Consent against one Defendant—Merger of Cause of Action.—A judgment obtained by consent against one of two co-defendants in an action where each defendant enters an appearance is a bar to further proceedings against the other defendant. Observations of BOWEN, L.J., in *Hodgson, In re; Beckett v. Ramsdale* (55 L. J. Ch. 241; 31 Ch. D. 177), adopted and applied. *M'Leod v. Power*, 67 L. J. Ch. 551; [1898] 2 Ch. 295; 79 L. T. 67; 47 W. R. 74—Byrne, J.

Judgment by Default.—A judgment by default may operate by estoppel, but the ground and extent of that estoppel must be found on the face of the judgment itself, and cannot be inferred or deduced from the pleadings of the party who has obtained the judgment where the defendant has said nothing, and has merely allowed the judgment to go by default. An unnecessary averment in a record that is neither pleaded to nor admitted cannot be used as an estoppel. *Irish Land Commission v. Ryan*, [1900] 2 Ir. R. 565—C.A.

Payment into Court.—See PRACTICE.

Parties—Civil and Criminal Proceedings.—See SHIPPING.

3. BY DEED.

Estoppel by Share Certificate.—A statement in a share certificate that the shares are fully paid will not estop the liquidator in the winding-up of the company from denying the sufficiency of the filed contract. *African Gold Concessions and Development Co., In re; Markham and Darter's Case*, 68 L. J. Ch. 215; [1899] 1 Ch. 414; 80 L. T. 282; 47 W. R. 509; 6 Manson, 84—Wright, J. See COMPANY.

Mortgage—Execution of.—See DEED AND SOLICITOR.

4. BY CONDUCT.

Representation—Future Conduct.—A representation as to a future course of conduct cannot create an estoppel. *Whitechurch (George), Lim. v. Cavanagh*, 71 L. J. K.B. 400; [1902] A.C. 117; 85 L. T. 349; 50 W. R. 218; 9 Manson, 351—H.L. (E).

Representations Influencing Conduct—Voluntary Trust.—N., a promoter of and vendor to an unsuccessful mining company, publicly and in good faith promised to create a trust, under which the company and its shareholders would have benefited, but died before the trust was created:—*Held*, that a person who heard of the contemplated trust could not, in virtue of the fact that he bought or held shares of the company in confidence of N.'s promise being carried out, establish a case of contract as against N., and in the absence of any fraud or special representation, neither N. nor his executors

would be estopped from denying liability, notwithstanding that N. himself might have benefited by the promise having been made. *Coleman v. North*, 47 W. R. 57—Romer, J.

Onus of Proof.—To entitle a plaintiff to recover from a defendant on the ground of estoppel, a loss occasioned through culpable neglect on the part of the defendant, the plaintiff must prove that the negligence complained of occurred in the particular transaction in which his loss arose, and also that such negligence was the proximate, direct, or real cause of the loss. *Longman v. Bath Electric Tramways*, 74 L. J. Ch. 424; [1905] 1 Ch. 646; 92 L. T. 743; 53 W. R. 480; 12 Manson, 147; 21 T. L. R. 373—C.A.

Public Authority—Ultra Vires Agreement—Laches and Acquiescence.—A local authority, being a public body with public duties, are not estopped from asserting a right to put an end to a nuisance by the fact they had formerly permitted and encouraged the acts which cause the nuisance, it being beyond their power to make any binding agreement to permit such acts. *Great North-West Central Railway v. Charlebois* (68 L. J. P.C. 25; [1899] A.C. 114) followed. *St. Mary, Islington, Vestry v. Hornsey Urban Council*, 69 L. J. Ch. 324; [1900] 1 Ch. 695; 82 L. T. 580; 48 W. R. 401—C.A.

Summary Conviction for Assault—Subsequent Civil Action for Damages.—A person who has been summarily convicted of assaulting a policeman, and who has made no attempt to have the conviction set aside, is not barred from bringing a civil action of damages against the policeman for an assault alleged to have taken place immediately before the assault of which the pursuer was convicted. *Wilson v. Bennett*, 6 F. 269—Ct. of Sess.

Payment of Rent under Supposed Legal Obligation.—For some years the defendants and their predecessors had paid to the plaintiff a yearly sum, as if in respect of the occupation of the lands beneath the surface, under a supposed legal obligation (which did not in fact exist) under a lease of 1822, by which certain mining privileges were granted:—*Held*, that the payment by the defendants was nothing more than a voluntary payment which did not estop them from setting up their true title. *Batten-Poole v. Kennedy*, 76 L. J. Ch. 162; [1907] 1 Ch. 256—Warrington, J.

Forgery—Adoption—Silence as Bar to Disclaiming Liability.—A person is not legally bound to answer and does not incur any liability by not answering letters addressed to him by persons to whom he stands in no special relation. *British Linen Co. v. Cowan*, 8 F. 704—Ct. of Sess.

From 1891 to 1894 two series of bills purporting either to be drawn by M. on and accepted by C. or drawn by C. on and accepted by M., were discounted by the British Linen Co. Each of these bills was substantially a renewal of an immediately preceding bill, and as the bills became overdue notices stating that they were lying under protest, and requesting their retrial, were sent by the bank to

C. C. did not reply to these notices, and, apart from the sending of them, there was no evidence that he was aware of the existence of the bills. In February, 1905, at which date a bill for 70*l.*, which purported to be drawn by C. on and accepted by M., and which had been discounted by the bank, was current, and, before any notice as to it had been sent by the bank, C. learned of its existence and at once repudiated liability under it, in respect that his signature appearing on it was not genuine. In an action by the bank against C. for payment of the 70*l.* contained in the bill, it was proved that C.'s name on all the bills had been forged by M.:—*Held*, that C.'s silence with reference to the notices as to the earlier bills did not involve adoption of the signature on the bill sued on or bar him from repudiating liability. *Ib.*

Certificated Transfers—Secretary of Company.]

—The secretary of a company is in the position of a servant, and has no power to bind the company by representations beyond the scope of his instructions and duties. The secretary of a company, in order to assist a shareholder in carrying out a fraud, falsely certified that certificates of shares had been deposited with him to meet certain transfers, when in fact no such certificates had been deposited:—*Held*, that the company were not thereby estopped from denying the right of the proposed transferee to be put upon the register of shareholders. *Grant v. Norway* (10 C. B. 665) followed. Lord Robertson doubting on this point. *Whitechurch (George), Lim. v. Cavanagh*, 71 L. J. K.B. 400; [1902] A.C. 117; 85 L. T. 349; 50 W. R. 218; 9 Manson, 351—H.L. (E.)

Managing Director.]—The articles of association of a limited company gave the managing director very wide powers as to the commercial business of the company:—*Held*, that this gave him no special powers to act as the representative of the company in relation to a proposed transfer of shares, so as to raise an estoppel against the company. *Ib.*

Bequest of Leasehold House—Gift Over to Executor on Legatee not Returning and Claiming—No Notice to Legatee of Gift Over—Death of Legatee without Claim.]—A testatrix bequeathed a leasehold house to a son then abroad, and directed that "in case he should not return and claim the said house" the same should accrue to another son, whom she appointed executor of her will. The executor informed the legatee of the bequest to him of the house, but did not mention the gift over to himself in the event of the legatee not returning and claiming. The legatee died abroad without having returned to claim the house:—*Held*, that there was no duty upon the executor to give notice to the legatee of the gift over in the event of his not returning to claim the house, and that the executor was not estopped from claiming the house under the gift over, which therefore took effect in his favour. *Lewis, In re; Lewis v. Lewis*, 73 L. J. Ch. 748; [1904] 2 Ch. 656; 91 L. T. 242; 53 W. R. 393—C.A.

Delivery "on sale or return"—"On sale for cash only or return"—Passing of Property—Redelivery on Sale for Cash or Return—Pledge—"Act adopting the transaction."]—The plain-

tiff, the manufacturer and owner of goods, delivered them to a retail dealer on the following terms: "On approbation. On sale for cash only or return. Goods had on approbation or on sale or return remain the property of" the plaintiff "until such goods are settled for or charged." The retail dealer delivered the goods to a second dealer on terms that the latter should pay cash or return the goods in a day or two. The second dealer fraudulently pledged the goods with the defendants, who took without notice of any defect in his title:—*Held*, first, that the goods had not been delivered by the plaintiff "on sale or return" or other similar terms "within the meaning of section 18 of the Sale of Goods Act, 1893; and secondly, that the delivery by the first dealer to the second and the pledge by the latter to the defendants did not amount to "an act" by the first dealer "adopting the transaction" within the meaning of the same section; that consequently the property in the goods had not passed from the plaintiff, who was therefore entitled to recover them from the defendants. *Held*, further, that the plaintiff was not under the circumstances estopped from asserting his title to the goods. *Weiner v. Gill; Weiner v. Smith*, 74 L. J. K.B. 845; [1905] 2 K.B. 172; 92 L. T. 843; 53 W. R. 553; 10 Com. Cas. 213; 21 T. L. R. 478—Bray, J.

Article Exempt from Distress—Request by Tenant to Landlord.]

—Upon a distraint being made upon a sewing machine, and a man being put in possession, a letter was written to the landlord: "I hereby request you to remove the sewing machine and other goods you have distrained on my premises":—*Held*, that this did not estop the respondent from raising the question whether the machine could be distrained upon at all. *Masters v. Fraser*, 85 L. T. 611; 66 J. P. 100—D.

Deviation from Deposited Plan—Subsequent Similar Deviation as to other Houses Shewn on Same Plan.]

—Where a specimen plan is deposited shewing a number of houses proposed to be erected, proceedings taken in respect of a deviation therefrom as to some of the houses in course of erection is not a bar to subsequent proceedings in respect of deviations from the plan as to others of the houses, although such latter deviations may be similar to those in question in the first proceedings. *Balby-with-Hetherthorpe District Council v. Mildard*, 68 J. P. 81; 2 L. G. R. 330—D.

Trustees—Liability—Mortgage by Beneficiary—Enquiry as to Prior Charge—Trustees Induced to Sign Incorrect Statement by Concealment of Facts—Security Deficient—Trustees not Liable—Estoppel.]—M., donee of a power, appointed 1,000*l.* to her son C. and 1,400*l.* to her son E. E. mortgaged this sum, and notice of the charge was given to the trustees, a fact which they entirely forgot. M., by her will, forgetting the appointment to E., appointed to her two sons and her daughter such further sums as, with C.'s 1,000*l.*, exhausted the fund. E. applied to X., one of the plaintiffs, for a loan on his interest under M.'s will, concealing the former appointment. X. required a memorandum from the trustees that they had no notice of a prior charge. He applied for this to P. and

A., solicitors to the trust, who informed him they never advised trustees to give such assurance. They, however, authorised X. to call on Dr. M., one of the trustees, to obtain from him a declaration of C.'s identity. X. sent his clerk, who took advantage of the visit to induce Dr. M. to sign the memorandum as to notices. Dr. M. was unwilling to sign without legal advice, but gave way on being informed that P. and A. had been seen and their assent obtained. The sight of Dr. M.'s signature led the other trustee to sign. X. completed the mortgage without informing P. and A. of the signatures he had obtained. E.'s interest, after paying the prior charge, was not sufficient to meet the plaintiffs' mortgage, and they claimed the deficiency from the trustees to whom the receipt of notice of the prior charge had been brought home.—*Held*, that the circumstances under which the signatures to the memorandum had been obtained precluded the plaintiffs from praying it in aid to estop the trustees from setting up the prior charge as a defence, and that the trustees were therefore not liable. *Porter v. Moore*, 73 L. J. Ch. 729; [1904] 2 Ch. 367; 91 L. T. 484; 52 W. R. 619—Swinfen Eady, J.

Negligence—Conveyance to Client Prepared by Solicitor—Portion of Solicitor's Property Comprised.—A person who relies on an estoppel by negligence must show that he was led into a belief on which he acted to his detriment. A solicitor was ordered by his client to investigate the title to and prepare a conveyance of property adjoining his (the solicitor's) property. In the conveyance a small portion of the solicitor's property was comprised, but the client did not believe, nor was he led by the solicitor to believe, that he was buying the small portion in question. The client subsequently brought an action claiming the land:—*Held*, that the solicitor was not estopped from setting up the truth. *Bell v. Marsh*, 72 L. J. Ch. 360; [1903] 1 Ch. 528; 88 L. T. 605; 51 W. R. 325—C.A.

Application for Shares in Fictitious Name—Estoppel.—A person who applies for and is allotted shares under an *alias* is estopped from disputing his liability as a shareholder. *Coventry's Case* (60 L. J. Ch. 186; [1891] 1 Ch. 202) distinguished. *Pugh and Sharman's Case* (41 L. J. Ch. 580; L. R. 13 Eq. 566) followed. *Central Klondyke Gold-Mining and Trading Co., In re; Savigny's Case*, 5 Manson, 386—Wright, J.

Personal Injury to Infant Workman—Unsuccessful Action for Negligence against Employer—Claim for Assessment of Compensation—Exercise of Option—Application by Workman for Judgment or New Trial in Action—Estoppel as regards Further Proceedings in Action.—An action brought by an infant workman, suing by his next friend, to recover damages from his employers for injuries sustained in the course of his employment, having been decided in favour of the employers, an application was made at the trial under section 1, sub-section 4 of the Workmen's Compensation Act, 1897, for compensation under that Act, and the Judge assessed the compensation and made his award in favour of the plaintiff. The plaintiff then applied to the Court of Appeal for judgment or for a new trial of

the action:—*Held*, that the plaintiff, by applying for compensation to be assessed and obtaining an award which had not been impeached, had exercised the option given by section 1, sub-section 2 (b) of the Act, and was thereby estopped from taking any further proceedings in the original action. *Isaacson v. New Grand (Clapham Junction), Lim.* (72 L. J. K.B. 227; [1903] 1 K.B. 539), discussed. *Neale v. Electric and Ordnance Accessories Co.*, 75 L. J. K.B. 974; [1906] 2 K.B. 558; 95 L. T. 592; 22 T. L. R. 732—C.A.

Landlord and Tenant—Lease—Mortgage by Demise before Conveyancing Act, 1881—Underlease by Mortgagor—Foreclosure—Acceptance of Rent by Mortgagee—Sub-lease by Licence of Mortgagee—Sale by Mortgagee subject to Underlease—Rights of Purchaser as against Underlessee and Sub-lessee—Representation by Mortgagee.—The lessee of certain premises under a lease for sixty years mortgaged the premises by demise to N. on March 9, 1881. By underlease of March 24, 1892, the mortgagor purported to demise the premises to the defendant company for twenty-one years subject to a power of re-entry if the defendant company should be wound up. On March 21, 1895, N. foreclosed, and from that date the defendant company paid their rent to him, and his executors after his death. N. died in 1899, and on October 13, 1899, his executors gave to the defendant company licence in writing to demise to S. the premises comprised in the under-lease for the residue of the term of twenty-one years, less the last ten days, and in this licence the executors described themselves as being the persons in whom the reversion expectant on the determination of the under-lease was vested. On November 27, 1899, the defendant company sub-let the premises to S. On August 9, 1900, N.'s executors assigned the premises to the plaintiff for the residue of the term, subject to but with the benefit of the under-lease. After that the defendant company paid their rent to the plaintiff. On October 1, 1901, the plaintiff gave the defendant company notice to do certain repairs in accordance with the covenants of the under-lease. On October 8, 1902, an order was made for the winding-up of the defendant company. The plaintiff brought the action to recover possession of the property. His contention was that the under-lease was not binding upon him, it having been granted by a mortgagor without the concurrence of the mortgagee under a mortgage created before the Conveyancing Act, 1881, and that the defendant company were merely tenants from year to year to N. and himself of the premises comprised in the under-lease upon the terms thereof so far as they were not inconsistent with such a tenancy, and he could determine the tenancy on account of the winding-up order:—*Held*, that N.'s executors had by their assertion that the reversion expectant on the determination of the under-lease was vested in them caused both the defendant company and S. to believe in that state of things, and to act on that belief so as to alter their previous positions, and the plaintiff, their successor, was estopped as against both the defendant company and S. from denying that he was the reversioner; and none the less so because the assertion was made by persons who, as mortgagees, were at the time entitled to say

that the under-lease was not binding on them. *Held*, also, that it was a proper case for relief against forfeiture under section 14 of the Conveyancing Act, 1881. *Keith v. Gancia*, 73 L. J. Ch. 411; [1904] 1 Ch. 774; 90 L. T. 395; 52 W. R. 580; 20 T. L. R. 330—C.A.

Fraudulent Sale of Goods by Servant—Title of Purchaser—Conduct of Master Enabling Fraud—General Authority to Servant to Deal with Goods.]

—A timber merchant gave a written authority to a dock company to accept all transfer or delivery orders of timber stored in his name in the dock signed by a clerk in his employ. The clerk in fraud of his employer used the authority to transfer timber belonging to the employer into an assumed name, under which he sold it to purchasers, who purchased it in good faith and without suspicion of fraud, and duly paid the clerk for it, and received delivery of it from the dock company under delivery orders given to them by the clerk in his assumed name. In an action by the merchant to recover the timber or its value from the purchasers, — *Held* (STIRLING, L.J., *dissentiente*), that, as the merchant had by his conduct enabled the clerk to hold himself out as the owner of the timber and thereby to commit the fraud, he was estopped from denying the title of the purchasers to the timber by reason of the principle of law that whenever one of two innocent persons must suffer by the act of a third person, he who has enabled the third person to occasion the loss must sustain it. *Farquharson v. King*, 70 L. J. K.B. 985; [1901] 2 K.B. 697; 85 L. T. 264; 49 W. R. 673—C.A.

By VAUGHAN WILLIAMS, L.J.—One of two innocent persons ought not to be said to have enabled a third person to occasion a loss, unless the act he has done, which is said to have enabled the third person to occasion the loss, is an act which was intended to be acted upon. *Id.*

Bill of Sale—Validity.]—A bill of sale given by the defendant to the plaintiffs was held invalid because the consideration was not “truly set forth” as required by section 8 of the Bills of Sale Act, 1882. Both the plaintiffs and the defendant had held out the bill to be valid against creditors of the defendant: — *Held*, that as between the plaintiffs and the defendant the bill was valid; the defendant having elected to obtain an advantage by asserting the bill to be valid could not, to gain a further advantage, be heard to say that it was invalid, even, *semble*, assuming that its invalidity was known to both the parties. *Comitti v. Maher*, 94 L. T. 158; 22 T. L. R. 121—Kekewich, J.

Will—Purported Disposition of Realty—Inc capacity to Dispose—Adverse Possession.]—By her will a married woman gave certain real property (of which she was competent to dispose) to her husband for life, with remainder over. By a codicil she purported to devise in the same way certain other property (to which she had a good title but which she was not competent to devise). Her husband entered on both properties and remained in possession for more than twenty years:—*Held*, that those claiming under the husband were not estopped from denying the testatrix's power to dispose

of the second property, and had a good title by adverse possession against her heir and those claiming in remainder under the codicil. *Anderson, In re*; *Pegler v. Gillatt*, 74 L. J. Ch. 433; [1905] 2 Ch. 70; 92 L. T. 725; 53 W. R. 510—Buckley, J.

The principle of *Board v. Board* (43 L. J. Q.B. 4; L. R. 9 Q.B. 48) does not apply to the case of a person who has a good title to property but is not competent to dispose of it. *Paine v. Jones* (43 L. J. Ch. 787; L. R. 18 Eq. 320) applied. *Id.*

5. OTHER MATTERS.

Conduct, by.]—See *Rimmer v. Webster*, 71 L. J. Ch. 561; *post*, MORTGAGE; PRINCIPAL AND AGENT.

Customer of Bank—Negligence of—Payment of Forged Cheque.]—See BANKER.

Fraud—Cause of.]—See SALE OF GOODS.

Promissory Note—Not for Negotiation—Possession in Payee after Payment by Maker.]—See BILL OF EXCHANGE.

— **Signature of in Blank.]**—See BILL OF EXCHANGE.

Rent—By Payment of.]—See *Sergeant v. Nash*, 72 L. J. K.B. 304; *post*, LANDLORD AND TENANT.

Representations by—Fraudulent Agent—Delivery Order.]—See TROVER.

Shares—Certificated Transfer—Secretary—General Manager.]—See COMPANY.

Tenancy, by.]—See LANDLORD AND TENANT.

EVIDENCE.

1. *Statutes*, 810.
2. *Presumptions*, 811.
3. *Documentary Evidence*, 812.
 - (a) *Public Documents*, 812.
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4. *Witnesses*, 817.
5. *Commission*, 818.
6. *Affidavits*, 818.
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11. *Foreign Law*, 821.
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13. *Other Matters*, 822.

1. STATUTES.

Colonial Statutes.]—7 Edw. 7 c. 16 is the *Evidence (Colonial Statutes) Act*, 1907.

Prize Proceedings.]—7 Edw. 7 c. 25 is the *Commissioners for Oaths (Prize Proceedings) Act*, 1907.

2. PRESUMPTIONS.

Marriage.—From 1856 to 1866 a man and woman lived together as man and wife and had five children. There was evidence that they had been treated as man and wife by friends and neighbours, and that their children had been recognised by the head of the father's family. In 1866 the woman left the man, who in 1874, while she was still alive, married another woman. In 1904 the question of the legitimacy of the children was raised:—*Held*, that the presumption in favour of a marriage having taken place had been established. *Thompson, In re; Langham v. Thompson*, 91 L. T. 680—Kekewich, J.

Death.—The Court will presume the death of a person after seven years, although there be strong evidence to shew that the person has reason to keep his identity concealed. *Wills v. Palmer*, 53 W. R. 169—Kekewich, J.

— **Death without Issue—Proof.**—Though death will in a proper case be presumed, there is no presumption that the person died without issue. That is a matter to be proved, and there must be such evidence as would justify a jury in finding as a fact that there was no issue. *Jackson, In re; Jackson v. Ward*, 76 L. J. Ch. 553; [1907] 2 Ch. 354—Kekewich, J.

— **Disappearance in Lifetime of Testator of Legatee entitled to Share on Surviving Testator—Onus Probandi.**—Where the presumption of law that a person who has not been heard of for seven years is dead applies, the burden of proving that he was alive at a particular time within that period, so as to be entitled as legatee to a share of a testator's estate on surviving that testator, lies upon those claiming under him, and must be discharged by distinct and affirmative evidence. *Walker, In re* (41 L. J. Ch. 219; L. R. 7 Ch. 120), applied. *Benjamin, In re; Neville v. Benjamin*, 71 L. J. Ch. 319; [1902] 1 Ch. 723; 86 L. T. 387—Joyce, J. *And see WILL (PROBATE).*

— **Seven Years—Onus Probandi—No Presumption of Continuance of Life.**—There is no presumption at law in favour of the existence of life, and when a person has not been heard of for seven years the burden of proving that he was alive at a particular date after that at which he was last heard of rests upon those who claim through him. *Phené's Trusts, In re* (39 L. J. Ch. 316; L. R. 5 Ch. 139) followed. *Aldersey, In re; Gibson v. Hall*, 74 L. J. Ch. 548; [1905] 2 Ch. 181; 92 L. T. 826—Kekewich, J.

The title to the income and capital of a share of residuary estate passing under a will depended upon the exact date of A's death, and as to part, which came by way of accruer, whether he survived March 16, 1896. A was last heard of on March 31, 1895, and was presumed to have been dead on March 31, 1902. Neither of the different claimants was able to prove that A was alive at any particular date after March 31, 1895:—*Held*, that the property in question was distributable on the footing that A must be taken to have died before March 16, 1896, because he was not proved to have been then alive. *Ib.*

Woman Past Child-bearing—Widow Aged Fifty-six Years and Three Months.—The Court treated as past child-bearing a widow aged fifty-six years and three months who had been married for twenty-four years and had immediately after the marriage had one child. *White, In re; White v. Edmond*, 70 L. J. Ch. 300; [1901] 1 Ch. 570; 84 L. T. 199; 49 W. R. 429—Buckley, J.

The cases of presumption against child-bearing in the case of a spinster are equally applicable to the case of a widow who has had a child. *Ib.*

Croxton v. May (9 Ch. D. 388) and *Hocking, In re; Michell v. Loe* (67 L. J. Ch. 662; [1898] 2 Ch. 567), distinguished. *Ib.*

“*Omnia presumuntur contra spoliatores*”—**Application.**—The plaintiff, who had purchased a particular make of bicycle from the defendants, was injured by the top of the steering-post breaking, and claimed damages for breach of warranty of fitness. After the accident the plaintiff had the broken part of the bicycle examined by experts, and then sent it to the defendants “for inspection.” The defendants replaced the broken parts and threw the broken pieces away, which accordingly were not produced at the trial:—*Held* (PALLES, C.B., *dis-sentiente*), that the loss and non-production of the broken pieces by the defendants did not under the circumstances (as the plaintiff's experts had seen the pieces) make the defendants *spoliatores* against whom *omnia presumenda*, or shift upon them the burden of proof. *Williamson v. Rover Cycle Co.*, [1901] 2 Ir. R. 615—C.A.

Legal Obligation—Immemorial Burden—Duty of Person Making Insufficient Tolls on Canal to Keep Locks in Repair.—There is no presumption in favour of the legal obligation of an immemorial burden. Consequently, a person who under patent or statute has succeeded to the ownership of locks or other mechanical appliances for facilitating navigation, with the right to charge for their use a reasonable toll, is not bound to work or keep them in repair to his own detriment if the tolls are not sufficient to defray the cost of maintenance and repairs, and is justified in closing them altogether. *Simpson v. Att.-Gen.*, 74 L. J. Ch. 1; [1904] A.C. 476; 91 L. T. 610; 3 L. G. R. 190; 69 J. P. 85; 20 T. L. R. 761—H.L. (E.)

3. DOCUMENTARY EVIDENCE.

(a) Public Documents.

Ancient Surveys and Reports—Maps and Plan—Admissibility.—Ancient documents such as surveys, estimates, and petitions of a private character, produced from the Record Office, which do not affect the King's property or revenues, are not public documents which are admissible as such according to the ruling of LORD BLACKBURN in *Sturtia v. Freccia* (50 L. J. Ch. 86, 96; 5 App. Cas. 623, 643), or as evidence of reputation. *Mercer v. Denne*, 74 L. J. Ch. 723; [1905] 2 Ch. 538; 93 L. T. 412; 54 W. R. 303; 70 J. P. 65; 3 L. G. R. 1293; 21 T. L. R. 760—C.A.

Depositions of Deceased Persons.—Depositions

of deceased witnesses in support of proceedings by the Crown in the public interest are not admissible against strangers if it is not shewn that the deponents were persons to whom such knowledge of the subject-matter ought to be imputed as to make their statements evidence of reputation. *Ib.*

Survey under Act of Parliament.—A surveyor's report made under the Act for the Better Management of the Land Revenue of the Crown (84 Geo. 3, c. 75), s. 8, is a public document, and if produced from the proper custody is admissible as evidence. *Evans v. Merthyr Tydfil Urban Council*, 68 L. J. Ch. 175; [1899] 1 Ch. 241; 79 L. T. 528—C.A.

Census Returns.—The Census (Ireland) Act, 1880, containing no provision similar to section 11 of the Census (Ireland) Act, 1890 (which provides that a certificate purporting to be signed by the Registrar-General shall be admitted in any Court of law as evidence of the population at the last census of any place in Ireland to which it refers), the plaintiffs in an action, to prove the population of Bray, in 1880, called one of the Census Commissioners, who produced the original draft general report signed by the Census Commissioners of that year and a print (Blue Book) of the "Abstract" laid by them before Parliament:—*Held*, that either as originals or as examined copies of public documents within Lord Brougham's Act (14 & 15 Vict. c. 99, s. 14) these were properly admitted as evidence. *Dublin Corporation v. Bray Township Commissioners*, [1900] 2 Ir. R. 88—Q.B. D.

Crown Grant—Trespass—Previous User Admitted to Interpret Crown Grant—Improper Rejection of Evidence.—Previous user of lands which are the subject of a Crown grant is evidence, where the language of the grant is not unambiguous in itself, of the extent of the grant, though not evidence of possession adverse to the Crown or of a lost grant; and where such evidence has been rejected a new trial will be ordered. *Van Diemen's Land Co. v. Marine Board of Table Cape*, 75 L. J. P.C. 28; [1906] A.C. 92; 93 L. T. 709; 54 W. R. 498; 22 T. L. R. 114—P.C.

The lease of part of a jetty which was leased and extended over the foreshore held to be evidence of seisin in the *locus in quo*, and not merely evidence of an easement. *Ib.*

Contemporaneous Exposition.—Contemporaneous exposition is not confined to user under the instrument; all circumstances which can tend to shew the intentions of the parties may be relevant. *Ib.* And see *Assheton-Smith v. Owen*, 76 L. J. Ch. 308; *post*, SHIPPING.

Date of Birth—Copy of Entry in the Register.—A certified copy of an entry in the register of births, pursuant to section 38 of the Births and Deaths Registration Act, 1836, is evidence of all the contents of the entry, including the date of birth. *Goodrich, In re*; *Payne v. Bennett*, 73 L. J. P. 33; [1904] P. 138; 90 L. T. 170; 20 T. L. R. 203—Jeune, P.

Marriage, of.—See HUSBAND AND WIFE.

Indian Marriage—Sufficiency.—The production from the India Office of a certified copy of a certificate of a marriage solemnised in India, sent over to this country pursuant to the provisions of the Indian Christian Marriage Act, 1872, ss. 80 and 81, is sufficient evidence of the solemnisation of the marriage of which it purports to be a record. *Westmacott v. Westmacott*, 68 L. J. P. 63; [1899] P. 183; 80 L. T. 632—Gorell Barnes, J.

(b) Other Documents.

Entries in Note-book of Deceased Surveyor—Professional Duty—Admissibility.—A surveyor had been employed in 1864 by a local board to survey ground comprising the property in question for the purpose of a drainage scheme. He had at the time made in his note-book, for the purpose of his report, entries of certain levels and other figures, and these entries were afterwards used by him in making his report. He was now dead:—*Held*, that the entries were admissible in evidence to shew the line to which the bi-monthly spring tides flowed at the date of the conveyance. *Mellor v. Widnesley*, 74 T. J. Ch. 475; [1905] 2 Ch. 161; 93 L. T. 574; 53 W. R. 581—C.A.

Register—Admissibility of Printed Copy.—Section 27 of the Pharmacy Act (Ireland), 1875, provides that the registrar shall every year cause to be printed, published, and sold correct copies of the registers, and that "printed copies of such registers for the time being in force, purporting to be so printed and published as aforesaid, or any extract therefrom, or from the original registers, certified under the hand of the said registrar, and countersigned by the president or two members of the said council, shall be evidence in all Courts and in all proceedings" of the matters specified in the section:—*Held*, that the condition as to certifying by the registrar and countersigning by the president or two members of the council, refers only to the case where an extract is intended to be made evidence, and that a printed copy of the register, purporting to be printed and published in accordance with the section, is admissible in evidence though not so certified and countersigned. *Barrett v. Henry*, [1904] 2 Ir. R. 693—K.B. D.

Plans and Reports—Not Permanent Records—War Office.—Confidential plans or reports made to the War Office are not admissible as evidence of reputation if they were not intended as permanent records affecting the property or revenue of the Crown or any grant by the Crown. *Mercer v. Donne*, 74 L. J. Ch. 723; [1905] 2 Ch. 538; 93 L. T. 412; 54 W. R. 303; 70 J. P. 65; 3 L. G. R. 1293; 21 T. L. R. 760—C.A.

Facts not within Living Memory—Expert's Reports—Admissibility.—Where an engineer's reports are within the common knowledge of engineers and accepted by them as accurate, they constitute evidence which the Court will accept as to facts not within living memory. *East London Railway v. Thames (River) Conservators*, 90 L. T. 347; 68 J. P. 302; 20 T. L. R. 378—Farwell, J.

Unstamped Agreement—Admissibility.—An

agreement in writing for the sale of its undertaking was entered into between a company and a trustee for a new company, but was not stamped. On an application to restrain the agreement being carried out, the Court looked at a copy of the document, not as an agreement, but as a document evidencing the terms upon which the company proposed to sell if not restrained from so doing. *Mason v. Motor Traction Co.*, 74 L. J. Ch. 273; [1905] 1 Ch. 419; 92 L. T. 234; 12 Manson, 31; 21 T. L. R. 238—Buckley, J.

Unstamped Documents.—The practice as to the admission of unstamped documents traced and explained. *Coolgardie Gold Fields, In re*; *Fleming, ex parte*, 69 L. J. Ch. 215; [1900] 1 Ch. 475; 82 L. T. 23; 48 W. R. 461—Cozens-Hardy, J.

(c) *Parol Evidence to Explain.*

Admissibility.—In a written contract verbally accepted the respondent was to be allowed a commission on “the estimate of 35,000l.”; and a further commission if “the total cost of the works” was reduced below 30,000l. Extrinsic evidence is admissible to shew that the estimate referred to was for the execution of the work exclusively of the cost of the land purchased, and the amount of commission. *Bank of New Zealand v. Simpson*, 69 L. J. P.C. 22; [1900] A.C. 182; 82 L. T. 102; 48 W. R. 591—P.C.

— **Contemporaneous Oral Agreement Contradicting Written Agreement—Bill of Exchange—Contemporaneous Oral Agreement to Renew.**—Evidence of a contemporaneous oral agreement to renew a bill of exchange is inadmissible in an action upon the bill. *New London Credit Syndicate v. Neale*, 67 L. J. Q.B. 825; [1898] 2 Q.B. 487; 79 L. T. 323—C.A.

— **Contract in Writing—Verbal Warranty—Written Warranty.**—Where a written contract exists, parol evidence may be given to prove a verbal warranty respecting a matter on which the written contract is wholly silent. Such evidence is not admissible so far as to enlarge the scope of a warranty which is contained in the written contract. A written contract stated: “. . . We hereby offer you ninety thousand pounds for the entire rights, assets, and liabilities of the above company, including the liabilities attaching to existing contracts as at this date. . . .” It also stated, “We agree to take over the liabilities of the company as under,” setting out certain specific items:—*Held*, that it was for the arbitrator to construe the whole of the contract and the meaning of the word “liabilities” in the earlier part; that parol evidence was not admissible to shew the meaning attached to the word by the parties when entering into the contract; and that there was no necessity for limiting the word “liabilities” in the first part to the particular liabilities set out later. *Lloyd (Edward) v. Sturgeon Falls Pulp Co.*, 85 L. T. 162—D.

— **Covenant to “pay” Rent in Advance—Antecedent Parol Agreement to Give Bill at Three Months.**—A covenant in a lease that the lessee will “pay” the rent in advance is a covenant that he will pay it in cash in advance;

and therefore an antecedent parol agreement that he will give bills at three months for the rent in advance is inconsistent with the covenant, and evidence of the agreement is accordingly inadmissible. *Henderson v. Arthur*, 76 L. J. K.B. 22; [1907] 1 K.B. 10; 95 L. T. 772; 23 T. L. R. 60—C.A.

— **Written Agreement of Tenancy—Parol Warranty as to Condition of Drains.**—Upon the execution of a lease of a dwelling-house, the landlord verbally warranted that the drains were in good condition. The lease contained covenants by the lessee to do the inside, and by the lessor to do the outside repairs, but was silent as to the then condition of the drains:—*Held*, that the parol warranty was collateral to the lease and admissible in evidence, and that the tenant was entitled to maintain an action for the breach of it. *De Lassalle v. Guildford*, 70 L. J. K.B. 533; [1901] 2 K.B. 215; 84 L. T. 549; 49 W. R. 467—C.A.

Consideration.—Where one consideration is stated in a deed, any other consideration that does not contradict the instrument may be proved. Proof of a larger consideration than that stated does not contradict the instrument. *Frith v. Frith*, 75 L. J. P.C. 50; [1906] A.C. 254; 94 L. T. 383; 54 W. R. 618; 22 T. L. R. 388—P.C.

(d) *Production.*

Order upon Person not a Party—Ex parte Application.—An order may be made *ex parte* against a person not a party to the action to attend before an examiner for the purpose of producing documents. *Zumbeck v. Biggs*, 82 L. T. 654; 48 W. R. 507—Kekewich, J.

— **Solicitor's Books—Entries against Interest—Mortgage.**—A deceased solicitor's books are evidence if he charges himself therein with receipts on his client's behalf, as being entries against his interests, whether or not the entries were made in the ordinary course of his business as a solicitor. *Wills v. Palmer*, 53 W. R. 169—Kekewich, J.

Banker's Books—Books “used in the ordinary business of the bank”—Successors of Bank.—The Bankers' Books Evidence Act, 1879, applies to books which are in the custody or control of the successors to the bank by whom the entries in the books were originally made. A book is “used in the ordinary business of the bank” within the meaning of section 9 of the Act, though it may not be in daily use, if it is kept by the bank so that they may have it in case it is desired to refer to it. *Asylum for Idiots v. Handysides*, 22 T. L. R. 573—C.A.

— **Inspection of Bankers' Books—Accounts of Persons not Parties to Action.**—The Court will not, as a general rule, make an order under section 7 of the Bankers' Books Evidence Act, 1879, for the inspection before the trial by one of the parties to an action of the banking account of third persons not parties to or concerned in the litigation. *Pollock v. Garle*, 66 L. J. Ch. 788; [1898] 1 Ch. 1; 77 L. T. 415; 46 W. R. 66—C.A.

— **Bank Account of Person not Party to**

Action.—An application for inspection of the bank account of a person not a party to the action ought not, as a general rule, to be granted without notice to such person and to his bankers, and then only upon an affidavit shewing, to the full satisfaction of the Court or Judge, that there are good grounds for believing that there are entries in the account material to some issue to be tried in the action, and which would be evidence at the trial for the party applying for such inspection. *L'Amie v. Wilson*, [1907] 2 Ir. R. 130—K.B. D.

Subject-matter in Dispute to Witness out of Jurisdiction.—The Court or a Judge may, either under Order XXXVII. rule 5 or under Order L. rule 3, in any cause or matter, where it shall appear to be necessary for the purposes of justice, order that the property which is the subject-matter in dispute shall be sent out of the jurisdiction for the purpose of identification by witnesses who are to be examined on commission. *Chaplin v. Puttick*, 67 L. J. Q.B. 516; [1898] 2 Q.B. 160; 78 L. T. 410; 46 W. R. 481—C.A.

Privilege—Secondary Evidence.—Where a party to an action has had an opportunity of inspecting and taking copies of documents belonging to his opponent and privileged from production, he can, notwithstanding the privilege, give secondary evidence of the contents of such documents. *Lloyd v. Mostyn* (12 L. J. Ex. 1; 10 M. & W. 478) followed. *Calcraft v. Guest*, 67 L. J. Q.B. 505; [1898] 1 Q.B. 759; 78 L. T. 283; 46 W. R. 420—C.A. And see DISCOVERY, col. 706.

4. WITNESSES.

Subpcna, Service of—Abuse of Process.—Although as a general rule a writ of *subpcna* may be served at any stage of the proceedings in an action, yet service at a time when, to the knowledge of the parties, the action cannot possibly be tried during the current sittings amounts to an abuse of the process of the Court, and ought to be set aside. *London and Globe Finance Corporation v. Kaufman*, 69 L. J. Ch. 196; 48 W. R. 458—North, J.

Liability of Witness to Answer Questions tending to shew Adultery—Petition to Vary Settlements in Divorce.—A petition to vary a settlement under section 5 of the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), is not a proceeding instituted in consequence of adultery within the meaning of section 3 of the Evidence Further Amendment Act, 1869. *Evans v. Evans* (No. 2), 73 L. J. P. 114; [1904] P. 378; 91 L. T. 600; 20 T. L. R. 612—Gorell Barnes, J.

— Trial of Issue as to Legitimacy.—A witness called upon the trial of an issue as to legitimacy directed upon such a petition to vary a settlement to prove his or her adultery (being a matter relevant upon the trial of such an issue) is not protected from being liable to answer questions tending to shew such adultery either by statute or by the general rule of law that a witness is not bound to incriminate himself or herself. *Id.*

Semble, the proviso to section 3 of the

Evidence Further Amendment Act, 1869, should be read as follows: "No witness in any 'such' proceeding"; and the proviso accordingly applies only to proceedings instituted in consequence of adultery. *Id.*

Expenses of Expert Witnesses.—Expenses of expert witnesses, in their character as such, cannot be allowed as between party and party on a rate exceeding that fixed by the scale relating thereto. *Macnehy v. Bank of New Zealand*, [1900] 1 Ir. R. 22—M.R.

Prisoner—Habeas Corpus.—Where a plaintiff moved *ex parte* for an order on the governor of a prison to produce a prisoner in Court at the trial, but the time of hearing was uncertain, the Court made the order in the form given in *Seton* (5th ed.), p. 89, but directed that the same should not be drawn up until the case was in the paper for trial. *Jenks v. Ditton*, 76 L. T. 591; 18 Cox C.C. 608—Stirling J.

Costs of Witnesses.—See COSTS, col. 580.

Evidence of Accused Persons.—See CRIMINAL LAW.

5. COMMISSION.

Fees and Expenses of Examiner—Witnesses Examined on Behalf of both Parties—Liability of Party obtaining Order.—The party who obtains an order for the examination of witnesses before an examiner, which gives liberty to the other parties to examine witnesses, may properly be ordered under Order XXXVII. rule 50 to pay to the examiner all his fees and expenses of the examination, including those on account of the examination of witnesses on behalf of the other party. *Linley v. Houlder*, 88 L. T. 829—C.A.

6. AFFIDAVITS.

Information and Belief—No Statement of Sources of—Irregularity—Costs.—Affidavits upon information and belief which do not state the sources from which the information or belief is derived are irregular, and ought not to be received in evidence either upon an interlocutory or a final application; and the person responsible for such an affidavit may be directed to pay the costs of it so far as it relates to matters of mere information and belief. *Young Manufacturing Co., In re; Young v. Young Manufacturing Co.*, 69 L. J. Ch. 868; [1900] 2 Ch. 753; 83 L. T. 418; 49 W. R. 115—C.A.

— Interlocutory Application.—On an interlocutory application in a debenture-holder's action for the appointment of a receiver and manager, the affidavit of a solicitor containing a detailed statement of an interview with another person, and affirming that to the best of his information and belief the whole of the statements of such person were true, was, notwithstanding the usual practice of the Chancery Division to admit under Order XXXVIII. rule 3 statements of information and belief on interlocutory applications, held not admissible in evidence where no irremediable injury would be caused by the refusal to admit, and where the person who made the statements in question

was at hand and could be subpoenaed. *Anthony, Birrell, Pearce & Co., In re; Doig v. Anthony, Birrell, Pearce & Co., Lim.*, 68 L. J. Ch. 444; [1899] 2 Ch. 50; 80 L. T. 688—Kekewich, J.

Foreign Country.—An affidavit made by a person resident in Germany and sworn before a notary was allowed to be used, the notary's signature having been attested by the seal of the British Consul, though it was not stated that he was by German law qualified to administer oaths. *London Ashphalte Co., In re*, 23 T. L. R. 406—Swinfen Eady, J.

Depositions.—Depositions which have been taken in a suit to perpetuate testimony instituted by a predecessor in title of a party to an action are not admissible as evidence of admissions by him, unless they are proved to have been adopted and used by him. It is not enough that when produced from the Record Office they are found to have been unsealed. *Evans v. Merthyr Tydfil Urban Council*, 68 L. J. Ch. 175; [1899] 1 Ch. 241; 79 L. T. 578—C.A.

Bankrupt's Public Examination.—Notes.—The notes of the evidence of a bankrupt taken at his public examination are not evidence against him in an action to which he is a party in a representative capacity. *New's Trustee v. Hunting*, 66 L. J. Q.B. 554; [1897] 2 Q.B. 19—C.A.

7. DECEASED PERSON.

Statements by.—Written statements by a deceased person are not admissible as made in the course of duty unless it is shewn that it was the duty of the deceased person to do the particular thing and to record the fact of having done it contemporaneously. *Rowe v. Brenton* (8 B. & C. 737) and *Newcastle (Duke) v. Broxtowe Hundred* (2 L. J. M.C. 47; 4 B. & Ad. 273) distinguished. *Mercer v. Deene*, 74 L. J. Ch. 71; [1904] 2 Ch. 534; 91 L. T. 513; 68 J. P. 479—Farwell, J.

—**Claim to Land—Compromise of Proceedings for Trespass—Act of Ownership—Landlord and Tenant—Evidence by Tenant against Reversioner.**—In an action to restrain trespass upon land and for a declaration of title, where the plaintiff's title is disputed by the defendant, an ancient document produced from the plaintiff's custody, and purporting to be signed by a deceased person, by which the deceased agreed to pay a sum in consideration of the plaintiff's predecessor in title stopping proceedings against him for trespass upon part of the land in question, and also agreed that he would refrain from trespassing upon the land for the future, is admissible in evidence as shewing an act of ownership by the plaintiff's predecessor in title. *Blandy-Jenkins v. Dunraven (Earl)*, 68 L. J. Ch. 589; [1899] 2 Ch. 121; 81 L. T. 209—C.A.

The fact that the deceased was a tenant of the predecessor in title of the defendant who claimed commonable rights over the land in question will not prevent the document being admissible. *Papendick v. Bridgwater* (24 L. J. Q.B. 289; 5 E. & B. 166) distinguished. *Ib.*

Entries of Deceased Person—Account-book Entries of Receipts and Disbursements—Admis-

sibility.—In taking accounts between a mortgagor and a deceased mortgagee of a barge, an account-book kept by the latter in his own handwriting containing entries of payments made to him by the mortgagor as well as disbursements made by him on account of the barge is admissible on behalf of the mortgagee's executors in evidence as containing entries against interest. *Taylor v. Witham* (3 Ch. D. 605) followed. *The Swiftsure*, 82 L. T. 389; 9 Asp. M.C. 65—Jeune, P.

Entries after Death of Solicitor.—The admissibility in evidence of a solicitor's books after his death discussed. *Bradshaw v. Widdrington*, 71 L. J. Ch. 627; [1902] 2 Ch. 480; 86 L. T. 726; 50 W. R. 561—C.A.

S. HEARSAY.

Statement by Medical Man to Patient—Admissibility.—Upon the trial of a petition by a husband for dissolution of marriage, the wife made counter-charges against him of cruelty and adultery. Evidence was tendered by the wife of a statement made to her by a doctor whom she consulted, but who died before the trial, as to the nature of her illness:—*Held*, that the evidence was not admissible. *Dawson v. Dawson*, 22 T. L. R. 52—Bargrave Deane, J.

Declaration in Discharge of Professional Duty.—Levels taken by a deceased surveyor under contract were not admitted in evidence. *Mellor v. Walmsley*, [1904] 2 Ch. 525; 52 W. R. 665—Swinfen Eady, J.

9. REPUTATION.

Tithe Map and Award—Deposited Plans—Admissibility.—A tithe map and award produced from the proper custody and acted upon, and the deposited plans of a proposed railway, though subsequently abandoned, are admissible as evidence of reputation on a question whether there was or was not a public road across two fields appearing on such documents. *Att.-Gen. v. Antrobus*, 74 L. J. Ch. 599; [1905] 2 Ch. 188; 92 L. T. 790; 3 L. G. R. 1071; 21 T. L. R. 471—Farwell, J.

Common Rights.—Upon the trial of an issue whether a piece of land is common land or subject to any commonable rights of the parish of C. or the parish of L. evidence of reputation is admissible—that is, of persons entitled to rights of common in either of those parishes. *Evans v. Merthyr Tydfil Urban Council*, 68 L. J. Ch. 175; [1899] 1 Ch. 241; 79 L. T. 578—C.A.

Plans and Reports—Not Permanent Records—War Office.—Confidential plans or reports made to the War Office are not admissible as evidence of reputation if they were not intended as permanent records affecting the property or revenue of the Crown or any grant by the Crown. *Mercer v. Deene*, 74 L. J. Ch. 71; [1904] 2 Ch. 534; 91 L. T. 513; 68 J. P. 479—Farwell, J.

Particular Facts.—Evidence of particular facts cannot be admitted as evidence of reputation. *Ib.*

Old Surveys—Duty—Reputation.—Old surveys not admitted as evidence of the high-water mark at the time when they were made, either as being made by a deceased person in the course of his duty or as matter of public reputation. *Assheton-Smith v. Owen*, 75 L. J. Ch. 181; [1906] 1 Ch. 179; 94 L. T. 42; 10 Asp. M.C. 164; 22 T. L. R. 182—C.A.

10. EVIDENCE FOR FOREIGN COURT.

How to be Taken.—The Foreign Tribunals Evidence Act, 1856, in authorising a Court to pronounce an order for the examination of witnesses on oath at the request of a foreign tribunal, does not authorise an order for their examination before a Court but only before an examiner. *Bildt's Petition, In re*, 7 F. 899—Ct. of Sess.

11. FOREIGN LAW.

Will—Testator Domiciled Abroad.—Where an expert witness giving evidence of the law of Chile was described merely as a solicitor and notary public practising in London, "who was well acquainted with the law of the South American Republics," THE COURT, whilst acting on his evidence, expressed a doubt whether evidence of foreign law from a witness described as above was sufficient. *Whitelegg, In the goods of*, 68 L. J. P. 97; [1899] P. 267; 81 L. T. 234—Jeune, P.

Status and Boundaries of Foreign Tribes—Judicial Knowledge—Application to Foreign Office.—Sound policy demands that in dealing with questions involving the sovereignty and extent of territory of a foreign State the Court should act in unison with her Majesty's Government. Accordingly, where, in the course of litigation, a dispute has arisen concerning the *status* and boundaries of a foreign State, the Court will, by enquiring of the Foreign Office, obtain judicial knowledge not only of such *status*, but also of the fact whether the district in dispute is within the territory of that State. *Foster v. Globe Venture Syndicate*, 69 L. J. Ch. 375; [1900] 1 Ch. 811; 82 L. T. 253—Farwell, J.

Information relating to the boundaries of a foreign State should be acquired by such a method, rather than by evidence adduced by the litigants which might lead to a result inconsistent with the practice of her Majesty's Government. *Ib.*

12. PERPETUATION OF TESTIMONY.

Right of Action—Examination of Witnesses—Discretion of Court—Title in Remainder to Estate and Peerage.—The Court has a discretion as to making an order for the examination of witnesses in an action to perpetuate testimony under Order XXXVII. rule 35; and in exercising that discretion it will consider the circumstances of the case, and the foundation of the jurisdiction, and the mode in which it was exercised by the old Courts of Chancery, who only entertained bills for that purpose to prevent failure of justice in cases where the matter in

dispute could not be brought to immediate judicial investigation. *West v. Sackville*, 72 L. J. Ch. 649; [1903] 2 Ch. 378; 88 L. T. 814; 51 W. R. 625—C.A.

The plaintiff brought an action for the purpose of perpetuating testimony concerning the alleged facts that he was the lawful son of the defendant S., and was entitled to an estate tail male expectant on the decease of S. in certain estates, and to an estate in the dignity, title, or honour of Baron S. The testimony asked for was to prove an alleged marriage between the plaintiff's mother and S., which was really the only matter in dispute between the parties:—*Held*, that, inasmuch as the sole matter in dispute, the legitimacy of the plaintiff, could be effectually determined at once by the Divorce Court under the Legitimacy Declaration Act, 1858, the order asked for by the plaintiff ought not to be made. *Ib.*

Semble,—The question in dispute could also be determined in an action for a declaration of title under the Rules of the Supreme Court, 1883, Order XXV. rule 5. *Ib.*

13. OTHER MATTERS.

Admission—Appeal from County Court.—*See* COUNTY COURT.

Adultery—Uncorroborated Confession of.—*See* HUSBAND AND WIFE, col. 924.

Common—Rights of.—*See* COMMON.

Corroboration—Claim against Deceased's Estate.—*See* EXECUTOR.

Criminal Proceedings, in.—*See* CRIMINAL LAW, col. 648.

Dentists' Register—Admissibility of Order Erasing Name from.—*See* PARTNERSHIP.

Depositions—Costs of.—*See* COSTS, col. 592.

Examination of Witness before Trial—Costs.—*See* COSTS.

Fees—Recovery from London Agent of Solicitor.—*See* SOLICITOR.

Foreign Country—Document of Record in—Secondary Evidence—Admissibility.—*See* VENDOR AND PURCHASER.

Invention—Prior User of.—*See* PATENT.

Judicial Notice.—*See* NEGOTIABLE INSTRUMENT.

EXECUTION.

1. *General Principles*, 823.
2. *Attachment*, 823.
3. *Fi. Fa.*, 823.
4. *Elegit*, 824.
5. *Sequestration*, 824.
6. *Charging Order*, 825.
7. *Receiver*, 826.
8. *Sheriff*, 828.
9. *Discovery in Aid of*, 829.
10. *Other Matters*, 830.

1. GENERAL PRINCIPLES.

"Execution" — Garnishee — Judgments Extension Act.]—"Execution" in section 4 of the Judgments Extension Act, 1868, is not restricted to writs of execution, but extends to such a remedy as a garnishee order. *Johnstone v. Bucknall*, [1898] 2 Ir. R. 499—Gibson, J. See ATTACHMENT OF DEBTS.

Rights of Judgment Creditor as against Debenture-holders.]—An execution creditor takes subject to all equities of the debenture-holders of a company. *Standard Manufacturing Co., In re* (60 L. J. Ch. 292, 298; [1891] 1 Ch. 627, 641), followed. *London Pressed Hinge Co., In re; Campbell v. Company*, 74 L. J. Ch. 321; [1905] 1 Ch. 576; 92 L. T. 409; 53 W. R. 407; 12 Manson, 219; 21 T. L. R. 322—Buckley, J.

2. ATTACHMENT.

Corporation—Enforcing Order against—Attachment of Director—Service of Order.]—An order on a corporation for an affidavit as to the purchase of shares will not be enforced, under Order XLII. rule 31, by the issue of a writ of attachment against its director, until he has been personally served with the order sought to be enforced. *McKeown v. Joint-Stock Institute*, 68 L. J. Ch. 390; [1899] 1 Ch. 671; 80 L. T. 641; 6 Manson, 338—North, J. See ATTACHMENT OF PERSON.

Enforcing Garnishee Order.]—See ATTACHMENT OF DEBTS.

3. FI. FA.

Property in the Goods.]—The property in goods seized under a *fi. fa.* remains in the debtor till sale, but subject to the security of the execution creditor. *Clarke, In re*, 67 L. Ch. 234; [1898] 1 Ch. 336; 78 L. T. 273; 46 W. R. 337—C.A.

Money or Bank Notes Belonging to Judgment Debtor—Right to Seize—Death of Judgment Debtor.]—The right of a sheriff under section 12 of the Judgments Act, 1838, to seize by virtue of a writ of *fi. fa.* money or bank notes belonging to an execution debtor can only be exercised during the lifetime of the debtor. *Johnson v. Pickering*, 77 L. J. K.B. 13; [1908] 1 K.B. 1; 24 T. L. R. 1—C.A. Reversing, 97 L. T. 516; 14 Manson, 191—Lawrance, J.

A sheriff, under a writ of *fi. fa.*, seized the goods in the house of the execution debtor. On the day after the seizure the debtor received a sum of money in bank notes and placed it in a drawer in the house. The debtor soon afterwards died, and his widow, finding the money, took it to her solicitors. Subsequently the sheriff, having sold the goods in the house, but having never had any knowledge of the existence of the sum of money, went out of possession. Two days later an order was made under section 125 of the Bankruptcy Act, 1883, for the administration of the debtor's estate. On an interpleader issue to determine whether the sum of money, which remained in the

hands of the solicitors to abide the order of the Court, was the property of the execution creditor or the trustee under the administration order,—*Held*, that, as the sheriff did not seize the money in the lifetime of the debtor, the money was the property of the trustee as against the execution creditor. *Ib.*

4. ELEGIT.

Interest of Tenant by Elegit—Term—Mortgage by Sub-demise.]—The tenant by *elegit* takes the whole interest of his judgment debtor in a term of years in land. The right of the judgment debtor to restitution after satisfaction of the judgment debt is in the nature of an executory interest. *Johns v. Pink*, 69 L. J. Ch. 98; [1900] 1 Ch. 296; 81 L. T. 712; 48 W. R. 247—Stirling, J.

Although the execution creditor takes the whole interest in a term of years extended, he is not so far an assignee of the judgment debtor as to be liable for rent and covenants upon the principles of *Moule v. Garrett* (41 L. J. Ex. 62; L. R. 7 Ex. 101). *Ib.*

The judgment debtor, being entitled to terms of years in eight houses, mortgaged the same by sub-demise to the plaintiffs, and covenanted to pay the rent and observe the covenants. The judgment creditor, who was seized of the freehold reversion, sued the judgment debtor for arrears of rent and issued a writ of *elegit*. The jury found that the judgment debtor was possessed, as of her own lands and tenements, of the houses, which the jurors found to be of the annual value of 200*l.*:—*Held*, that the interest extended was the interest of the judgment debtor as mortgagor in possession, and was put an end to or suspended by the appointment by the plaintiffs of a receiver. *Ib.*

Sheriff—Duty of—Return of Writ to Court—Filing.]—Observations on the duty of sheriffs to return to the Court and file of record writs of *elegit*. *Ib.*

5. SEQUESTRATION.

Order for Payment of Costs—"Order requiring any person to do an act"—Indorsement of Order—Personal Service.]—An order to pay costs is not "an order requiring any person to do an act" within meaning of Order XLI. rule 5. A sequestration for disobedience to such an order is governed by rule 7 and not by rule 6 of Order XLIII., and may issue by leave of the Court or a Judge, although the order to pay costs is not proved to have been, and has not in fact been, personally served or indorsed with the memorandum prescribed by Order XLI. rule 5. *Deakin, In re; Cathcart, ex parte*, 69 L. J. Q. B. 797; [1900] 2 Q.B. 478; 83 L. T. 39—C.A.

Balance in Bank—Payment out after Notice of Writ.]—On failure of H. E. P. to pay into Court, in accordance with an order in an administration action, the sum of 136*l.*, a writ of sequestration was issued against his estate. On the same day as the writ was issued the sequestrators gave notice thereof to the manager of the C. branch of the L. and C. Banking Com-

pany, where H. E. P. had an account, the balance to his credit at that time being 204*l*. The manager having refused to pay over to the sequestrators the balance to the credit of H. E. P. without an order of Court, a summons was at once taken out with the view of obtaining an order and served on the banking company. Since the notice of sequestration had been given to the manager of the C. branch the cheques of H. E. P. had been honoured, so that a balance of 187*l*. only remained to the credit of H. E. P.:—*Held*, that the banking company could not be ordered to pay the sum of 204*l*. into Court, but only the balance of 187*l*. *Pollard In re*; *Pollard v. Pollard*, 87 L. T. 61; 51 W. R. 111—Joyce, J.

Sequestration—Completion of.]—See BANKRUPTCY.

6. CHARGING ORDER.

“Stock or shares” in Public Company—Debentures.]—The expression “stock or shares in a public company” in section 14 of the Judgments Act, 1838, does not include the debentures of a company, and therefore an order cannot be made under the Rules of the Supreme Court, Order XLVI. rule 1, charging the debentures of a company. *Sellar v. Bright*, 73 L. J. K.B. 643; [1904] 2 K.B. 446; 91 L. T. 9; 52 W. R. 563; 20 T. L. R. 586—C.A.

Interest in Shares Charged with Judgment Debt—Application to Enforce Charge by Order for Sale.]—Where an order has been made charging a judgment debtor's interest in shares with the amount due on the judgment under the Judgments Act, 1838, that order cannot, under section 24 of the Judicature Act, 1873, be enforced by an order made in the original action. *Leggott v. Western* (12 Q.B. D. 287) followed. *Kolchmann v. Meurice*, 72 L. J. K.B. 289; [1903] 1 K.B. 534; 88 L. T. 369; 51 W. R. 356—C.A.

Leave for Service out of Jurisdiction.]—Leave cannot be given for service of a writ out of the jurisdiction under Order XI. rule 1 (e) in an action to enforce such a charging order. *Ib*.

Stocks—Contingent Interest of Judgment Debtor.]—A testatrix by her will appointed two persons her executors and trustees, and directed them to collect and gather together her estate, consisting of money, bonds, bankers' balances, securities, and other property, and invest and re-invest it as from time to time might be prudent, and to manage the whole fund and to invest all interest or income accumulating after her death, as well as the capital thereof; and she further directed them, at the end of six years after her death, to dispose of the accumulations in a certain specified way, and furthermore, at the end of six years after her death, to divide all the capital of her estate then in their custody and control into three equal and distinct parts, one of such parts to be paid to and to become the sole property of the defendant, against whom judgment had been recovered in the action. After the decease of the testatrix her estate had been collected by the executors and trustees, and the funds invested in certain stocks:—*Held*, that the defendant, the judgment debtor, had a contingent

interest in the stocks within the meaning of section 1 of the Judgments Act, 1840, in respect of which a charging order might be made under section 1 of the Judgments Act, 1838, and Order XLVI. rule 1. *Bolland v. Young*, 78 L. J. K.B. 1030; [1904] 2 K.B. 824; 91 L. T. 746; 53 W. R. 67—C.A.

Charging Order Nisi—Fund in Court—Death of Judgment Debtor—Leave to Issue Execution—Validity of Order Nisi.]—Where the defendant dies after judgment has been recovered against him, and the plaintiff obtains leave to issue execution against the executor under Order XLIII. rule 23, the executor does not thereby become a judgment debtor within the Judgments Act, 1838, s. 14, so as to enable the plaintiff to obtain a charging order on the interest of the executor in stock or shares of the defendant. *Haly v. Barry* (37 L. J. Ch. 723; L. R. 3 Ch. 452) and *Finney v. Hinde* (48 L. J. Q.B. 745; 4 Q.B. D. 102) discussed. *Stewart v. Rhodes*, 69 L. J. Ch. 174; [1900] 1 Ch. 386; 82 L. T. 337; 48 W. R. 354—C.A.

The Court will not make an order charging stock or shares in favour of a judgment creditor unless the case is brought within the provisions of the Judgments Acts, as provided by Order XLVI. rule 1. *Ib*.

—Correction of Order—Subsequent Decree for Administration.]—Per STIRLING, J.—A charging order *nisi* having according to its true construction been made on the interest, not of the executor, but of the judgment debtor, and being therefore bad, the Court ought not to correct the order under Order XXVIII. rule 11 in a case where judgment for the administration of the debtor's estate had been given in the interval between the date of the charging order and the time fixed for shewing cause against it. *Ib*.

Money in Court—Defaulting Broker—Assignment.]—See STOCK EXCHANGE.

7. RECEIVER.

Equitable Execution by Appointment of Receiver—Share of Residuary Estate—Administration Action—Judgment Creditor—Subsequent Incumbrancers—Charging Orders—Stop Orders—Priorities.]—An order obtained by a judgment creditor appointing a receiver by way of equitable execution operates as an injunction to restrain the judgment debtor from himself receiving the moneys over which the receiver is appointed, and prevents him from dealing with the moneys to the prejudice of the execution creditor. It also prevents any subsequent judgment creditor from gaining priority over the creditor obtaining the order, if at the date when obtained the property of the judgment debtor cannot be taken in execution or made available by any other legal process. Accordingly, charging orders and stop orders upon a judgment debtor's share in a testator's residuary estate represented by a fund in Court will not confer priority over a previous judgment debt in respect of which an order appointing a receiver of the debtor's interest was obtained at a time when, owing either to there being no fund in Court or to the residue not having been

then ascertained, no other method of taking in execution the judgment debtor's share was open to the judgment creditor. *Anglesey (Marquis), In re; De Galve (Countess) v. Gardner*, 72 L. J. Ch. 782; [1903] 2 Ch. 727; 52 W. R. 124—Swinfen Eady, J.

— **Special Circumstances.**— Judgment debtors, who were a limited company incorporated and carrying on business abroad, had no place of business in this country and no assets or property which could be taken in execution by any ordinary process of execution, their only assets in this country being debts due or accruing to them from persons or firms to whom they had sold goods. The judgment creditor was unable to make the affidavit in the form No. 25 in Appendix B, Part II. to the Rules of the Supreme Court, 1883, for the purpose of attaching the debts by garnishee proceedings, being ignorant of and having no means of ascertaining particulars of the debts. There was evidence that it was the intention of the defendants to collect all the debts due to them in this country and then go into liquidation:—*Held*, that, having regard both to the practical difficulty of attaching the debts and to the likelihood of the judgment debtors collecting them for themselves, there were special circumstances which made it just and convenient to allow the judgment creditor equitable execution by the appointment of a receiver of the debts. *Goldschmidt v. Oberrheinische Metallwerke*, 75 L. J. K.B. 300; [1906] 1 K.B. 373; 94 L. T. 303; 54 W. R. 255; 22 T. L. R. 285—C.A.

Remainder—Real Estate—Petition for Sale—“Delivered in execution.”—An order by which, on the application of a judgment creditor, a receiver is appointed of the rents, profits, and moneys receivable in respect of a legal remainder in real estate is not such a delivery in execution of the remainder as will enable the Court to order a sale under the Judgments Act, 1864. *Harrison and Bottomley, In re*, 68 L. J. Ch. 208; [1899] 1 Ch. 465; 80 L. T. 29; 47 W. R. 307—C.A.

“Rents, profits, and moneys”—Debtor's Interest in Real Estate—Vendor and Purchaser—Contract for Sale Payment of Deposit—Fiduciary Relation—Money Paid in Compromise of Action on Contract—Debtor's Personal Estate—Purchaser's Lien—Notice.—The relation of trustee and *cestui que trust* does not arise between a vendor and purchaser of land so long as the contract for sale is *in fieri*, but arises only when the contract is completed. Accordingly, a purchaser who has merely paid a deposit, and done nothing more towards completing the contract, does not acquire any estate in the land upon which a receivership order obtained by his judgment creditor can operate by way of equitable execution. *Ridout v. Fowler*, 73 L. J. Ch. 325; [1904] 1 Ch. 658; 90 L. T. 147—Farwell, J. Affirmed in C.A., *post*, VENDOR AND PURCHASER.

The appointment of a receiver at the instance of a judgment creditor, where the appointment is conditional upon the receiver's giving security, does not operate by way of equitable execution upon the debtor's personal estate until the security has been given. When the

security is given, the order does not, as in the case of real estate, relate back to the date when it was made. *Ib.*

Assignment of Salary of Clerk of Petty Sessions—Public Policy.—A petty sessions clerk covenanted to assign his official salary to the plaintiff to secure an annuity. The plaintiff, having recovered judgment for arrears of the annuity, obtained an order for the appointment of a receiver by way of equitable execution over the future salary of the petty sessions clerk:—*Held*, that the order should be discharged. *M^cCreery v. Bennett*, [1904] 2 Ir. R. 69—K.B. D.

Per KENNEY, J.—A clerk of petty sessions is a public and judicial officer, and the assignment of his salary would be contrary to public policy and unenforceable. *Ib.*

National Schoolmaster—Instalment of Salary Actually Due—Public Policy.—The Court has jurisdiction to appoint a receiver over an instalment of a National schoolmaster's salary which has actually become due. It is not against public policy that an instalment of such a salary when actually due should be liable to execution. *Picton v. Cullen*, [1900] 2 Ir. R. 612—C.A.

Chose in Action—Receiver—Priorities.—An assignee for value of a debt has priority over a person who subsequently obtains an order appointing him receiver by way of equitable execution over such debt, although the order was obtained before notice of the assignment was given by the assignee to the debtor. *Bristow, In re*, [1906] 2 Ir. R. 215—Boyd, J.

Scotch Decree Registered in England—Equitable Execution.—Where legal execution is not available, a receiver may be appointed by way of equitable execution in respect of a Scotch decree registered in England under the Judgments Extension Act, 1868. *Thomson v. Gill*, 72 L. J. K.B. 411; [1903] 1 K.B. 760; 88 L. T. 714; 51 W. R. 484—C.A.

Summons for Receiver—Ex parte Injunction until Hearing.—Upon the hearing of an *ex parte* application by a judgment creditor for leave to issue a summons for the appointment of a receiver of property of the judgment debtor by way of equitable execution, an injunction restraining the judgment debtor from dealing with the property until after the hearing of the summons is not granted as necessarily ancillary to the summons, but only if in the opinion of the Judge the facts of the particular case require it—as, for instance, if it appears that there is danger that the property may be made away with or abstracted from the jurisdiction of the Court. *Lloyds Bank v. Medway Upper Navigation Co.*, 74 L. J. K.B. 851; [1905] 2 K.B. 359; 93 L. T. 224; 54 W. R. 41—C.A. *And see PRACTICE.*

Appointment of Receiver in County Court.—*See COUNTY COURT.*

S. SHERIFF.

Seizure of Goods under Fi. Fa.—Abandonment of Possession—Question of Fact.—Where a

sheriff who has seized goods under a writ of *fi. fa.* goes out of possession the question whether in so doing he has abandoned possession or not is always a question of fact. *Bagshawes, Lim. v. Deacon*, 67 L. J. Q.B. 658; [1898] 2 Q.B. 173; 78 L. T. 776; 46 W. R. 618—C.A.

Notice to Sheriff of Bankruptcy Petition—Service of Notice after Two o'clock on Saturday.]—Rule 90 of the Bankruptcy Rules, 1886, which provides that service of notices and other proceedings shall be effected before the hour of two in the afternoon on Saturdays, does not apply to service upon the sheriff, who has taken goods in execution for a sum exceeding 20*l.*, of a notice that a receiving order has been made against the debtor; and therefore, where the fourteen days limited by section 11, sub-section 2 of the Bankruptcy Act, 1890, during which the sheriff is required to hold the proceeds of an execution for a sum exceeding 20*l.* in his hands, expire on a Saturday, notice of a receiving order may be served upon the sheriff after two in the afternoon on that day, so as to entitle the official receiver to the proceeds of the execution as against the execution creditor. *Lole v. Betteridge*, 67 L. J. Q.B. 215; [1898] 1 Q.B. 256; 77 L. T. 543; 46 W. R. 161; 5 Manson, 1—C.A.

Sheriff's Fees—Notice of Receiving Order.]—A sheriff in possession of goods under a writ of *fi. fa.*, who before sale has received a notice under the Bankruptcy Act, 1890, s. 11, sub-s. 1, that a receiving order has been made against the execution debtor, and also a demand from the official receiver for the delivery of the goods of the debtor in his possession, is not entitled to poundage. *Thomas, in re; Trustee, ex parte*, [1899] 1 Q.B. 66; 79 L. T. 356—D.

— Possession Money—Several Writs against same Judgment Debtor.]—The defendants lodged a writ of *fi. fa.* with the sheriff for execution. The sheriff was already in possession of the goods of the judgment debtor under another writ, and with the consent of all parties he remained in possession. Other writs of *fi. fa.* against the same judgment debtor were afterwards lodged with the sheriff. The defendants subsequently ordered the sheriff to withdraw, which he did. Under orders made in interpleader proceedings the sheriff had received possession money in respect of the executions other than the defendants' :—*Held*, that the sheriff, having already been paid possession money, was not entitled to recover it from the defendants. *Glasbrook v. David*, 74 L. J. K.B. 492; [1905] 1 K.B. 615; 92 L. T. 299; 53 W. R. 408; 21 T. L. R. 276—Farwell, J.

— in Bankruptcy.]—See BANKRUPTCY.

Liability of Sheriff.]—See BANKRUPTCY (EXECUTIONS).

Liability of Bailiff of County Court.]—See COUNTY COURT.

9. DISCOVERY IN AID OF.

Unsatisfied Judgment against Company—Order for Examination of Former Director.]—Where

judgment has been obtained against a company and remains unsatisfied, the Court has power under Order XLII. rule 32 to make an order for the examination of a former officer of the company as to debts owing, or other property belonging to the company. *Société Générale du Commerce v. Farina*, 73 L. J. K.B. 355; [1904] 1 K.B. 794; 90 L. T. 472; 52 W. R. 404; 20 T. L. R. 367—C.A.

Examination of Debtor as to Means—Costs.]—The examination of a debtor as to means is only a mode of obtaining execution, and there would appear to be no reason why it should be looked upon as a luxury, and the creditor made to bear the costs in any event. *Adlington v. Coningham*, 67 L. J. Q.B. 926; [1898] 2 Q.B. 492; 79 L. T. 232—C.A.

10. OTHER MATTERS.

Bankruptcy—Effect of.]—See BANKRUPTCY.

Costs of.]—See BANKRUPTCY (EXECUTIONS).

County Court, in.]—See COUNTY COURT.

Debentures — Floating Security — Right to Money Obtained by Execution.]—See COMPANY.

Goods “taken in execution.”]—See METROPOLIS.

Partners, against.]—See PARTNERSHIP.

Sale under County Court Judgment.]—See COUNTY COURT.

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EXECUTOR AND ADMINISTRATOR.

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9. *Other Matters*, 855.

1. BENEFICIAL INTEREST.

Right to Residue—Equal Pecuniary Legacies—Unequal Specific Legacies.]—The rule of law, in a case not affected by the Executors Act, 1890, that equal pecuniary legacies to all the executors will, like a legacy to a sole executor, exclude them from taking beneficially a residue undisposed of by the will, is not affected by the fact that unequal specific legacies are also bequeathed to them; nor does the fact that the only express trusts in the will are imposed upon some other person raise an implication that the executors are to take beneficially and not as trustees. *Glukman, In re; Att.-Gen. v. Jefferys*, 76 L. J. Ch. 82; [1907] 1 Ch. 171; 96 L. T. 225; 23 T. L. R. 212—Swinfen Eady, J.

Will—Express Trust of Residue—Partial Failure of Beneficial Interest—Next-of-kin—Executors—Advancements—Hotchpot.]—Where there was an intestacy in respect of the beneficial interest in a share of residue, such share being vested in trustees,—*Held*, that, there being a gift to the trustees upon certain trusts, the implication of law in favour of the executors was excluded, and that therefore the Executors Act, 1890, did not apply, and children of the testator taking the undisposed-of share as his next-of-kin were not bound to bring advances made to them into hotchpot, in accordance with the provisions of the Statute of Distribution, s. 5. *Williams v. Arkle* (45 L. J. Ch. 590; L. R. 7 H.L. 606) followed. *Roby, In re; Howlett v. Newington*, 76 L. J. Ch. 454; [1907] 2 Ch. 84; 97 L. T. 172—Neville, J. *And see WILL.*

2. CO-EXECUTOR.

Liability for Default of—Putting Assets into Sole Control of Co-executor.]—A testator died on February 3, 1897, having appointed J. and M. executors, both of whom proved the will. They realised the assets, and at the end of 1897 or commencement of 1898 three sums of money—(a) 1,330*l.* standing on deposit receipt in the Hibernian Bank; (b) 1,500*l.* on deposit receipt with the Antrim Iron Ore Co.; and (c) 886*l.* Consols, were called in and paid over to M., who was proprietor of a bank which received money on deposit, paying interest thereon. But these moneys were not deposited in M.'s bank; they were lodged to the credit of M.'s account with the Bank of Ireland, which at the time was overdrawn. A delay of some months occurred in the administration consequent upon a claim against the testator's assets, which on investigation turned out to be unfounded. In January, 1899, M.'s bank stopped payment. It appeared that the testator had several dealings with M.'s bank:—*Held*, that the action of J. in placing these sums of money in the sole control of his co-executor was not what an ordinarily prudent man would have done with his own money, that handing the money over to M. was not lodging it with a banker, and that J. was jointly and severally liable with M. for the loss. *Lowe v. Shields*, [1902] 1 Ir. R. 320—C.A.

Contract for Sale of English Realty—Title—Special Executors of Property in Australia—

General Executors—Non-concurrence of Special Executors.]—Where a testator appoints special executors of property in Australia and also general executors, the latter alone are the "personal representatives" of the testator within sections 1 and 2 (sub-section 2) of the Land Transfer Act, 1897, and they can consequently make a good title to the testator's real estate in England without the concurrence of the special executors. *Cohen's Executors and London County Council, In re*, 71 L. J. Ch. 164; [1902] 1 Ch. 187; 86 L. T. 73; 50 W. R. 117—Byrne, J.

Power of Executor to Compromise with Co-executor.]—*See col. 834.*

3. RENUNCIATION.

Retraction.]—Notwithstanding the provisions of section 79 of the Court of Probate Act, 1857, the Court has power to allow one of several executors who has renounced to retract such renunciation for the purpose of carrying on the executorship; but such power ought only to be exercised in a proper case—that is, where it can be clearly shewn that such retraction is for the benefit of the estate. *Stiles, In the goods of*, 67 L. J. P. 23; [1898] P. 12; 78 L. T. 82; 46 W. R. 444—Jeune, P.

4. REMOVAL.

Appointment of Judicial Trustee—Jurisdiction.]—Under the Judicial Trustees Act, 1896, the Court has power to remove an executor and appoint a judicial trustee in his place. *Ratcliff, In re*, 67 L. J. Ch. 562; [1898] 2 Ch. 352; 78 L. T. 834—Kekewich, J.

5. DUTIES AND LIABILITIES OF EXECUTORS AND ADMINISTRATORS.

Conversion of Improper Investments—Judicial Trustees Act, 1896.]—A trustee to be entitled to relief under section 3 of the Judicial Trustees Act, 1896, must act both honestly and reasonably; the mere fact that he acted honestly is not sufficient. *Barker, In re; Ravenshaw v. Barker*, 77 L. T. 712; 46 W. R. 296—North, J.

Explaining Rights to Legatee.]—*Semble*, there is no legal obligation upon an executor to disclose to a legatee his rights under a will. *Dictum* upon this point in *Brittlebank v. Goodwin* (37 L. J. Ch. 377, 381; L. R. 5 Eq. 545, 550) observed upon. *Lewis, In re; Lewis v. Lewis* (73 L. J. Ch. 748; [1904] 2 Ch. 656), considered. *Mackay, In re; Mackay v. Gould*, 75 L. J. Ch. 47; [1906] 1 Ch. 25; 93 L. T. 694; 54 W. R. 88—Kekewich, J.

Bequest of Leasehold House—Gift Over to Executor on Legatee not Returning and Claiming—No Notice to Legatee of Gift Over—Death without Claim—Estoppel.]—A testatrix bequeathed a leasehold house to a son then abroad, and directed that "in case he should not return and claim the said house," the same should accrue to another son, whom she appointed executor of her will. The executor informed the legatee of the bequest to him of

the house, but did not mention the gift over to himself in the event of the legatee not returning and claiming. The legatee died abroad without having returned to claim the house:—*Held*, that there was no duty upon the executor to give notice to the legatee of the gift over in the event of his not returning to claim the house, and that the executor was not estopped from claiming the house under the gift over, which therefore took effect in his favour. *Lewis, In re; Lewis v. Lewis*, 73 L. J. Ch. 748; [1904] 2 Ch. 656; 91 L. T. 242; 53 W. R. 393—C.A.

Misappropriation of Assets—Bankruptcy—Injunction to Restrain Executor from Acting.]—Where an executor has misappropriated the assets of his testator and become a bankrupt, the Court has jurisdiction to restrain him from further acting as executor or interfering with the testator's estate. And where there is a co-executor willing to act it is not necessary to appoint a receiver. *Bowen v. Phillips*, 66 L. J. Ch. 165; [1897] 1 Ch. 174; 75 L. T. 628; 45 W. R. 286; 4 Manson, 370—Kekewich, J.

Residue of Estate Paid Away by Executor—Devastavit—Action on Guarantee Given by Testator—Statute of Limitations.]—A testator gave a guarantee to the plaintiffs, who were bankers, whereby he guaranteed the payment of the premiums on certain policies on the life of one of his sons deposited with the plaintiffs as security for advances made to that son. In 1897 the testator died, having by will appointed another son, who was also the residuary legatee, and the defendant, his executors. Both executors proved the will, and after payment of all debts and legacies the defendant in 1898 handed over the residue of the estate to his co-executor, the residuary legatee. The premiums on the policies were paid down to 1903, when default was made in respect of the premium on one of the policies, and subsequently default was made with regard to other policies. The plaintiffs, having paid these premiums in order to keep up the policies, brought an action in 1905 in the High Court, which was remitted to the County Court, claiming repayment from the defendant, as executor, under the guarantee. Notice was given by the plaintiffs in the County Court to the defendant that they would contend that he had been guilty of a *devastavit*, and thereupon the defendant gave notice of the special defences that he had fully administered the estate, and that if he had committed a *devastavit*, which he did not admit, he would rely upon the Statute of Limitations, as the *devastavit* alleged—the handing over of the residue of the estate to the residuary legatee in 1898—took place more than six years before action brought. Judgment was given against the defendant as executor, and also against him personally, for having been guilty of a *devastavit*. The Divisional Court on appeal having affirmed the judgment,—*Held*, that the claim of the plaintiffs, so far as it was founded on a *devastavit*, was barred by the Statute of Limitations, the action having been brought more than six years after the handing over of the assets by the defendant to the residuary legatee. *Lacons v. Warmoll*, 76 L. J. K.B. 914; [1907] 2 K.B. 350; 97 L. T. 379; 23 T. L. R. 495—C.A.

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Executor's Liability—Judicial Trustees Act.]—
See TRUST.

6. POWERS OF EXECUTORS AND ADMINISTRATORS.

(a) Power of Sale.

Land—Charge of Debts and Legacies.]—The executor of a will which, after charging real estate with payment of debts and legacies, contains an executory devise thereof, has a continuing power of sale both at the common law and by virtue of sections 14 and 16 of the Law of Property Amendment Act, 1859 (Lord St. Leonards' Act), notwithstanding section 18 of that Act and the fact that the executory devisee ultimately entitled in fee takes possession after a period of some years, and subsequently deals with the legal estate in the property by way of settlement and mortgage. *Wilson, In re; Pennington v. Payne* (54 L. T. 600), approved; and *Rebbek, In re; Bennett v. Rebbek* (63 L. J. Ch. 596), distinguished. *Barrow-in-Furness Corporation and Rawlinson's Contract, In re*, 72 L. J. Ch. 233; [1903] 1 Ch. 339; 87 L. T. 724; 51 W. R. 248—Kekewich, J.

— Implied Power.]—After bequeathing a pecuniary legacy, and directing its investment, a testator provided as follows: "I will and bequeath all the remainder of my property in lands . . . together with chattels, stock, shares, furniture and personal effects, to my brothers and sisters, or their representatives in equal shares." The testator, after naming the beneficiaries and indicating their shares, appointed two persons who were not beneficiaries under his will "to be my executors, to carry out the intention of this my last will and testament":—*Held*, that the executors were given by the will an implied power of sale over the real estate. *Carlisle v. Cooke*, [1905] 1 Ir. R. 269—M.R.

(b) Compromise.

Power of Executor to Compromise Debt with Co-Executor.]—The power of an executor to compromise a claim against the estate of his testator is a power under the common law, and may, in a proper case, be exercised where the person making the claim is a co-executor; but the question in each case is one which should properly be brought before the Court. *Houghton, In re; Hawley v. Blake*, 73 L. J. Ch. 317; [1904] 1 Ch. 622; 90 L. T. 252; 52 W. R. 505; 20 T. L. R. 276—Kekewich, J.

(c) Mortgage.

Administrator, by—Payment of Debts and to One of Next-of-Kin—Mortgage in Due Course of Administration.]—By mortgage dated February 10, 1876, D. O. mortgaged certain lands to G. L. to secure 350*l.* G. L. died on August 11, 1878, intestate and unmarried, leaving him surviving six brothers and one sister, his only next-of-kin. On September 23, 1878, letters of administration to his estate were granted to J. L., a brother of the deceased. On December 20, 1886, J. L. executed a sub-mortgage of the mortgage of 1876 to H. to secure 200*l.* At the time the sub-mortgage was executed J. L. stated

to H. that he required the money partly for the purpose of paying the debts of G. L., and also to pay one of the next-of-kin who was going abroad:—*Held*, that the mortgage was made in the ordinary course of administration, and was valid. *O'Donnell's Estate, In re*, [1905] 1 Ir. R. 406—C.A.

(d) *Power to Carry on Testator's Business.*

Rights of Testator's Creditors and Subsequent Creditors of Executors—Indemnity.—A testator's business was carried on for about two years after his death by his executors in accordance with a power in his will, and afterwards, by leave of the Court in an administration proceeding brought by the executors for their own protection, until the business was sold by order of the Court. Considerable liabilities were incurred by the executors in carrying on the business, and the assets were insufficient to pay both the creditors of the testator and those of the executors. The testator's creditors, who were chiefly members of his family, were aware that the business was being carried on not for the purpose of selling it as a going concern, but in the hope of realising a fund sufficient to pay them in full, and did not interfere:—*Held*, that they must be taken to have assented to the carrying-on of the business, and that the executors were entitled in priority to the testator's creditors to be indemnified out of the assets in hand against the liabilities incurred by them in carrying on the business. *Dowse v. Gorton* ([1891] A.C. 190) and *Brooke v. Brooke* ([1894] 2 Ch. 600) followed and applied. *Hodges v. Hodges*, [1899] 1 Ir. R. 480—M.R.

Executors Authorised to Carry on Business—Creditors Subsequent to Death.—Where a testator has authorised his executors to carry on his business, an order for administration of his estate may be made at the suit of a subsequent creditor of the business, even although there are no creditors of the testator himself. *Shorey, In re*; *Smith v. Shorey*, 79 L. T. 349; 47 W. R. 188—Byrne, J.

Trading by Administrator—Public-house—Rights of Creditors of Intestate and Subsequent Creditors of Administrator.—On the death intestate of a publican and grocer his administratrix carried on the business, maintaining the intestate's family out of receipts therefrom, and continued such trading after decree for administration without any order authorising her so to do. There were still unpaid creditors of the intestate, and the administratrix was in default.—Creditors in respect of goods supplied for the business after decree *held* not entitled to prove against the assets in priority to creditors of the deceased or otherwise. *M'Aloon v. M'Aloon*, [1900] 1 Ir. R. 367—V.C.

Costs, Charges, and Expenses—Indemnity—Deficient Estate—Priority.—An executor and trustee, who has been authorised to carry on the testator's business both by the will and by the Court, and who has properly incurred liabilities to trade creditors, is entitled to an indemnity in respect of such liabilities; and where the assets are deficient, the amount of such indemnity takes priority on allocation over the costs which had been awarded by the Court,

on further consideration, to a plaintiff legatee. The trade creditors of the business stand in the shoes of the executor, and are subrogated to his rights of indemnity and priority. *Moore v. M'Glynn*, [1904] 1 Ir. R. 334—C.A.

Sale for Shares in Company to be Formed—Sanction of Court.—The Court has no jurisdiction to sanction the sale of a testator's business for shares or debentures in a company to be formed to take it over. *Crawshay, In re*; *Dennis v. Crawshay* (60 L. T. 357), followed. *West of England Bank v. Murch* (52 L. J. Ch. 784; 23 Ch. D. 188) distinguished. *Morrison, In re*; *Morrison v. Morrison*, 70 L. J. Ch. 399; [1901] 1 Ch. 701; 84 L. T. 383; 49 W. R. 441; 8 Manson, 210—Buckley, J.

(e) *To give Receipt.*

Administrator with Will Annexed—Property Settled under General Power—Married Woman Appointor—Right to Receive Fund.—An administrator with the will annexed can give a valid receipt for settled personality appointed by will under a general power, even where the appointor was a married woman who died before the coming into operation of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). *Philbrick's Trusts, In re* (13 W. R. 570), and *Hoskin's Trusts, In re* (46 L. J. Ch. 817; 5 Ch. D. 229; 6 Ch. D. 281), applied. *Peacock's Settlement, In re*; *Kelcey v. Harrison*, 71 L. J. Ch. 325; [1902] 1 Ch. 552; 86 L. T. 414; 50 W. R. 473—Swinfen Eady, J.

7. ADMINISTRATION OF ASSETS.

(a) *Receiver.*

Creditor's Action—Receiver of Rents and Profits of Real Estate—Parties—No Legal Personal Representative—Personal Estate Completely Administered.—Where an intestate, who died before the passing of the Land Transfer Act, 1897, was possessed of real estate, and all his personal estate had been administered and proved insufficient to satisfy the debts, the Court appointed a receiver of the rents and profits of the real estate, at the instance of a creditor of the intestate, suing on behalf of himself and the other creditors. Such appointment will be made as a matter of right, even where there is no legal personal representative of the intestate before the Court. *Dawson, In re*; *Clarke v. Dawson*, 75 L. J. Ch. 201; 94 L. T. 130—Kekewich, J.

Charge of Fraud—Costs—Benefit to Estate.—When an action charging a person with gross personal fraud both as administrator *pendente lite* and also as receiver of an estate was, in default of appearance by the plaintiff at the trial, dismissed with costs, and the plaintiff was unable to pay the costs, the receiver was not allowed out of the estate the costs of his defence of the action, on the ground that the defence had not and could not have resulted in any benefit to the estate. *Walters v. Woodbridge* (47 L. J. Ch. 516; 7 Ch. D. 504), discussed, and principle applied. *Dunn, In re*; *Brinklow v. Shingleton*, 73 L. J. Ch. 425; [1904] 1 Ch. 648; 91 L. T. 135; 52 W. R. 345—Byrne, J.

Equitable Execution—Share of Residuary Estate—Administration Action—Judgment Creditor—Subsequent Incumbrancers—Charging Orders—Stop Orders—Priorities.]—An order obtained by a judgment creditor appointing a receiver by way of equitable execution operates as an injunction to restrain the judgment debtor from himself receiving the moneys over which the receiver is appointed, and prevents him from dealing with the moneys to the prejudice of the execution creditor. It also prevents any subsequent judgment creditor from gaining priority over the creditor obtaining the order, if at the date when obtained the property of the judgment debtor cannot be taken in execution or made available by any other legal process. Accordingly, charging orders and stop orders upon a judgment debtor's share in a testator's residuary estate represented by a fund in Court will not confer priority over a previous judgment debt in respect of which an order appointing a receiver of the debtor's interest was obtained at a time when, owing either to there being no fund in Court or to the residue not having been then ascertained, no other method of taking in execution the judgment debtor's share was open to the judgment creditor. *Anglesey (Marquis), In re; De Galve (Countess) v. Gardner*, 72 L. J. Ch. 782; [1903] 2 Ch. 727; 89 L. T. 584; 52 W. R. 124—Swinfen Eady, J. *And see* col. 826.

(b) *Order of Administration.*

Intermeddling with Assets before Administration—Injunction.]—Where, shortly after the death of a tenant intestate, the landlord wrongfully entered and seized the goods of the deceased, the Court, on the *ex parte* application of the sole next-of-kin before administration, granted an injunction restraining the landlord from interfering with the assets, the plaintiff giving an undertaking as to damages. *Cassidy v. Foley*, [1904] 2 Ir. R. 427—Andrews, J.

Grant to Attorney—Duty to Distribute Assets.]—Where letters of administration have been granted to the attorney of the person entitled, who is abroad, the attorney is administrator for all purposes, and is not justified in paying over assets to his principal for distribution until such principal has himself taken out administration. *Rendell, In re; Wood v. Rendell*, 70 L. J. Ch. 265; [1901] 1 Ch. 230; 83 L. T. 625; 49 W. R. 131—Cozens-Hardy, J.

Rentcharge Issuing out of Leaseholds—"Chattel real"—Vendor's Lien—Intestacy—Liability of Next-of-kin.]—A rentcharge issuing out of leaseholds is a chattel real. A rentcharge of this kind contracted to be purchased by a testator who died intestate in respect thereof is within the provisions of the Real Estate Charges Acts, 1854 and 1877, and passes to his next-of-kin as persons claiming through him, subject as between themselves and the other persons claiming through the deceased to a primary liability to payment of the vendor's lien for unpaid purchase-money, notwithstanding the absence of any reference to next-of-kin in the negating part of section 1 of the Act of 1877. *Fraser, In re; Lowther v. Fraser*, 73 L. J. Ch. 481; [1904] 1 Ch. 726; 91 L. T. 48; 52 W. R. 516; 20 T. L. R. 414—C.A.

Real Estate—Demise of Mortgaged Estate—Action to Administer Estate of Mortgagor—Rents and Profits—Assets for Payment of Debts—Funds in Medio—Right of Creditor against Devisee before Judgment.]—The Administration of Estates Act, 1833, which makes real estate of a deceased person assets for payment of debts, does not create a lien or charge on the estate, and therefore a creditor cannot, without obtaining a judgment, attach the rents and profits of such estate. *Moon, In re; Holmes v. Holmes*, 76 L. J. Ch. 535; [1907] 2 Ch. 304—Warrington, J.

Mortgagees of real estate of a testator commenced an action, on behalf of themselves and all other creditors, for administration of his real and personal estate. At the time of the issue of the writ the personal estate had been administered. The testator had devised and bequeathed all his real and personal estate (subject as to his personal estate to payment of his debts and funeral and testamentary expenses) to certain persons, who were represented by the defendants. There was standing in Court to the credit of a partition action, which had been commenced between the devisees, a fund, which had been paid in, representing rents and profits of the real estate. The plaintiffs in the administration action, before having obtained judgment in their action, applied for an injunction to restrain the defendants from applying for a transfer or payment to themselves of the fund in Court:—*Held*, that the application must be refused. *Hyatt, In re; Bowles v. Hyatt* (57 L. J. Ch. 777; 38 Ch. D. 609), distinguished. *Id.*

Specialty Debt—Mortgagor—Covenant—Real Assets—Specific Devisees—Payment of Interest by one Devisee—Testator's General Estate—Acknowledgment.]—Payment of interest by the specific devisee of part of a testator's real estate, which was subject to a mortgage created by the testator, is sufficient to keep the mortgagee's right of action alive against the specific devisees of other parts of the real estate which were not subject to the mortgage, and thus entitle the mortgagee to an order for administration of the whole of the testator's real estate. The principles laid down in *Roddam v. Morley* (1 De G. & J. 1) applied. *Bradshaw v. Widdrington* (71 L. J. Ch. 627; [1902] 2 Ch. 430) discussed. *Lacey, In re; Howard v. Lightfoot*, 76 L. J. Ch. 316; [1907] 1 Ch. 330—C.A.

Marshalling Assets—Charge of Debts, Funeral and Testamentary Expenses on Realty—Insufficiency of Personalty—Pecuniary Legatees and Devisees of Realty—Order of Payment—Land Transfer Act.]—The operation of Part I. of the Land Transfer Act, 1897, by putting the real estate on an equality with the personal estate as regards administration, has rendered it unnecessary for a testator to direct that his real estate shall be charged with the payment of his debts; but where such a direction has been in fact given, and the free personalty has been exhausted in paying the debts, the Court will give effect to it at the instance of pecuniary legatees, and direct that the testator's debts &c. shall be paid out of the realty, so far as is necessary in order to leave a sufficient part of the personalty not specifically bequeathed to satisfy the pecuniary legacies. *Roberts, In re;*

Roberts v. Roberts (72 L. J. Ch. 88; [1902] 2 Ch. 884), followed. *Kempster, In re; Kempster v. Kempster*, 75 L. J. Ch. 286; [1906] 1 Ch. 446; 94 L. T. 248; 54 W. R. 385—Kekewich, J.

Claims against Estate of Deceased—Corroboration.]—There is no rule that the Court must necessarily reject a claim against a deceased person's estate merely because it is supported only by the uncorroborated evidence of the claimant. Such uncorroborated evidence should be examined with care, and even with suspicion, but if in the result it convinces the Court that the claim should be allowed, the Court should allow the claim. *Hodgson, In re; Beckett v. Ramsdale* (31 Ch. D. 183), followed; *Finch, In re; Finch v. Finch* (23 Ch. D. 267), dissented from. *Rawlinson v. Scholes*, 79 L. T. 350—D.

There is no absolute rule as to corroboration being necessary in the case of a claim against the estate of a deceased person. *Griffin, In re; Griffin v. Griffin*, 79 L. T. 442—Byrne, J.

Order for Payment of Debt in Priority—Administration of Estate in High Court—Effect of Order.]—In the administration of the estate of a lunatic, a creditor in whose favour an order for payment has been made during the lunatic's lifetime, under section 117 of the Lunacy Act, 1890, has no right to priority over the other creditors. The rights of creditors after the lunatic is dead are to have the assets collected and distributed according to their rights as creditors on the estate of a deceased person, and these are not affected by the fact that the estate was up to the time of his death subject to the jurisdiction in lunacy. *Hunt, In re; Silicate Paint Co. v. Hunt*, 75 L. J. Ch. 801; [1906] 2 Ch. 295; 95 L. T. 600—Buckley, J.

Delay in Probate—Neglect to get in Assets—Omission to Pay Debt—Loss of Interest—Wilful Default.]—An executor will not be charged on the footing of wilful default for loss of interest arising from not paying off a mortgage, where he has no assets in hand which he can apply in redemption of the mortgage and the property is charged with an amount in excess of its value. *Stevens, In re; Cooke v. Stevens*, 67 L. J. Ch. 118; [1898] 1 Ch. 162; 77 L. T. 508; 46 W. R. 177—C.A.

Whether executors who delay proving their testator's will can be rendered liable for losses which they could have avoided if they had proved it earlier—*quære. Ib.*

Liabilities—Action to Establish Will—Compromise—Agreement to Pay Sum out of Assets to Buy Off Opposition—Executor's Right to Credit for Such Payment—Costs.]—A testator died in 1894, having made his will the night before his death, leaving considerable assets. A brother of the testator, who was supposed to be the heir-at-law, but to whom nothing had been left, entered a *caveat* against probate being granted. The executors brought an action to establish the will, which was tried in 1895, when the executors compromised the suit by paying the *caveator* 2,000*l.* and 300*l.* for his costs. In 1896 an elder brother of the testator who had emigrated to Australia over twenty

years before, and had not been heard of for many years, returned to Ireland, and brought an action to have probate recalled and the will set aside. The action was tried in 1897, when the jury disagreed. It was tried a second time in 1898, when a verdict was found in favour of the will, omitting certain clauses. In an action to administer the estate of the testator the assets were found insufficient to pay the legacies:—*Held*, that the executors were not entitled to credit for the sums of money spent in compromising the first probate suit, but that they were entitled to their costs in that suit. *Graham v. M'Cashin*, [1901] 1 Ir. R. 404—C.A.

Contingent Liabilities—Calls—Retention of Assets—Practice—Parties.]—On an application for an order directing the distribution of a testator's estate among the residuary legatees, notwithstanding the existence of a possible future claim against the estate for calls on shares of a company which are not fully paid up, the company are not proper parties to the proceedings. *King, In re; Mellor v. South Australian Land Mortgage and Agency Co.*, 76 L. J. Ch. 44; [1907] 1 Ch. 72; 95 L. T. 724—Neville, J.

In such a case the Court will order distribution of the estate among the residuary legatees without directing the retention of any part of the assets to meet such possible future claim; and such order of the Court completely exonerates the executors from all liability. *Nixon, In re; Gray v. Bell*, (73 L. J. Ch. 446; [1904] 1 Ch. 638) followed. *Ib.*

Semble, the order can only be made in proceedings in which administration is asked for. *Ib.*

Leaseholds—Indemnity—Retention of Assets by Executors—No Privity of Estate.]—Prior to the Law of Property Amendment Act, 1859, the practice of the Court used to be to direct the retention of funds to meet future liabilities in respect of leaseholds belonging to a deceased person only where there was privity of estate between the lessor and the executors, the ground of such retention apparently being the indemnity of the executors. *Nixon, In re; Gray v. Bell*, 73 L. J. Ch. 446; [1904] 1 Ch. 638—Byrne, J.

Where in a case admittedly governed by the law as it stood before the Law of Property Amendment Act, 1859, executors had retained assets as an indemnity fund against contingent liabilities that might arise under leases which had formerly been the property of their testator but had not become vested in the executors, and there was no privity of estate between them and the lessors, the Court made an order for the distribution of the fund amongst the beneficiaries, it being admitted that the executors would be amply protected by the order of the Court. *King v. Maltcott* (22 L. J. Ch. 157; 9 Hare, 692) and *Dodson v. Sammell* (30 L. J. Ch. 799; 1 Dr. & S. 575) discussed. *Ib.*

Voluntary Creditor—Effect of Judicature Act, 1875, s. 10.]—In the administration of an insolvent estate in the Chancery Division the Bankruptcy Rules by virtue of the Judicature Act, 1875, s. 10, apply as to the equality of

provable debts, and therefore voluntary creditors rank *pari passu* with creditors for value. *Smith v. Morgan* (49 L. J. C.P. 410; 5 C.P. D. 337) and *Maggi, In re* (51 L. J. Ch. 560; 20 Ch. D. 545), so far as they conflict with this rule, overruled. *Whitaker, In re; Whitaker v. Palmer*, 70 L. J. Ch. 6; [1901] 1 Ch. 9; 83 L. T. 449; 49 W. R. 106—C. A.

Estate Duty on Settled Property—Payment by Executor—Right of Recoupment.—B. mortgaged certain property to secure the payment of 10,000*l.* to a son of a first marriage, with a proviso that the principal sum was not to be called in during B.'s life, if interest at 5 per cent. was punctually paid during his life. The mortgage shortly afterwards, on the occasion of the son's marriage, was vested in the trustees of his settlement. A few years afterwards, on the occasion of his second marriage, B. agreed to bring into settlement property of sufficient value to produce 500*l.* a year. Certain property was actually brought in at the time and settled on the usual trusts, which, however, proved to be only worth 297*l.* a year. By his will B. devised the residue of his property, after payment of his funeral and testamentary expenses, to his executors on trust. On B.'s death his estate was administered in Court. By an order of the Court leave was given to the trustees of the second settlement to prove for a sum of 6,800*l.* to make good the deficiency in the value of the property brought by B. into the aforesaid settlement. The estate proved insolvent. The revenue authorities in assessing the "principal value" of the property for the purpose of the payment of estate duty, declined to allow credit for the said sums secured by the above-mentioned settlements. The estate duty was paid by the executor, who claimed the right to be recouped by the trustees of the respective settlements a proportionate part of the duty on the sums realised by them in respect thereof:—*Held*, that the executor was entitled to be so recouped. *Cope v. Breslin*, [1903] 1 Ir. R. 418—V.C.

Trust for Sale and Conversion—Shares of Residue—Appropriation of Specific Assets—Chattels Real.—The principle upon which the rule, that under a will containing a trust for sale and conversion executors and trustees are entitled to appropriate specific assets to answer shares of residue, proceeds is that it must be competent for executors and trustees to agree with the beneficiary that they will sell the particular assets to the beneficiary and set off the amount against the money which they would otherwise have to pay to him, and that it is not necessary for them to go through the form of first converting the assets and then handing over to the beneficiary the money which the beneficiary may be desirous of immediately reinvesting in the very assets which have just been sold. The doctrine, therefore, of appropriation is not confined to pure personal estate, but extends to chattels real and also to real estate which is subject to a trust for sale and conversion. *Beverley, In re; Watson v. Watson*, 70 L. J. Ch. 295; [1901] 1 Ch. 681; 84 L. T. 296; 49 W. R. 343—Buckley, J.

Although section 4, sub-section 1 of the Land Transfer Act, 1897, applies as well to personal as to real estate, it has not taken away from

executors and trustees the power of appropriation which existed before the Act, at all events in cases where there is a trust for sale and conversion. *Ib.*

Appropriation of Specific Assets—Will—Residue—Settled Shares—Infant.—Executors or trustees have power to appropriate specific assets to answer settled shares of residue, though the interests of infants are concerned. *Lepine, In re; Dowsett v. Culver* (61 L. J. Ch. 153; [1892] 1 Ch. 210), and *Richardson, In re; Morgan v. Richardson* (65 L. J. Ch. 512; [1896] 1 Ch. 512), applied and extended. *Nickels, In re; Nickels v. Nickels*, 67 L. J. Ch. 406; [1898] 1 Ch. 630; 78 L. T. 379; 46 W. R. 422—Stirling, J.

Absolute Gift followed by Executory Limitation—Conversion of Reversionary Interest.—The rule in *Howe v. Dartmouth (Earl)* (7 Ves. 137; 1 Wh. & Tu. L.C. (7th ed.) 68), which requires the conversion of wasting securities and reversionary interests, may apply to a case of an absolute gift subject to an executory limitation; but the inference as to the intention of the testator, upon which the rule is based, is weaker in such a case than when the testator has given the property to persons successively as tenant for life and remaindermen. *Bland, In re; Miller v. Bland*, 68 L. J. Ch. 745; [1899] 2 Ch. 336—Stirling, J.

Contingent Legacy without Interest—Appropriation—Validity.—Where a contingent legacy is given by a will, but interest is not given in the meantime, the executor is not entitled to invest the amount of the legacy and appropriate the investment to it in such a way that the legatee would receive any profit or bear any loss arising from the investment before the happening of the contingency. He can set apart and invest a reasonable sum to secure payment of the legacy if it should become payable, but the investment and the income thereof will, until the contingency happens, remain part of the estate of the testator. *Hall, In re; Foster v. Metcalfe*, 72 L. J. Ch. 554; [1903] 2 Ch. 226; 88 L. T. 619; 51 W. R. 529—C.A.

Intestacy—Allowances to Presumptive Next-of-kin—Death of One of such Next-of-kin in Lunatic's Lifetime Leaving Children—Whether Allowance to Parent to be brought into Hotchpot.—Under various orders in lunacy allowances were made to the presumptive next-of-kin of a lunatic. The orders provided that the persons to whom such allowances were made should bring them into account in the event of their surviving the lunatic. The lunatic died a bachelor and intestate. One of the presumptive next-of-kin, a sister, to whom allowances had been made, died in the lifetime of the lunatic, leaving children:—*Held*, that the children took *per stirpes* under the Statute of Distribution as representing their parent, but were under no obligation to bring into account the allowances made to her. *Gist, In re; Gist v. Timbrill*, 75 L. J. Ch. 657; [1906] 2 Ch. 280; 95 L. T. 41; 22 T. L. R. 637—C.A. Affirming, 54 W. R. 104—Swinfen Eady, J.

Annuity—Bequest of Residue after Death of Annuitant—Fund Set Apart to Answer Annuity—Right of Residuary Legatee to Balance.—

Where residue is bequeathed on trust to pay an annuity to A, and after the decease of A to pay the *corpus* to B, the Court has jurisdiction to order, in spite of opposition by A, that a fund shall be set apart to answer the annuity, and the balance be paid over to B. *Harbin v. Masterman*, 65 L. J. Ch. 195; [1896] 1 Ch. 351—C.A.

Intestate Husband—Widow's Rights—Real and Personal Estate—Contingent Interests—Valuation.—For the purposes of computing the rights of a widow in the property of her intestate husband under the Intestates' Estates Act, 1890, "the real and personal estates" of such an intestate mean all that he has, whether in possession, reversion, or contingency; and the general words of section 1, which says that "the real and personal estate," if under the value of 500*l.*, shall belong to the widow absolutely, are not controlled by the provisions of sections 5 and 6 as to valuation. *Heath, In re; Heath v. Widgeon*, 76 L. J. Ch. 450; [1907] 2 Ch. 270; 97 L. T. 41—Kekewich, J.

Sole Executor and Universal Legatee Predeceasing Testator—Intestacy—Advances—Hotchpot.—Where the sole executor and universal devisee and legatee under a will dies before the testator, there is an intestacy, and section 5 of the Statute of Distribution applies, and children of the deceased who have received advances from him in his lifetime must bring the advances into hotchpot before receiving their shares in his estate. *Ford, In re; Ford v. Ford*, 71 L. J. Ch. 778; [1902] 2 Ch. 605; 87 L. T. 113; 51 W. R. 20—C.A.

Practice—Devisees—Heir-at-Law—Costs—Land Transfer Act, 1897.—A summons was taken out by the executors of a testator, who died after the Land Transfer Act, 1897, came into operation, for the determination of the question whether, under the terms of the will, a certain piece of freehold land was included in a specific devise, or went to the heir-at-law. The will contained no general devise of real estate. The devisees and the heir-at-law were made respondents:—*Held*, that the land went to the heir-at-law; the devisees had made their claim and failed, and were in the same position as if they had brought an action under the old law. The costs of the heir-at-law therefore would be taxed as between party and party, and paid by the devisees. *Peel, In re; Woodcock v. Holroyd*, 81 L. T. 504—Kekewich, J.

Real Estate—Conveyance by Personal Representatives under the Land Transfer Act—Executors Appointed for Property Outside the Jurisdiction.—A personal representative in the sense in which the expression is used in the Land Transfer Act, 1897, means a personal representative in whom, prior to the Act, a chattel real belonging to the deceased would have vested. Executors appointed solely for the foreign property of a testator are not, under the Land Transfer Act, 1897, necessary parties to a conveyance of testator's English real estate. *Cohen's Executors and London County Council, In re*, 50 W. R. 117—Byrne, J.

Fund Carried to Separate Account—Mortgage of Separate Fund—Claim against Fund by other Beneficiaries—Priorities.—Where in an ad-

ministration suit, by a decree made in the presence of all the parties interested, the share of a beneficiary entitled to a life interest is placed to a separate account, with liberty to him to receive the rents and dividends, the mortgagee of such share, who has no notice of a claim against the share on the part of other beneficiaries, is entitled, on the subsequent bankruptcy of the mortgagor, to priority over the other sharers in the estate administered. *Eyton, In re; Bartlett v. Charles* (59 L. J. Ch. 733; 45 Ch. D. 458), approved. *Edgar v. Plomley*, 69 L. J. P.C. 95; [1900] A.C. 431; 82 L. T. 573; 49 W. R. 142—P.C.

In an administration suit a decree was made in 1888, in the presence of all the parties interested, carrying over to a separate account the share of one of the beneficiaries who was also the sole trustee and had a life interest in such share, and empowering him to receive the income of his share. In 1893 the respondent, a purchaser of the interest of some of the devisees, instituted a suit against the trustee alone for an account of rents and profits received by him, and, so far as was necessary, for administration of the trusts of the will, but made no suggestion of any breach of trust. In 1895 the trustee assigned his interest by way of mortgage to the appellant. The trustee became bankrupt, being largely indebted to the other beneficiaries, who claimed priority over the appellant for the amount due to them:—*Held*, that the appellant was entitled to priority on the ground that the decree of 1888 amounted to a declaration that the separated funds were free from claims by the other sharers in the estate. *Id.*

Common Order for Administration against Executor—Subsequent Action by same Plaintiff charging Wilful Default and Fraud—No Evidence of Fresh Information Acquired since Date of Common Order—Leave of Court.—A plaintiff who has obtained a common order for administration of an estate against the executor may obtain the leave of the Court to bring a fresh action charging (*inter alia*) wilful default against the executor without proving that he did not acquire the information on which he founds his fresh action in time to utilise it in the former proceeding in which he obtained the common order for administration, proof of which was required in the case of *Laming v. Gee* (48 L. J. Ch. 196; 10 Ch. D. 715), on the plaintiff, who was an undischarged bankrupt, giving security to the satisfaction of the Master for the executor's costs of the fresh action. *Kurtz, In re; Emerson v. Henderson*, 90 L. T. 12—Swinfen Eady, J.

Costs—No Assets—Executor's Costs.—It is a general rule, as held in *Bluett v. Jessop* (Jac. 240), that where a creditor proceeds against a personal representative for the administration of the personal estate, and the result shows that there was no personal estate at the time of the commencement of the suit, and therefore nothing to pay the costs of the personal representative, and that the personal representative is not in any default, the plaintiff must indemnify the personal representative in respect of the costs of the proceedings. *Hibernian Bank v. Lauder*, [1898] 1 Ir. R. 262—V.C.

— Real and Personal Estate—Incidence—

Land Transfer Act, 1897.]—The Land Transfer Act, 1897, has not made any difference to the settled practice of the Chancery Division, as laid down in *Middleton, In re; Thompson v. Harris* (51 L. J. Ch. 273; 19 Ch. D. 552), that the costs of an administration action, so far only as they have been increased by the administration of real estate, are to be borne by the real estate. *Jones, In re; Elgood v. Jones*, 71 L. J. Ch. 6; [1902] 1 Ch. 92; 85 L. T. 608; 50 W. R. 215—Buckley, J.

The Act has not the effect of causing the costs of an administration action to be borne, proportionately to their respective values, by the real estate and the personal estate. Thus, costs of probate or of letters of administration are still borne by the personal estate. *Ib.*

— **Will—"Testamentary expenses"—Real and Personal Estate—Direction to Pay out of Personal Estate—Enquiry as to Heir-at-Law on Intestacy—Costs of Action—Incidence.]**—A testatrix who died intestate as to her real estate bequeathed her personal estate subject to the payment of testamentary expenses. Administration proceedings were necessitated by the intestacy to obtain an enquiry as to who was her heir-at-law:—*Held*, that, although the costs of these proceedings were "testamentary expenses," it is a rule established by *Patching v. Barnett* (51 L. J. Ch. 74), that costs exclusively occasioned by the administration of real estate must be borne by the real estate, and that this rule remains unaffected by the Land Transfer Act, 1897. *Jones, In re; Elgood v. Jones* (71 L. J. Ch. 6; [1902] 1 Ch. 92), followed. *Betts, In re; Doughty v. Walker*, 76 L. J. Ch. 463; [1907] 2 Ch. 149; 96 L. T. 875—Kekewich, J. *And see WILL.*

Costs of Personal Representative in Default to the Estate—Solicitor for Defaulting Administrator.]—A personal representative, who has been ordered, in an administration suit, to bring in money due by him to the estate, will not be allowed any costs in the suit until he has complied with the order. His solicitor cannot be in any better position, and will not be allowed credit for such costs, in accounting for moneys received by him as such solicitor, until his client has brought in the balance due by him. *O'Kean, In re; Ferris v. O'Kean*, [1907] 1 Ir. R. 223—C.A.

Manager Appointed by the Court—Unsuccessful Action Brought by Manager with the Sanction of the Court—Insolvent Estate—Priority—Solicitor.]—A manager appointed by the Court in an administration suit obtained leave to proceed with an action at common law by the executors to recover a sum claimed to be due in respect of a contract with the testator. The defendants in that action counterclaimed a larger sum, and in the result judgment was entered for them for the difference between their counterclaim and the claim, with costs. The fund representing the testator's available assets was insufficient to pay the costs in the common-law action of the defendants and those of the manager. It appeared that no sum out of the assets would be payable to the manager personally in respect of a considerable balance certified to be due to him, and that the costs in question were due and payable to his solicitor:

—*Held*, that the manager's solicitor was entitled to be paid his costs in the common-law action in priority to the costs of the defendants therein, out of the fund in Court. *Ramsay v. Simpson*, [1899] 1 Ir. R. 194—C.A.

Practice—Further Consideration—Creditor—Application for Liberty to Attend.]—An order had been made in a creditor's action for accounts and enquiries and the administration of an estate. Upon an application by another admitted creditor that he might be at liberty to attend the proceedings under the order at his own expense, or, in the alternative, that he might be supplied by the defendants' solicitors with a copy of the list of claims lodged in the action and copies of any affidavits which he might require relating thereto, and that the defendants might be directed to give notice from time to time to the applicant or his solicitors of all proceedings to be taken under that order in reference to claims against the estate,—*Held*, that leave to attend the proceedings could only be given under the general power of the Judge to manage the business in his own chambers, and that, although the applicant could contest a particular claim of any other creditor, it would be inconvenient to give all creditors general leave to attend, and therefore the application must be refused. The applicant could have copies of the affidavits filed, the list of claims, and other documents supplied to him by the defendants at his own expense. *Schwabacher, In re; Stern v. Schwabacher*, 76 L. J. Ch. 399; [1907] 1 Ch. 719; 96 L. T. 564—Parker, J.

Conduct of Proceedings—Concurrent Actions—Disputed Claim—Order on Undisputed Claim—Application for Carriage of Order.]—The rule that, where there are two actions for administration of an estate and judgment is given in one, the plaintiff whose action was first commenced is entitled to the conduct of proceedings and the carriage of the order made, does not extend so as to make it a matter of course to give the conduct to a creditor whose claim is disputed, merely because he was the first to bring action. *Ross In re; Wingfield v. Blair*, 76 L. J. Ch. 302; [1907] 1 Ch. 482; 96 L. T. 814—Swinfen Eady, J.

(c) Insolvent Estate.

Master's Certificate—Subsequent Distribution of Surplus—Incorporation of Rules in Bankruptcy.]—The incorporation of certain of the rules of bankruptcy into the administration by the Chancery Division of an insolvent estate, by virtue of section 10 of the Judicature Act, 1875, does not cease with the making of the Master's certificate, but continues to the end of the administration, provided that the estate still remain insolvent. *Whitaker In re; Whitaker v. Palmer*, 73 L. J. Ch. 166; [1904] 1 Ch. 299; 90 L. T. 277—Farwell, J.

An estate is "insufficient for the payment in full of . . . debts and liabilities" within the meaning of section 10, in case it be insufficient to pay interest, from the date of the order of administration, on the debts that carry interest at law, even though it be sufficient to pay all principal debts and interest up to the date of the order. *Ib.*

Dictum of RIGGS, L.J., in *Whitaker In re*; *Whitaker v. Palmer* (70 L. J. Ch. 6, 7; [1901] 1 Ch. 9, 12), applied. *Henley, In re*; *Alcock v. Henley* (75 L. T. 307), not followed. *Id.*

Proof—Bankruptcy Rules—Estimated Value of Future Calls on Shares.—In the administration of the insolvent estate of a deceased person the amount due for calls which may be made in respect of shares in a company held by him should be estimated and proved for as well when the company is a going concern as when it is being wound up. *McMahon, In re*; *Fuller v. McMahon*, 69 L. J. Ch. 142; [1900] 1 Ch. 173; 81 L. T. 715; 7 Manson, 38—Stirling, J.

Administration—Costs out of Estate—Real Estate.—*See WILL.*

Priority of Judgment Creditors.—In the administration of the assets of a person whose estate has proved insufficient to pay his debts, judgment creditors will be paid *pari passu*, and not in priority of time. *M. Causland v. O'Callaghan*, [1904] 1 Ir. R. 876—C.A.

Priority of Debts—Local Rates.—By the combined operation of section 1, sub-section 6 of the Preferential Payments in Bankruptcy Act, 1888, and section 10 of the Judicature Act, 1875, parochial and other local rates (including poor rate and highway and general district rates) have, in the administration by the Court of the assets of any person whose death is subsequent to December 31, 1888, and whose estate proves to be insufficient for the payment in full of his debts and liabilities, the same priority which they have, by virtue of the Preferential Payments in Bankruptcy Act, 1888, in the case of a bankruptcy where the receiving order is made after December 31, 1888, and *pari passu* with wages and salaries, are payable before other debts. *Heywood In re*; *Parkington v. Heywood*, 67 L. J. Ch. 25; [1897] 2 Ch. 593; 77 L. T. 423; 46 W. R. 72; 4 Manson, 321—Stirling, J.

Onerous Property—Disclaimer.—Section 55 of the Bankruptcy Act, 1883, which gives power to the trustee in bankruptcy to disclaim onerous property, applies to administrations in bankruptcy under section 125. *Dictum* of CAVE, J., in *Gould, In re*; *Official Receiver, ex parte* (56 L. J. Q.B. 333, 335; 19 Q.B. D. 92, 95), followed. *Mellison, In re*; *Day, ex parte*, 75 L. J. K.B. 595; [1906] 2 K.B. 68; 94 L. T. 679; 54 W. R. 444; 13 Manson, 201—D.

Costs—Priority of Legal Personal Representatives.—The legal personal representatives of a deceased person whose assets prove insufficient to pay the costs of an administration action in full are entitled to priority in respect of costs unless and until an order is made expressly depriving them of their priority. *Gavett v. Taylcr* (2 Hare, 413) followed in preference to *Swale v. Milner* (6 Sim. 572). *Griffith, In re*; *Jones v. Owen*, 73 L. J. Ch. 464; [1904] 1 Ch. 807; 90 L. T. 639—Farwell, J.

Transfer of Proceedings in Chancery to Bankruptcy.—The intention of the Legislature in section 125 of the Bankruptcy Act, 1883, is that estates of deceased insolvents shall be administered in Bankruptcy in the same way, so far as possible, as those of living bankrupts. Con-

sequently proceedings for administration of a deceased insolvent's estate commenced in Chancery were ordered to be transferred to Bankruptcy in the absence of any special reasons for retention. Such reasons are that difficult questions of law have to be determined or that the Chancery proceedings are far advanced. *Kenward, In re*; *Hammond v. Eade*, or *Eade, In re*, 94 L. T. 277; 22 T. L. R. 239—Kekewich, J. *See also* BANKRUPTCY, col. 153.

(d) *Right of Retainer.*

Money Paid into Court on Executor's own Application.—An executor or administrator does not lose his right of retainer out of money paid into Court because he himself applies for the order under which the money is so paid in. The right of retainer need not be expressly reserved in the order. *Langley, In re*; *Johnson v. Langley*, 68 L. J. Ch. 361—Kekewich, J.

Decree for Administration—Form of Administration Bond.—The personal representative may still retain his own debt, notwithstanding a decree for administration made in a suit by other creditors, notwithstanding the assets out of which he seeks to retain came to his hands after the decree, and notwithstanding the present form of a creditor's administration bond which provides for a due course of administration "rateably and proportionably and according to the priority required by law and not unduly preferring his own debt or the debts of any other of the creditors of the deceased by reason of being an administrator as aforesaid." *Nunn v. Barlow* (2 L. J. (o.s.) Ch. 123; 1 Sim. & S. 588) examined and followed. *Davies v. Parry*, 68 L. J. Ch. 346; [1899] 1 Ch. 602; 47 W. R. 429—Romer, J.

Payment of Money under Mistake of Law—Right to Recover.—The mere fact of payment into the hands of an official receiver acting as trustee under an administration order in bankruptcy of assets collected by an executor does not necessarily bar the executor's right of retainer any more than payment into Court. *Rhoades, In re*; *Rhoades, ex parte*, 68 L. J. Q.B. 804; [1899] 2 Q.B. 347; 80 L. T. 742; 47 W. R. 561; 6 Manson, 277—C.A.

An insolvent debtor died indebted to his executrix in a sum of 604*l.* The executrix got in the estate and paid the money into a bank in her own name. An order was subsequently made for the administration in bankruptcy of the debtor's estate. Thereupon the official receiver required the executrix to pay over to him the assets which she had collected, which she accordingly did. She then put in a proof for the 604*l.*, but on being informed that she had a right of retainer she withdrew it:—*Held*, that the executrix had not, by handing over the assets to the official receiver without reserving her right of retainer, lost that right. *Id.*

Payment out of Court.—An executor's or administrator's right of retainer is only applicable to a fund which he has actually or constructively got into his possession. Money paid into Court on his application does not come constructively into his possession. *Pulman v. Meadows*, 70 L. J. Ch. 97; [1901] 1 Ch. 233; 84 L. T. 26—Cozens-Hardy, J.

It is not usually the practice of the Court to pay out funds in Court to the legal personal representative of a creditor, but to direct an enquiry as to who are the persons beneficially entitled thereto. *Id.*

Debt Barred by Statute.]—The right of an executor to retain or set off the share of one of the next-of-kin in the estate under a partial intestacy against a debt owing by him to the estate, notwithstanding that it is barred by the Statute of Limitations, depends upon whether there was due from the legatee a debt for which but for the Statute of Limitations he could have been sued. *Wheeler, In re; Hankinson v. Hayter*, 73 L. J. Ch. 576; [1904] 2 Ch. 66; 91 L. T. 227; 52 W. R. 586—Warrington, J.

Waste by Testator—Claim against Executors—Statute-barred Debt.]—Although an executor may retain a legacy against a statute-barred debt due from the legatee to the testator, this rule does not entitle executors to the benefit of a statute-barred debt as against a person who is claiming a legal right to damages against the testator's estate as distinguished from a claim on the testator's bounty. *Dingle v. Coppen*, 68 L. J. Ch. 337; [1899] 1 Ch. 726; 79 L. T. 693; 47 W. R. 279—Byrne, J.

Executor Equitable Tenant for Life.]—An executor, who is a tenant for life and *cestui que trust*, is not entitled to retain a sum due from the testator's estate for interest, where there are trustees competent to sue for the *corpus* of the sum. *Dunning, In re; Hatherley v. Dunning* (54 L. J. Ch. 900), followed. *Loomes v. Stotherd* (1 L. J. (o.s.) Ch. 220; 1 Sim. & S. 458) examined and explained. *Hayward, In re; Tweedie v. Hayward*, 70 L. J. Ch. 155; [1901] 1 Ch. 221; 84 L. T. 256; 49 W. R. 296—Byrne, J.

Executor's Debt Exceeding Assets—Realisation—Retainer in Specie.]—An executor whose debt largely exceeds the value of his testator's estate may retain the entire assets in specie without first realising them. *Woodward v. Darcy (Lord)* (1 Plowd. 184) and *Chapman v. Turner* (9 Mod. 268; s.c. Vin. Abr. "Executor," D 2, p. 71) discussed. *Gilbert, In re; Gilbert, ex parte*, 67 L. J. Q.B. 229; [1898] 1 Q.B. 282; 77 L. T. 775; 46 W. R. 351; 4 Manson, 337—Wright, J.

Plene Administravit—Claim for Succession Duty—Crown Debt—Priority.]—A debt in respect of which an executor has exercised his right of retainer must be treated as a debt paid by him, and not as money remaining in his hands. Where therefore an executor has, without notice of any claim for succession duty, fully administered his testator's estate, retaining a portion of the assets in payment of a debt to himself, a subsequent claim for succession duty cannot be enforced against the portion of the assets so retained by the executor. *Fludyer, In re; Wingfield v. Erskine*, 67 L. J. Ch. 620; [1898] 2 Ch. 562; 79 L. T. 298; 47 W. R. 5—Romer, J.

Administratrix of Sole Trustee—Debt Due from Trustee to his Trust Estate—Right of Beneficiaries to Require Exercise of Right of Retainer.]—Where a sole trustee dies insolvent and indebted to his trust estate, his legal personal

representative, who has not done anything which amounts to an acceptance of the trust, cannot be compelled at the instance of the *cestuis que trust* to exercise for their benefit his right of retainer as personal representative over the assets of the deceased trustee in respect of the moneys owing by him to the trust estate. *Ridley's Trust, In re* (73 L. J. Ch. 696; [1904] 2 Ch. 774) approved. *Fox v. Garrett* (29 L. J. Ch. 423; 28 Beav. 16) overruled. *Sander v. Heathfield* (44 L. J. Ch. 113; L. R. 19 Eq. 21) and *Faithfull, In re* (57 L. T. 14), distinguished. *Benett, In re; Ward v. Benett*, 75 L. J. Ch. 122; [1906] 1 Ch. 216; 94 L. T. 72; 54 W. R. 237—C.A.

Quære, per VAUGHAN WILLIAMS, L.J., whether the right of retainer would continue to be exercisable by the personal representative after he had appointed new trustees of the trust instrument. *Id.*

Judgment against Executrix—No Plea of Plene Administravit or Retainer—Subsequent Administration Action—Insolvent Estate—Right to Set up Retainer against Judgment Creditor.]—Where an action is brought by a creditor against an executor in respect of a debt due to him from the testator, and in the action the executor does not either plead *plene administravit*, or set up his retainer, and the creditor recovers judgment, the executor cannot in an action brought to administer his testator's estate set up his right of retainer as against the judgment creditor. *Marvin, In re; Crauter v. Marvin*, 74 L. J. Ch. 699; [1905] 2 Ch. 490; 93 L. T. 599; 54 W. R. 74; 21 T. L. R. 765—Swinfen Eady, J.

Right of Wife to Retain as Executrix Money Lent to Husband for Purposes of his Business—Husband's Estate Insolvent.]—Section 3 of the Married Women's Property Act, 1882, which deals with loans by a wife to her husband, does not apply to the subject of retainer by a woman as executrix of her husband. Consequently, the right of a woman who is executrix of her late husband to retain out of assets of his estate come to her hands the amount of a loan made by her out of her separate estate to her husband for the purpose of his business is not taken away by the joint operation of that section and section 10 of the Judicature Act, 1875, in cases where the estate is insolvent. *Leng, In re; Tarn v. Emmerson* (64 L. J. Ch. 468, 471, 472; [1895] 1 Ch. 652, 657, 660), and *May, In re; Crawford v. May* (60 L. J. Ch. 34; 45 Ch. D. 499), followed. *Ambler, In re; Woodhead v. Ambler*, 74 L. J. Ch. 367; [1905] 1 Ch. 697; 92 L. T. 716; 53 W. R. 584; 21 T. L. R. 376—C.A.

Proceeds of Sale of Real Estate—Real Representative—Land Transfer Act.]—The Land Transfer Act, 1897, does not enable an administratrix out of the proceeds of sale of real estate to retain a debt due to her from the intestate's estate in priority to other creditors. *Williams, In re; Holder v. Williams*, 73 L. J. Ch. 82; [1904] 1 Ch. 52; 89 L. T. 580; 52 W. R. 318; 20 T. L. R. 54—Joyce, J.

Disclaimer of Right of Retainer—Application of Beneficiaries.]—Where a sole trustee had misappropriated part of his trust estate, the

executor of his insolvent estate, who had not acted in the trust, was held to be at liberty to decline to exercise any right of retainer at the request of beneficiaries under the trust as against other creditors. *Ridley's Trusts, In re*, 73 L. J. Ch. 696; [1904] 2 Ch. 774; 91 L. T. 189—Joyce, J.

Quære, whether a person who has never agreed to be trustee, and can only be trustee by reason of the trust estate having devolved upon him by operation of law, may not at any time decline to act further in the trust. *Ib.*

Administrator of Sole Trustee—Insolvent Estate—Exercise for Benefit of Trust Estate.]—The administratrix of a sole trustee who died insolvent appointed new trustees of the trust estate, without, however, vesting the trust property in them:—*Held*, that the right to sue for the trust property was a *chose in action* retained by her, and that in virtue of such right and as legal personal representative of the trustee she was bound, if called upon to do so by the beneficiaries under the trust, to exercise her right of retainer in respect of any debt due from the trustee's estate to the trust estate. *Ridley, In re* (73 L. J. Ch. 696; [1904] 2 Ch. 774), considered. *Benett, In re*; *Ward v. Benett*, 92 L. T. 593—Buckley, J.

Creditor Appointed Administrator—Administration Bond—"Not unduly preferring."]—Under an administration bond entered into by a creditor administrator with a condition that he "do well and truly administer according to law (that is to say) do pay all and singular the debts which he (the deceased) did owe at his decease in a due course of administration rateably and proportionably and according to the priority acquired by law and not unduly preferring his own debt or the debts of any other of the creditors of the said deceased by reason of his being an administrator . . .," the administrator is not precluded from exercising his right of retainer in respect of debts due to himself from the deceased. *Davies v. Parry* (68 L. J. Ch. 346; [1899] 1 Ch. 602) approved. *Belham, In re*; *Richardes v. Yates*, 70 L. J. Ch. 474; [1901] 2 Ch. 52; 84 L. T. 440; 49 W. R. 498—C.A. See also *Belham, In the goods of*; *Richardes v. Yates*, 84 L. T. 300; 49 W. R. 448—Gorell Barnes, J.

Rents Collected by Receiver—Funds Transferred from other Matter.]—An executor, who was also a creditor of his testator, held, in an administration action, not entitled to a right of retainer in respect of his debt out of rents of a chattel real collected by a receiver and lodged by him to the credit of the action, but entitled to such right out of a sum lodged in Court under the Trustee Relief Act, to which the testator was entitled in remainder, and which, having fallen into possession after his death, was in presence of the executor transferred to the credit of the action. *Taaffe v. Taaffe*, [1902] 1 Ir. R. 148—V.C.

Grant of Administration to Agent—Retainer for Principal's Debt.]—A person to whom a grant of administration has been made as nominee of a creditor of an intestate, where the grant is not expressed to be for the use of his principal, cannot retain for the debt due to his principal.

Richards, In re; *Lawson v. Harvey*, 70 L. J. Ch. 699; [1901] 2 Ch. 399; 85 L. T. 273; 50 W. R. 57—Cozens-Hardy, J.

(e) Right of Preference.

Specialty Creditors—Simple Contract Creditors.]

—An executor's right of preference of one creditor over another before a judgment for administration has not been abolished by the Administration of Estates Act, 1869 (commonly called *Hinde Palmer's Act*), and as a result of that Act can now be exercised as against specialty and simple contract creditors on an equal footing, so that a simple contract creditor of the testator may be preferred by the executor to a specialty creditor. *Hankey, In re*; *Smith v. Hankey* (68 L. J. Ch. 242; [1899] 1 Ch. 541) (see below), overruled. *Samson, In re*; *Robins v. Alexander*, 76 L. J. Ch. 21; [1906] 2 Ch. 584; 95 L. T. 633—C.A.

Creditors of Unequal Degree.]—An executor's or administrator's right of preference stands on the same footing as his right of retainer, and, notwithstanding *Hinde Palmer's Act*, can only be exercised as between creditors of equal degree. A simple contract creditor may not be preferred to a specialty creditor. *Orsmond, In re*; *Drury v. Orsmond* (58 L. T. 24), not followed. *Jones, In re*; *Calver v. Lawton* (55 L. J. Ch. 350; 31 Ch. D. 440), and other decisions on the right of retainer followed and applied. *Hankey, In re*; *Smith v. Hankey*, 68 L. J. Ch. 242; [1899] 1 Ch. 541; 80 L. T. 47; 47 W. R. 444—North, J.

(f) Secured Creditor.

Withdrawal of Proof—Certificate—Depreciation in Security—Subsequent Reintroduction of Proof.]—Under section 10 of the Judicature Act, 1875, the rule in bankruptcy—that a creditor can come in and prove at any time during the administration, provided that he does not interfere with any prior distribution of the estate amongst the creditors, and subject, in cases where he has to get leave to prove, to any terms which the Court may impose—is applicable in the administration of an insolvent estate in Chancery, unless there is any Chancery practice which prevents it being applicable in the particular case. *M'Murdo, In re*; *Penfield v. M'Murdo*, 71 L. J. Ch. 691; [1902] 2 Ch. 684; 86 L. T. 814; 50 W. R. 644—C.A.

In an action for the administration of an estate in Chancery a creditor is as a rule allowed to come in after a certificate of debts has been made and share in the administration of any assets remaining undistributed, but upon such terms as the Court thinks fit to impose. This can be done notwithstanding the certificate and without varying it, unless the debt was contested and adjudicated upon by the Master when making his certificate. *Ib.*

A creditor of an insolvent estate who held security, preferring to rely on his security, withdrew his claim to prove before the Master, and the certificate stated that the claim had been made and disallowed. The security subsequently became very much depreciated owing to circumstances beyond the control of the creditor, and

was insufficient for his debt:—*Held*, that the certificate did not amount to an adjudication upon the debt, and the creditor ought upon terms to be allowed to come in and prove against undistributed assets without varying the certificate. Terms stated. *Hopkins, In re; Williams v. Hopkins* (18 Ch. D. 370), distinguished by *ROMER, L.J.*, and *STIRLING, L.J. Metcalfe, In re; Hicks v. May* (49 L.J. Ch. 192; 18 Ch. D. 236), applied by *STIRLING, L.J. Ib.*

The fact that a creditor who holds as security for his debt shares and debentures of a company might during the administration have realised his security for a substantial sum but did not do so, is not in itself a sufficient reason for refusing to allow him to come in and prove when his security turns out to be insufficient. *Ib.*

Proof against Real Estate—Application to Prove against Personality in Court—Lapse of Time.—Where an estate is administered in the Chancery Division a legal debt is not thereby made equitable, and the right of a creditor under the decree is a legal right though the remedy is given by a Court of equity. *Harrison v. Kirk*, 73 L. J. P.C. 35; [1904] A.C. 1; 89 L. T. 566—*H.L. (Ir.)*

A creditor is not precluded from the benefit of the decree after the time fixed by the Court for creditors to come in and prove their debts, and if there is a fund in Court applicable to the payment of debts the Court will allow such a creditor to share such assets subject to the terms which it may impose. *Ib.*

Holding Security from Third Party—Proof—Payment from Third Party.—*J. B.* by his will left all his real and personal estate to his wife for life, and he left legacies to his children, payable after the death of his wife, which he charged upon his real and chattel real estates, and, subject thereto, he gave the residue of his realty and personality to his wife. After the testator's death in 1870 his widow went into possession, and some of the legatees applied to her for payment of their legacies during her lifetime, and she agreed to the proposal. The money was borrowed from an insurance company, the repayment being secured by three deeds of mortgage, by which the legatees so paid mortgaged their legacies to the company and covenanted for payment of the amount advanced. The widow also covenanted with the insurance company for payment, and charged her life estate and the residue with the repayment of the amount advanced. The company advanced for payment of the legacies 5,400*l.* The widow died in 1891 and her estate proved insolvent, but the interest on the mortgages was paid down to her death. In the proceedings to administer her assets the insurance company proved for 5,400*l.* on the covenants in the mortgage deeds, without valuing the other securities which they held, and they received payments which reduced the amount due to them to 3,138*l.* On the final allocation of the funds,—*Held*, that the insurance company were entitled to receive a dividend on the full amount of their debt as proved, without deducting therefrom the payment received, provided that they did not receive more than twenty shillings in the pound. *Browne v. Browne*, [1904] 1 Ir. R. 299—*C.A.*

8. ACTIONS BY AND AGAINST.

Action by Creditor—Judgment against Executrix—No Plea of Plene Administravit or Retainer—Subsequent Administration Action—Insolvent Estate—Right to Set up Retainer against Judgment Creditor.—Where an action is brought by a creditor against an executor in respect of a debt due to him from the testator, and in the action the executor does not either plead *plene administravit*, or set up his retainer, and the creditor recovers judgment, the executor cannot in an action brought to administer his testator's estate set up his right of retainer as against the judgment creditor. *Marvin, In re; Crawler v. Marvin*, 74 L. J. Ch. 699; [1905] 2 Ch. 490; 93 L. T. 599; 54 W. R. 74; 21 T. L. R. 765—*Swinfen Eady, J.*

Claim against Estate of a Deceased Person—Damages for Misrepresentation—Unliquidated Damages—“Actio personalis moritur cum persona.”—A claim in an administration action against the estate of a deceased testator for damages, on the ground that the claimant was induced by the misrepresentation of the testator to purchase from him certain worthless shares in a company, is in the nature of a claim for unliquidated damages in an action for deceit, although the claim is made for the actual price paid for the shares. Such a claim falls within the maxim *Actio personalis moritur cum persona*, and is not maintainable. *Duncan, In re; Terry v. Sweeting*, 68 L. J. Ch. 253; [1899] 1 Ch. 387; 80 L. T. 322; 47 W. R. 379—*Romer, J.*

Administrator Pendente Lite—Receiver—Indemnity—Dismissal of Action Charging Misconduct—No Benefit to Estate—Costs of Defence.—A receiver is not entitled to be indemnified against every action that may be brought charging fraud against him personally, but only in cases where in defending himself as receiver in an action brought in respect of the estate he is also defending the estate. The nature of the indemnity in such circumstances is similar to that given in the case of trustees. *Dunn, In re; Brinklow v. Singleton*, 73 L. J. Ch. 425; [1904] 1 Ch. 648; 91 L. T. 135; 52 W. R. 345—*Byrne, J.*

Where an action charging a person with gross personal fraud both as administrator *pendente lite* and also as receiver of an estate was, in default of appearance by the plaintiff at the trial, dismissed with costs, and the plaintiff was unable to pay the costs, the receiver was not allowed out of the estate the costs of his defence of the action, on the ground that the defence had not and could not have resulted in any benefit to the estate. *Walters v. Woodbridge* (47 L. J. Ch. 516; 7 Ch. D. 504) discussed, and principle applied. *Ib.*

Action of Trespass—Real Estate—Grant not Obtained—Receiver.—An administrator can bring an action in respect of a trespass against the real estate in the interval between the death of the testator and the grant of the letters of administration, and he can, if necessary, before the grant obtain the appointment of a receiver to prevent a wrong being done to the estate. The principle laid down in *Foster v. Bates*, (13 L. J. Ex. 88, 90; 12 M. & W. 226, 233)

applied. *Pryse, In re*, 73 L. J. P. 84; [1904] P. 301; 90 L. T. 747—C.A.

9. OTHER MATTERS.

Acknowledgment by One of Two Executors.]—
See LIMITATION, STATUTES OF.

Administration of Insolvent Estates—Section 125 of Bankruptcy Act, 1883.]—*See* BANKRUPTCY.

Annuity—Appropriation of Capital Sum.]—*See* *Ross, In re, post*, HUSBAND AND WIFE.

— **Arrears—Certificate.]—***See* WILL.

Contract by Testator to Build—Devise—Non-completion—Rights of Devisee.]—*See* WILL.

De son tort.]—*See* REVENUE.

Easement—Power to Grant.]—*See* LANDS CLAUSES ACT.

Grant of Letters of Administration, &c.]—*See* WILL.

Intermeddling by Executor—Compelled to Take out Probate.]—*See* WILL.

Leaseholds—Sale of—Title—Non-existence of Debts.]—*See* *Verrell's Contract, In re, post*, VENDOR AND PURCHASER.

Legacies, &c.—Payment of.]—*See* WILL.

Originating Summons.]—*See* PRACTICE.

Real Estate—Assent of Executor to Devise of Stamp.]—*See* REVENUE.

Trustee—When Executor Becomes.]—*See* TRUST.

— **Whether Executor an Express.]—***See* TRUST.

Undischarged Debtor—After-acquired Property.]—*See* BANKRUPTCY, col. 107.

EXTRADITION.

1. *Statute*, 855.
2. *General Principles*, 855.
3. *Bail*, 858.
4. *Reviewing Decision of Magistrate*, 858.
5. *Property of Prisoner*, 858.

1. STATUTE.

6 Edw. 7 c. 15 is the *Extradition Act*, 1906.

2. GENERAL PRINCIPLES.

Foreign Depositions—Duty of Magistrate to Hear Evidence for Defence.]—In extradition cases the magistrate ought to scrutinise foreign depositions to see that they afford substantial evidence of facts going to prove an offence, but the fact that they may be criticised or cross-examined subsequently, or that they may not have been taken according to the English rules of evidence, does not preclude the magistrate from acting upon them. Evidence given on behalf of the defence ought to be considered by the magistrate in deciding whether he will grant a committal for extradition or not. *Re v. Zossenheim*, 20 T. L. R. 121—D.

Fugitive Offender—Committal for Return—Offence—Evidence—Proof of Colonial Statute.]—Under the Fugitive Offenders Act, 1881, before the magistrate can commit a fugitive to prison to await his return he must be satisfied that the offence with which the fugitive is charged is one which is for the time being punishable in that part of his Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment. Where the fugitive was charged with larceny in the State of Victoria, and the evidence on the depositions did not shew that the fugitive had committed the offence charged or that it was an offence punishable in Victoria by imprisonment with hard labour for twelve months or more, the evidence on the depositions being merely to the effect that larceny was punishable under the Crimes Act (Victoria) (No. 1,079), 1890, by imprisonment with hard labour for any term not exceeding five years, it was contended that the offence which the fugitive had committed came within the provisions of the Crimes Act, 1890, Amendment Act (No. 1,478), 1896—as to which, however, no evidence had been given before the magistrate, nor did any evidence appear on the depositions:—*Held*, upon a rule *nisi* for a writ of *habeas corpus*, that, taking into account all the circumstances of the case, the order of the magistrate committing the fugitive to prison to await his return must be discharged, as there was no proof before the Court of the colonial statute so as to bring the case within section 9 of the Fugitive Offenders Act, 1881, and that it was the duty of the prosecution to prove that the conditions imposed by that statute had been fulfilled. *Re v. Brixton Prison (Governor); Percival, In re*, 76 L. J. K.B. 619; [1907] 1 K.B. 696; 96 L. T. 545; 71 J. P. 148; 23 T. L. R. 238—D.

Semble, the Court could in a proper case receive evidence shewing that the condition of the statute had been fulfilled, or send the case back to the magistrate for further evidence to be given. *Ib.*

Suspension of Period of Punishment—Discharge on Ground of Ill-health—Condition that Punishment must be Resumed upon Improvement of Health—"Exemption from prosecution or punishment acquired by lapse of time"—German Extradition Treaty.]—The applicant was convicted on September 22, 1903, in Germany, of misappropriating various sums of money and obtaining a loan by false pretences, and sentenced to four years' imprisonment. The sentenced commenced to run from November 11, 1902. In October, 1903, the applicant was removed to a hospital, and was discharged in February, 1905, under the provisions of section 487 of the German Criminal Procedure Ordinance, as "further execution caused apprehension of imminent danger to his life." The stay in hospital up to February 4, 1904, was reckoned as being within the period of punishment. The applicant was in November, 1905, ordered to enter again upon his punishment in order to complete his sentence. His extradition was applied for in April, 1907, and a rule having been obtained for a *habeas corpus* on the ground that, having been lawfully discharged from custody, the term of imprisonment had

expired before the demand for extradition was made,—*Held*, that the rule must be discharged, as the applicant had not been “tried and discharged or punished” within Article IV. of the Extradition Treaty with Germany; and, further, that no exemption from punishment had been acquired by lapse of time within Article V. of the treaty, inasmuch as that exemption only applied according to the laws of the State applied to, and in England no exemption from punishment could be acquired by lapse of time, a sentence having to be completed within the specified time of the sentence, while in Germany a man who was ill was allowed out of prison under the obligation to serve the rest of his sentence when his health improved. *Re v. Brierton Prison (Governor)*; *Calberla, In re*, 76 L. J. K.B. 1117; [1907] 2 K.B. 861; 71 J. P. 509; 23 T. L. R. 737—D.

Prescription of Punishment under Foreign Law—Committal for Extradition before Expiry of Prescriptive Period—Conviction for Offence in this Country—Liberation after Expiry of Prescriptive Period—Competency of Surrender.—On June 28, 1901, the prisoner was convicted of larceny in Belgium in his absence, and the prescriptive period of five years fixed by Belgian law began to run on July 9, 1901. On March 9, 1906, an order was made by a magistrate at Bow Street committing the prisoner to prison to await the warrant of a Secretary of State for his surrender to the Belgian Government, but on the same day the prisoner was committed for trial at the Central Criminal Court for an offence committed in this country, and in respect of which he was sentenced on April 4, 1906, to twelve months’ imprisonment with hard labour. On being liberated at the expiration of that sentence on February 16, 1907, he was immediately re-arrested and detained under the committal order of March 9, 1906, pending extradition. A rule having been obtained for a *habeas corpus* on the ground that, as the period of prescription under Belgian law had expired on July 9, 1906, the offence committed in Belgium was no longer punishable, and consequently that the prisoner could not be extradited,—*Held*, that the rule must be discharged, inasmuch as the committal order for extradition made on March 9, 1906 (at which date the prescriptive period had not elapsed), was a good order in respect of which the Secretary of State could have issued his warrant, if his power to do so had not, by virtue of section 3, sub-section 3 of the Extradition Act, 1870, and Article XI. of the Extradition Treaty with Belgium, been suspended until the punishment to which the prisoner became subject by English law had taken place. *Re v. Brierton Prison (Governor)*; *Anwera, In re*, 76 L. J. K.B. 661; [1907] 2 K.B. 157; 96 L. T. 821; 71 J. P. 226; 23 T. L. R. 415—D.

Treaty with Germany—Evidence for Extradition—Limit of Time—Habeas Corpus.—The object of Article XII. of the Extradition Treaty with Germany, 1872, which provides that “if sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive, he shall be set at liberty,” is to prevent a prisoner for whose apprehension a provisional warrant has been issued under section 8, sub-section 2 of the Extradition Act, 1870, from being detained

for more than two months upon suspicion. *Bluhm, In re*, 70 L. J. K.B. 472; [1901] 1 K. B. 764; 49 W. R. 464—D.

Semble, that a prisoner is not entitled to be set at liberty under Article XII. where, in the magistrate’s opinion, sufficient evidence for the extradition upon one charge has been produced within the two months, and that, in such a case, it is competent to the magistrate, after the expiration of two months, to take evidence in other cases against the prisoner, and to commit him for extradition upon all of them. *Ib.*

3. BAIL.

Bail—British Subject—Fugitive from Jurisdiction of Consular Court—Committal under Fugitive Offenders Act, 1881—Power of Court to Grant Bail.—The Fugitive Offenders Act, 1881, does not take away from the High Court its inherent power to grant bail to a fugitive offender, apprehended in England and committed to prison by a magistrate to await his surrender to take his trial at a Consular Court. *Reg. v. Spilsbury*, 67 L. J. Q.B. 938; [1898] 2 Q.B. 615; 79 L. T. 211; 62 J. P. 600; 19 Cox C.C. 160—D.

4. REVIEWING DECISION OF MAGISTRATE.

Committal—Fresh Evidence since Committal—Jurisdiction of Court to Review Magistrate’s Decision.—On an application for a *habeas corpus* to bring up a fugitive criminal committed for extradition by a police magistrate under the Extradition Act, 1870, it is not competent for the Court to review the decision of the magistrate on the ground that further evidence has come to light, provided that there was evidence upon which the magistrate could act and that it is not shewn that he had not jurisdiction. Observations in *Castioni, In re* (60 L. J. M.C. 22; [1891] 1 Q.B. 149), questioned. *Re v. Holloway Prison (Governor)*; *Siletti, In re*, 71 L. J. K.B. 935; 87 L. T. 332; 51 W. R. 191; 67 J. P. 67; 20 Cox C.C. 353—D.

Order of Committal under Fugitive Offenders Act, 1881—Power of Court to Review Magistrate’s Decision.—An order was made by a police magistrate, under section 5 of the Fugitive Offenders Act, 1881, committing V. to prison before being sent to South Africa for an offence alleged to have been committed by him there. A rule for a writ of *habeas corpus* having been granted,—*Held*, discharging the rule, that on the facts there was a “strong or probable presumption” within section 5 that V. had committed the offence alleged against him. *Re v. Vyner*, 68 J. P. 142—D.

Whether the Court has power to review the decision of the committing magistrate who has held that there is a strong or probable presumption that the accused has committed the offence charged—*quere*. *Ib.*

5. PROPERTY OF PRISONER.

Property in Prisoner’s Possession when Arrested—Subsequent Bankruptcy—Order for Com-

mittal—Retention of Property by Police—Claim by Trustee in Bankruptcy—Handing over Property for Purposes of Foreign Trial—Undertaking to Return.—The trustee in bankruptcy of a fugitive criminal domiciled in England, against whom an order for committal on an extradition warrant has been made, is not entitled to a transfer of the property in the possession of the prisoner at the time of his arrest until the magistrate who makes the order for committal has decided what, if any, portions of such property are required for the purposes of the foreign trial. The concurrence of the Secretary of State in handing over such portions to the country requesting the extradition should be obtained and a stipulation made for the return of the same upon the conclusion of the trial to the trustee in bankruptcy in this country. *Borovsky, In re; Salaman, ex parte*, 71 L. J. K.B. 992; [1902] 2 K.B. 312; 87 L. T. 184; 51 W. R. 48; 9 Manson, 346—Wright, J.

FACTOR.

See PRINCIPAL AND AGENT.

FACTORY.

See MASTER AND SERVANT.

FACULTY.

See ECCLESIASTICAL LAW.

FALSE IMPRISONMENT.

See MALICIOUS PROCEEDINGS.

FALSE PRETENCES.

See CRIMINAL LAW.

FALSE REPRESENTATION.

See FRAUD AND MISREPRESENTATION.

FEES.

Counsel, of.—See COSTS, col. 581.

Court.—See REVENUE.

Marriage.—See HUSBAND AND WIFE.

FELONY.

See CRIMINAL LAW.

FEME COVERT.

See HUSBAND AND WIFE.

FENCES.

See BOUNDARIES—METROPOLIS.

FERRY.

See WAY.

FERTILISERS.

See LOCAL GOVERNMENT, cols. 1332, 1341.

FINES.

Copyholds, for.—See COPYHOLDS.

Directors, in Case of.—See COMPANY LAW, col. 410.

Leases, on Renewal of.—See LANDLORD AND TENANT.

Offences, for.—See JUSTICE OF THE PEACE AND CRIMINAL LAW.

Roads, for Non-repair of.—See WAY.

FINES AND RECOVERIES.

See SETTLEMENT.

FIREARMS.

See PISTOLS.

FIRE BRIGADE.

See LOCAL GOVERNMENT.

FIRE INSURANCE.

See INSURANCE.

FISHERY.

1. *Statutes*, 860.
2. *Grant of*, 861.
3. *Several Fishery*, 861.
4. *Close Time*, 862.
5. *Salmon Fishery*, 863.
6. *Sea Fishery*, 865.
7. *Oysters*, 865.
8. *Other Matters*, 867.

1. STATUTES.

3 Edw. 7 c. 31 is the *Board of Agriculture and Fisheries Act*, 1903.

7 Edw. 7 c. 15 is the *Salmon and Fresh Water Fisheries Act*, 1907.

2. GRANT OF.

Lease of Land including Stream—No Reservation of Fishery Rights—Right of Landlord to Prosecute for Taking Fish.]—By a lease of land, whether agricultural or other land, through which a river flows, the right of fishing in the river, unless expressly reserved to the lessor in the lease, passes to the tenant, and the lessor cannot prosecute persons for unlawfully taking fish in the river. *Jones v. Davies*, 86 L. T. 447; 66 J. P. 439; 20 Cox C.C. 184—D.

Exclusive Right—Landlord and Tenant—Lease—Construction—Covenant not to Assign the "said premises"—Omission of Words "any part of the premises"—Licence for Two Rods—Validity.]—A lessor granted to a lessee for a term of years the exclusive right of fishing in certain portions of a river and taking away the fish so caught, and the lessee covenanted not to underlet or assign the "said premises" without the lessor's consent. The lessee subsequently agreed to grant a licence to another to fish upon the same water, and in like manner as in the lease provided, for the unexpired residue of the term, but so that not more than two rods should be used at any time under the licence. The lessor objected:—*Held*, that the grant of this licence was not a breach of the covenant. *Grove v. Portal*, 71 L. J. Ch. 299; [1902] 1 Ch. 727; 86 L. T. 350—Joyce, J.

3. SEVERAL FISHERY.

Ownership of Bed of River—Inconsistent Rights—Evidence—Right of Way—Incorporeal Hereditament—Appurtenancy.]—A grant of a fishery and weirs (gurgites) in a river is a grant of the bed over which the fishery extends. *Hanbury v. Jenkins*, 70 L. J. Ch. 730; [1901] 2 Ch. 401; 49 W. R. 615; 65 J. P. 631—Buckley, J.

A several fishery may be granted without the use of the word "several." On a claim for a several fishery, evidence that rights of fishing exist in certain portions of the waters to which the claim extends inconsistent with the existence of a several fishery in those portions is admissible on the question whether a several fishery exists in other portions; but proof of the existence of such inconsistent rights does not necessarily negative the existence of a several fishery elsewhere. *Ib.*

Acts by riparian occupiers, such as placing stakes and wattles on the soil of a river to prevent erosion by flood, taking gravel deposited by flood, and making pens in the stream to prevent cattle from straying, though *prima facie* acts of ownership, but referable to an absence of objection on the part of another person claiming the bed of the river and reasonably necessary or convenient for the protection and enjoyment of the property of the riparian occupiers, are not inconsistent with the ownership of the bed of the river being in such other person. *Ib.*

Appendant.]—Where there is no incongruity in the union of two incorporeal things, one—*e.g.* a right of way—may be appendant or appurtenant to the other—*e.g.* a several fishery. *Ib.*

Right to Soil.]—Proof of ownership of a several fishery in a tidal river is evidence of a title to the soil over which it is exercised, but such evidence may be rebutted. *Beaufort (Duke) v. Aird*, 20 T. L. R. 602—Warrington, J.

The plaintiff was the owner of a several fishery in the river Wye, where the tide flowed:—*Held*, on the evidence, that he was the owner of the bed of the river below high-water mark. *Ib.*

Reservation—Allotment of Waste of Manor.]—A several fishery vested in the lord as owner of the soil of the bed of a river is a territorial right, and is not, on an allotment of waste, reserved to him by the usual clause in an Enclosure Act reserving to him all his royalties, franchises, &c. This clause refers to manorial rights only, and therefore it does not reserve to the lord as incidental or appurtenant to the fishery the right of landing on the banks of the waste allotted by the award. For this purpose there is no difference between rights of fishing and rights of shooting. *Devonshire (Duke) v. O'Connor* (59 L. J. Q.B. 206; 24 Q.B. D. 468) followed. *Ecroyd v. Coulthard*, 67 L. J. Ch. 458; [1898] 2 Ch. 358; 78 L. T. 702—C.A.

4. CLOSE TIME.

By-law—Alteration of Close Season.]—Section 39, sub-section 1 of the Salmon Fishery Act, 1873, enables the conservators of the S. Fishery Board "to alter the commencement and termination of the annual close season as to the whole or part of the district so that such close season when so altered" should "not be less than 154 days for all modes of salmon fishing except rod and line and" should "not commence later than the 1st day of November in each year." By by-law 17 made by the conservators: "The annual close time as to the whole of the S. Fishery District for all modes of salmon fishing except with rod and line shall commence on the 16th day of August in each year and terminate on the 1st day of February following." By section 2 of the Salmon Fishery Law Amendment Act, 1879: "Notwithstanding anything in the Salmon Fishery Acts, 1861 to 1876 contained, the annual close season for putts and putchers shall commence on the 1st Sept. in each year and terminate on the 1st May in the ensuing year, both inclusive. None of the provisions of the said Acts as to the weekly close season shall apply to putts and putchers":—*Held*, that the respondent was justified in fishing with putchers on August 22, 1905. *Prosser v. Cadogan*, 94 L. T. 777; 70 J. P. 511; 21 Cox C.C. 190—D.

Validity—Ultra Vires—Penalty—"Description of nets"—Beating Net.]—Section 39, sub-section 3 of the Salmon Fishery Act, 1873, enables a board of conservators to make by-laws "to determine the length, size, and description of nets for taking salmon." As to part of their district conservators made a by-law that the only description of net to be used for taking salmon should be beating nets as therein described:—*Held*, that the by-law was not *ultra vires*. *Clayton v. Peirse*, 73 L. J. K.B. 268; [1904] 1 K.B. 424; 90 L. T. 119; 52 W. R. 495; 68 J. P. 233; 20 Cox C.C. 596—D.

5. SALMON FISHERY.

Fishery District—Limits—River—Tributary—“Waters”—Reservoir.—The “waters” which by virtue of section 6 of the Salmon Fisheries Act, 1878, may be included in a fishery district must be tributaries of or communicate with a river. Therefore a person who, without a licence from the fishery board having jurisdiction within the fishery district, fishes for trout in a reservoir geographically situated within the fishery district, but which does not communicate with a river except by a valve, cannot be convicted under section 35 of the Salmon Fishery Act, 1865, and sections 6 and 7 of the Freshwater Fisheries Act, 1878, of fishing without a proper licence. *Stead v. Nicholas*, 70 L. J. K.B. 653; [1901] 2 K.B. 163; 85 L. T. 23; 49 W. R. 522; 65 J. P. 484; 20 Cox C.C. 27—D.

— **Limits of District—Certificate of Secretary of State—River—“Tributary”—Mill-dam.**—The Salmon Fishery Act, 1865, s. 5, provides that the limits of a river shall be defined, and a fishery district formed by a Secretary of State's certificate, and section 3 defines the term “river” as including “such portion of any stream with its tributaries” as may be declared in the certificate. By a certificate made under the Act a fishery district was formed comprising so much of a river and its “tributaries” as lay within a certain county. Within the district was a mill-dam communicating freely with a mill-race through an opening in the bank between them in which there was a grating. The mill-race issued from a stream which was a tributary of the river, and all the water of both the mill-race and the mill-dam, either by passing over the mill-wheel or by another route, eventually returned to the stream further down its course:—*Held*, that the mill-dam was a “tributary” of the river within the meaning of the certificate, and consequently that a person was not entitled to fish in it without a licence from the fishery board of the district. *Moses v. Iggo*, 75 L. J. K.B. 331; [1906] 1 K.B. 516; 94 L. T. 548; 70 J. P. 251; 21 Cox C.C. 136—D.

Net—“Snare or other like instrument.”—A net of such a description that the use thereof for catching salmon would constitute an offence under section 10 of the Salmon Fishery Act, 1861, is not an “otter lath or jack, wire or snare, spear, gaff, strokehall, snatch, or other like instrument for catching or killing salmon” within the meaning of section 8 of the same Act, as amended by section 18 of the Salmon Fishery Act, 1873, so as to render any one found in possession of such a net with the evident intention of presently using it to catch salmon liable to a conviction under section 8 of the Act of 1861, for “having in his possession . . . any of the foregoing instruments under such circumstances as to satisfy the Court before whom he is tried that he intended at the time to catch or kill salmon by means thereof.” *Jones v. Davies*, 67 L. J. Q.B. 294; [1898] 1 Q.B. 405; 78 L. T. 44; 62 J. P. 182; 18 Cox C.C. 706—D.

Weekly Close Time—By-law—Intention—Evidence.—D. had a net fixed and kept up and closed in salmon waters capable of taking

salmon during the weekly close time provided by the by-laws, and in which salmon had been in fact taken, and in respect of which he had taken out a salmon licence. The mesh of the net was smaller than that allowed by the by-laws:—*Held*, that, provided the Justices found intention, there was evidence of fishing for salmon otherwise than by rod and line during the weekly close time, and of attempting to take salmon with smaller meshes than that allowed by the by-laws. *Davies v. Evans*, 86 L. T. 419; 66 J. P. 392; 20 Cox C.C. 177—D.

Fixed Engine—Fishermen in Employment of Tenant of Fishings.—Fishermen in the employment of the tenant of salmon fishings used the alleged fixed engine complained of in accordance with their master's instructions:—*Held*, that they were not “owners” of the fixed engine within the meaning of section 11 of the Salmon Fishery Act, 1861. *Phyn v. Kenyon*, 7 F. (Just. Cas.) 47—Ct. of Justy.

Poisoned Stream—Dying Fish Taken from Stream by Hand—Offence.—To take dying trout by hand from a poisoned stream is an offence within section 22 of the Salmon Fisheries Act, 1873, as extended to trout or char by section 7 of the Freshwater Fisheries Act, 1878; and the offence is complete notwithstanding the absence of evidence to connect the person so taking them with the poisoning of the stream. *Stead v. Tillotson*, 69 L. J. Q.B. 240; 48 W. R. 431; 64 J. P. 343—D.

Maliciously Placing Lime in Salmon River—Construction of Statute—Elimination of Words Preventing Plain Object of Statute being Attained.—The plain object of section 13 of the Salmon Fishery Act, 1873, was to extend to salmon rivers the provisions of section 32 of the Malicious Damage Act, 1861, in order to prevent the destruction of property in salmon rivers by the serious act of poisoning the water. Therefore section 13 of the Act of 1873 must be read as if the words “in lieu of the words ‘private rights of fishery’” were omitted, inasmuch as the manifest intention of the statute would be absolutely defeated if section 32 of the Act of 1861 were altered in the strict way which the amending section directs. *Rex v. Vasey*, 75 L. J. K.B. 19; [1905] 2 K.B. 748; 93 L. T. 671; 54 W. R. 218; 69 J. P. 455; 21 Cox C.C. 49; 22 T. L. R. 1—C.C.R.

Trout Stream—Adjoining Owners—Right of One Owner to Erect Weir—Injunction.—The plaintiff and defendant were adjoining owners of land through which a well-known trout stream flowed. The defendant erected upon his own property a weir with fenders and gratings with the avowed purpose of preventing fish going up to the plaintiff's property while it allowed them to pass from that property to the defendant's. The plaintiff alleged that he was thereby damnified. The defendant did not deny these allegations, but submitted that not interfering with the flow of water he was entitled to erect and maintain such weir. On the case being set down for argument on questions of law arising on the pleadings:—*Held*, that the principle which was to be found in the authorities, that the erection in a salmon river of a weir whereby fish were prevented from reaching the upper portions of the river con-

stituted an injury to the owners of the upper waters with respect to which they had a right of action, might possibly extend to other kinds of fish if damage were proved. That, therefore, on the present materials the case could not be disposed of, but that it must go to trial in order that all the materials necessary for arriving at a proper decision might be before the Court. *Barker v. Faulkner*, 79 L. T. 24—Stirling, J.

"Possession" of Salmon taken during Close Time.—The word "possession" in section 21 of the Salmon Fisheries (Scotland) Act, 1868 [cf. section 19 of the English Salmon Fishery Act, 1873], which renders liable to a penalty "any person who . . . shall have in his possession any salmon taken within the limits of this Act" during the annual close time, does not necessarily mean actual physical possession. *M'Attee v. Hogg*, 5 F. (Just. Cas.), 67—Ct. of Justy.

Unlawful Possession of Unseasonable Fish—Recovery of Penalty—Time.—The time within which penalties may be recovered in a summary manner under section 62 of the Salmon Fishery Act, 1873, is to be calculated in accordance with the provisions of section 11 of the Summary Jurisdiction Act, 1848. It is therefore unnecessary that a conviction and recovery of a penalty should take place within six months from the actual date of the offence, so long as an information has been laid within the six months. *Morris v. Duncan*, 68 L. J. Q.B. 49; [1899] 1 Q.B. 4; 79 L. T. 379; 47 W. R. 96; 62 J. P. 823; 19 Cox C.C. 186—D.

6. SEA FISHERY.

District Fisheries Committee—Appointment of Fishery Officer—Conditions as to Expenditure—Restrictions by Constituent Councils.—Where a district fisheries committee has been appointed by more county or borough councils than one, it is not open to any one of such councils alone to impose, under section 6 of the Sea Fisheries Regulation Act, 1888, restrictions or conditions as to expenditure relative to the appointment and equipment of fishery officers. *Reg. v. Yorkshire (North Riding) County Council; North-Eastern Sea Fisheries District Committee, ex parte*, 68 L. J. Q.B. 93; [1899] 1 Q.B. 201; 79 L. T. 521; 47 W. R. 205; 63 J. P. 68—D.

"Trawl or trawl net"—Otter Trawl.—An otter trawl, which has no beam, but which is used in fishing for sea fish as a trawl with a beam, is within by-law 1 of the North-Eastern Sea Fisheries District By-laws, 1894, which prohibits the use of any trawl or trawl net, or any net having a beam, and its use is contrary to that by-law. *Colbeck v. Ashfield*, 67 L. J. Q.B. 333; 46 W. R. 302; 62 J. P. 214—D.

7. OYSTERS.

Deposit on Foreshore to Purify Them—Incident to Public Right of Fishing in Adjacent Waters—Occupation of Soil—Trespass—Infringement of Right of Owner of Soil of Foreshore.—An action was brought by the Corporation of Truro, as lessees of the foreshore of the estuary of the

Truro river, to recover damages for trespass from a fisherman who had marked out by boundary-marks a part of the foreshore, and deposited thereon oysters, dredged by him in the adjacent waters in the exercise of a public right of fishing, for the purpose of purifying them and rendering them fit for market, claiming a right to appropriate the part of the foreshore so marked out for this purpose to the exclusion of the rest of the public. At the trial of the action the jury found that the acts done did not constitute an occupation of the soil, but were only incidental to the fishing for oysters, which could not practically be carried on without a place of deposit:—*Held*, that the claim of the defendant could not be supported, as he might by the acts in question, if uninterrupted, acquire a title against the plaintiffs. *Truro Corporation v. Rowe*, 71 L. J. K.B. 974; [1902] 2 K.B. 709; 87 L. T. 386; 51 W. R. 68; 66 J. P. 821—C.A.

A municipal corporation empowered by a local Act, confirming an order of the Board of Trade pursuant to the Sea Fisheries Act, 1868, to regulate an oyster fishery, is entitled to take a lease of the foreshore for fourteen years, where its doing so will facilitate the carrying out of the purposes of the local Act. *Truro Corporation v. Rowe*, 70 L. J. K.B. 1026; [1901] 2 K.B. 870; 85 L. T. 422; 50 W. R. 151; 65 J. P. 806—Wills, J.

Where it is necessary for the practical carrying on of an oyster fishery that some of the oysters should be deposited for a time upon the foreshore for the purpose of purifying them and rendering them fit for the market, and from time immemorial the fishermen have been accustomed to deposit oysters there for that purpose, a right so to deposit oysters exists both at common law and by custom as an incident of the right of oyster fishing. *Ib.*

Oyster Beds—Pollution—Prescriptive Right to Discharge Sewage.—Since the Sea Fisheries Act, 1868, there can be no prescriptive right acquired to discharge sewage into the sea so as to contaminate oysters in private oyster beds. *Foster v. Warblington Urban Council*, 69 J. P. 42; 3 L. G. R. 605; 21 T. L. R. 214—Walton, J.

No one can acquire by prescription a right to pollute a public fishery. *Ib.*

On Foreshore—Pollution by Sewage—Liability of Sanitary Authority—Extension of Drainage System—Prescriptive Right to Discharge Sewage.—The plaintiff, who was an oyster merchant, had been for more than twenty years in occupation of certain oyster storage beds on a part of the foreshore within the limits of the manor of E. When the plaintiff first went into occupation there existed a sewer, which had been made by the rural sanitary authority of the district for disposing of the sewage of the town of E., and which had its outfall into the sea in the neighbourhood of the oyster storage beds. Subsequently the defendant urban district council became the sanitary authority of the district, and they extended the system of drainage by making new sewers which connected with the old sewer, and caused the discharge at the outfall to be greatly increased. The oyster storage beds and the oysters therein having become contaminated by sewage matter,

the plaintiff brought an action against the defendants for damages and an injunction:—*Held*, that, whether or not there was evidence of any title in the plaintiff derived from the lord of the manor to the soil of the beds or to a several fishery, the plaintiff's occupation of the beds was sufficient to enable him to maintain an action for trespass; and that, as the injury complained of had been brought about by the defendants' acts, and not merely by omission on their part to perform their statutory duty, and as the defendants failed to prove any prescriptive right to discharge sewage as they did, the plaintiff was entitled to recover damages. *Glossop v. Heston and Isleworth Local Board* (49 L. J. Ch. 89; 12 Ch. D. 102) and *Att.-Gen. v. Dorking Guardians* (51 L. J. Ch. 585; 20 Ch. D. 595) distinguished. *Foster v. Warblington Urban Council*, 75 L. J. K.B. 514; [1906] 1 K.B. 648; 94 L. T. 876; 54 W. R. 575; 4 L. G. R. 735; 70 J. P. 233; 22 T. L. R. 421—C.A.

Per VAUGHAN WILLIAMS, L.J.—There is no common law right to discharge sewage into the sea. *Ib.* See also NUISANCE.

— **Damage to—Action in Rem—Jurisdiction.**—See SHIPPING.

S. OTHER MATTERS.

Custom as to Drying Nets.—See CUSTOM.

Larceny—Fish Taken at Sea—Possession of Owner of Boat.—See CRIMINAL LAW.

Non-tidal River—Prescription.—See *Chesfield (Earl) v. Harris*, 43 L. J. N. C. 417.

Salmon.—See SCOTLAND.

Unlawful Angling—Larceny.—See CRIMINAL LAW.

FIXTURES.

Machinery Attached by Bolts and Screws—Hire-purchase Agreement—Implied Licence to Remove Machinery—Mortgagor and Mortgagee.—

Certain machines, obtained by a trader under a hire-purchase agreement, were placed on concrete beds in his factory and were attached to upright bolts, to which they were screwed by means of nuts. The factory was mortgaged by the trader, who was lessee under a long term. Default having been made by the trader in payments under the hire-purchase agreement, the owner of the machines gave notice determining the agreement and demanding the return of the machines. A few days before the notice was given the mortgagees had taken possession of the premises under their mortgage, and they refused to give up the machines:—*Held*, that the machines were attached in such a way as to raise the presumption that they were fixtures, that the hire-purchase agreement was not evidence to rebut this presumption, and that the Judge at the trial was right in withdrawing the case from the jury and deciding as a matter of law that the machines were fixtures which passed to the mortgagees under their mortgage, and that the owner of the machines was not entitled to remove them. *Hobson v. Gorringe* (66 L. J. Ch. 114; [1897] 1 Ch. 182) followed. *Gough*

v. Wood (63 L. J. Q.B. 564; [1894] 1 Q. B. 713) and *Chidley v. West Ham Churchwardens* (32 L. T. 486) distinguished. *Reynolds v. Ashby*, 72 L. J. K.B. 51; [1903] 1 K.B. 87; 87 L. T. 640; 51 W. R. 405—C.A.

Lease of Mill by Tenant for Life—Machinery Erected by Lessee—Purchase under Covenant by Lessor at End of Term—Right of Executrix to Remove as against Remainderman.—“*Quicquid plantatur solo, solo cedit.*”—The principle which, as between tenant and landlord, enables the former to remove during his term chattels which he has affixed to the soil for the benefit of his trade applies also to the case of tenant for life and remainderman, and allows the former, or his personal representatives, to remove chattels affixed to improve the estate for his own enjoyment. *Hulse, In re; Beattie v. Hulse*, 74 L. J. Ch. 246; [1905] 1 Ch. 406; 92 L. T. 232—Buckley, J.

This is an exception to the maxim *Quicquid plantatur solo, solo cedit*, and not a concession allowing what has become part of the soil to be removed. *Ib.*

The question is one not of the nature of the attachment, but of its purpose and of the intention with which it was made. *Leigh v. Taylor* (71 L. J. Ch. 272; [1902] A.C. 157) followed. *Ib.*

Hire-purchase Agreement—Machinery Embedded in Concrete Floor—Mortgagee in Possession.—Machinery obtained by a trader under a hire-purchase agreement was fastened down to beds of concrete by bolts and nuts in such a way that it could be removed without injury to the building or the concrete. The premises were subject to a mortgage including “fixtures machinery and fittings”; and the mortgagee entered into possession. Subsequently, on default of payment by the trader under the agreement, the vendor of the machinery gave notice determining the agreement and demanding the return of the machinery:—*Held*, that the mortgagee was entitled to the machinery as fixtures. *Hobson v. Gorringe* (66 L. J. Ch. 114; [1897] 1 Ch. 182) approved. *Reynolds v. Ashby*, 73 L. J. K.B. 946; [1904] A.C. 466; 91 L. T. 607; 53 W. R. 129; 20 T. L. R. 766—H.L. (E.)

— **Subsequent Equitable Mortgage—Priority.**

—Machinery obtained by a company under a hire-purchase agreement was fixed to its business premises. Subsequently the company gave to a bank an equitable mortgage of its premises by deposit of deeds accompanied by written memoranda of charge. The bank had no notice of the hire-purchase agreement. On default in payment by the company under the hire-purchase agreement the vendor of the machinery gave notice demanding the return of the machinery. A winding-up order was made against the company, and money was still owing to the bank under its memoranda of charge:—*Held*, that the bank being an equitable mortgagee took subject to the hire-purchase agreement, that the hire-purchase agreement created an equitable interest by which a subsequent purchaser who had not the legal estate was bound, and that the interest of the bank under its mortgage was postponed to the interest of the vendors of the machinery

under the hire-purchase agreement. *Allen & Sons, Ltd., In re*, 76 L. J. Ch. 362; [1907] 1 Ch. 575; 96 L. T. 660; 14 Manson, 144—Parker, J.

Gough v. Wood & Co. (63 L. J. Q.B. 564; [1894] 1 Q.B. 713), *Hobson v. Gorringe* (66 L. J. Ch. 114; [1897] 1 Ch. 182), and *Reynolds v. Ashby* (73 L. J. K.B. 946; [1904] A.C. 466) distinguished. *Ib.*

Chairs Hired by Owner of Hippodrome and Screwed to Floor—Mortgage of Premises, together with Fixtures—Mortgagee in Possession—Right of Owner of Chairs to Remove Them.—The owner of a hippodrome hired a number of chairs for a term of weeks at a weekly sum. The chairs were constructed and affixed to the floor of the hippodrome in the following way: Cast-iron standards were arranged in rows, and between each two adjoining standards a lift-up seat was mounted on pivots projecting from the standards, and a board forming the back of the chair was secured by screws driven through flanges in the standards. The standards were affixed by means of screws driven through flanges at the feet to the floor of the building, which consisted of wooden boards resting on and nailed to concrete. The owner of the building mortgaged it, together with all fixtures except trade machinery, to a bank to secure an overdraft. The mortgagees having taken possession of the hippodrome and sold the chairs,—*Held*, that the chairs were not fixtures, but remained the property of the persons from whom they had been hired, and that these persons were entitled to recover their value from the mortgagees. *Lyon v. London, City, and Midland Bank*, 72 L. J. K.B. 465; [1903] 2 K.B. 135; 88 L. T. 392; 51 W. R. 400—Joyce, J.

Lace Looms—Mode of Attachment.—Certain lace looms in a factory were bolted to a long iron sole-plate attached only by its own weight to the floor, the upper part of the looms being tied by substantial iron stays to the roof beams:—*Held*, that these looms were fixtures which passed under a mortgage of the factory. *Howie's Trustees v. Mc'Kay*, 5 F. 214—Ct. of Sess.

Mortgagor and Mortgagee—Annexation to Freehold—Dog Grates Resting by Own Weight.—The mortgagor of a freehold dwelling-house after the execution of the mortgage removed certain fixed grates from the house and substituted for them an equal number of dog grates. The substituted dog grates were not physically attached to the freehold, but rested in their place merely by their own weight, which was considerable:—*Held*, that, the true inference being that the dog grates were substituted for the purpose of improving the inheritance, they were fixtures. *Monti v. Barnes*, 70 L. J. K.B. 225; [1901] 1 K.B. 205; 83 L. T. 619; 49 W. R. 147—C.A.

Tapestry—Ornamental Purposes—Tenant for Life and Remainderman—Damages for Removal.—The exception of ornamental fixtures from the rule *Quicquid plantatur solo, solo cedit* applies as well between tenant for life and remainderman as between tenant and landlord. *De Falbe, In re*; *Ward v. Taylor*, 70 L. J. Ch. 286; [1901] 1 Ch. 523; 84 L. T. 273; 49 W. R. 455—C.A.

Tapestries affixed by means of nails and moulding to the walls of a drawing-room by the tenant for life for the purpose of enjoying them as ornaments are within the exception of ornamental fixtures as between tenant for life and remainderman, and are removable by the tenant for life or by his executors after his death. *D'Eyncourt v. Gregory* (36 L. J. Ch. 107; L. R. 3 Eq. 382) and *Norton v. Dashwood* (65 L. J. Ch. 737; [1896] 2 Ch. 497) observed on. *Ib.*

The remainderman is not entitled to consequential damages occasioned by the removal of ornamental fixtures, as, for instance, to compensation for the expense of redecoration. *Ib.*

—Heir and Executor—Landlord and Tenant—Degree of Attachment to the Structure.—The two principles, that where an object is so attached to the house as to become part thereof it goes to the heir; and that where from its nature and purpose it is clearly not intended to form part of the realty, but is only attached thereto for the purpose of enjoyment during the occupancy of its owner, it is removable and goes to the executor—have been established from the earliest times and are still in force. These principles govern all cases of fixtures, whether between landlord and tenant or tenant for life and remainderman; and any apparent change in the law is not in the principles themselves, but arises from their application under altered conditions of life and habits. *Leigh v. Taylor*, 71 L. J. Ch. 272; [1902] A.C. 157; 86 L. T. 239; 50 W. R. 623—H.L. (E.)

Tapestries affixed by means of nails and moulding to walls by a tenant for life which were removable, and had in fact been removed without damage to the structure, held to belong to the tenant for life who erected them. *Ib.*

Covenant to Yield up on Termination of Tenancy.—*See LANDLORD AND TENANT.*

FORECLOSURE.

See MORTGAGE.

FOREIGN ENLISTMENT ACT.

See WAR.

FOREIGN JUDGMENT.

See INTERNATIONAL LAW.

FOREIGN LAW.

See INTERNATIONAL LAW.

FORESHORE.

Private Owner—Right of Public to Bath.—By the common law all the King's subjects have in general a right of passage over the sea

with vessels for the purpose of navigation, and have, *prima facie*, a common of fishery there. They have the same rights over that portion of the sea which lies over the foreshore at the times when the foreshore is covered with water. When the sea recedes and the foreshore becomes dry, there is no general common-law right in the public to pass over the foreshore. There are certain limited rights over the foreshore when dry—namely, to cross the same in case of peril or necessity—but the fact that such limited rights exist goes far to shew that there cannot be a general right. *Brinckman v. Matley*, 73 L. J. Ch. 160; [1904] 2 Ch. 313; 90 L. T. 199; 52 W. R. 363; 2 L. G. R. 258; 68 J. P. 161; 20 T. L. R. 180—*Buckley, J.* Affirmed in C.A., 73 L. J. Ch. 642; [1904] 2 Ch. 313; *post*, SEA.

There is no right at common law in the public to bathe in the sea from a foreshore belonging to a private owner. *Blundell v. Catterall* (5 B. & Ald. 268) explained and followed. *Ib.*

Lands Bounded by Foreshore—Owner's Right of Access to Sea.—An owner of lands bounded by the sea has a private right of access thereto for the purposes of navigation. Such right is not limited to the period of the day when the sea is in contact with his lands, but includes a private right of access to the sea across the portion of the foreshore left bare by the receding tide. An improper obstruction of such owner's right to use the foreshore for the purposes of navigation will be restrained by injunction. *Coppinger v. Sheehan*, [1906] 1 Ir. R. 519—*Barton, J.*

Removal of Sand from Foreshore—Boundary—“Precincts.”—By section 2 of the Musselburgh Harbour Act of 1840, the word “harbour” shall be understood to mean the “harbour of Fisherrow,” and shall include the whole precincts thereof as after specified. By section 76 the said harbour shall be deemed to extend “along the shore” from the Magdalena Burn on the west to the Ravenshaugh Burn on the east, and to seaward to the extent of 100 yards beyond low-water mark opposite to the shore between the aforesaid burns. The distance between the two burns was two miles. By section 49 it shall not be lawful for any person to dig or take away from the said harbour or its precincts any sand, gravel, shingle, or stones except from such place or places as shall from time to time be appointed by the Harbour Commissioners. In an action by the Harbour Commissioners against persons who were proprietors of part of the foreshore between the two burns to restrain them from digging sand, &c.,—*Held*, that the harbour and its precincts included the whole foreshore between the two burns, and that the defenders were not entitled to remove sand from their land without the authority of the Harbour Commissioners. *Att.-Gen. v. Tomline* (14 Ch. D. 58) followed. *Musselburgh Real Estate Co. v. Musselburgh (Provost)*, [1905] A.C. 491—*H.L. (Sc.)*

Taking Shingle—Prohibition by Board of Trade—Encroachment of Sea—Erection of Sea-wall—Owner Removing Shingle from below High-water Mark from Land which formerly belonged to Him—Claim of Right.—Under the powers given by section 14 of the Harbours Act, 1814, the Board

of Trade, for the protection of a certain port, made an order prohibiting the taking or removing of any shingle from the shores or banks of the sea between certain points. The appellant, acting with the authority of the owner of land adjoining the seashore, removed shingle from the foreshore below the then ordinary high-water mark, and within the limits prohibited by the order, to another part of the foreshore above high-water mark belonging to the same owner, where it was used to form concrete for the building of a sea-wall to protect the owner's adjoining property from the encroachment of the sea. The point from which the shingle was taken had a few years before been the property of the owner, but, owing to the encroachment of the sea, the sea now ebbed and flowed over the land at the point in question. The shingle was removed solely for the construction of the sea-wall and to prevent any further encroachment of the sea over the owner's property. Upon an information against the appellant for removing the shingle from the foreshore, in contravention of the order,—*Held*, that an offence had been committed against the order and the appellant was properly convicted, notwithstanding that the land from which the shingle was taken was before the encroachment the property of the owner, and that the owner was acting under a *bona fide* claim of right to take the shingle from one part of his property for the protection of another part of his property. *Anderson v. Jacobs*, 93 L. T. 17; 21 T. L. R. 453—*D.*

Part of Manor—Grant of Manor by Crown—User.—The foreshore may constitute a part of a manor which adjoins the sea, and consequently may pass from the Crown by a grant of the manor, although the technical words to describe it be absent. When a patent contains words under which the foreshore may pass, it may be shewn by user that a particular part only of foreshore passed, although it be clear that other parts did not pass, or although it be left uncertain whether such other parts did or did not pass. Where a patent, though omitting technical words, contains words under which foreshore may pass, and where there have been proved, affecting part of the foreshore of the manor, several acts of ownership, open, notorious, and long persevered in, on the part of the grantee of a manor under a patent, though each of such acts would have been an act of trespass or encroachment if that part of the foreshore had not passed by the patent, the proper course is to attribute all such acts of ownership to a legal origin and not to usurpation, and to hold that such part of the foreshore passed by the patent. *Vandeleur v. Glynn*, [1905] 1 Ir. R. 483—*C.A.*

Conveyance of Land—Boundaries.—*See* BOUNDARIES.

Custom to Dry Nets.—*See* CUSTOM.

Right of Inhabitants to Place Chairs on Foreshore for Hire.—*See* EASEMENT.

FORFEITURE.

Lease, of.—*See* LANDLORD AND TENANT.

Shares, of.—*See* COMPANY, col. 393.

FRANCHISE.

See ELECTION LAW.

FRAUD AND MISREPRESENTATION.

1. *Frauds on Creditors*, 873.
2. *Abuse of Confidential Relationship*, 875.
3. *Unconscionable Bargains*, 876.
4. *Money-lending Transactions*, 877.
5. *Recovery of Money obtained by Fraud*, 883.
6. *Misrepresentation*, 883.
7. *Other Matters*, 884.

1. FRAUDS ON CREDITORS.

13 Eliz. c. 5—Effect of.—In considering whether a conveyance is fraudulent and void within the statute 13 Eliz. c. 5, the Court must look at the whole of the circumstances surrounding the execution of the conveyance and see whether it was in fact executed with the intent to defeat and delay creditors. *Holland, In re; Gregg v. Holland*, 71 L. J. Ch. 518; [1902] 2 Ch. 360; 86 L. T. 542; 50 W. R. 575; 9 Manson, 259—C.A.

— **Post-Nuptial Settlement—Reversionary Property of Wife to which Husband Entitled Jure Mariti—Ante-Nuptial Parol Agreement to Settle—Recital of in Settlement—Admissibility of Recital as Evidence—Trustee in Bankruptcy of Husband—Life Interest of Husband Determinable on Bankruptcy.**—By a post-nuptial settlement which recited an ante-nuptial parol agreement to settle, the husband covenanted that certain reversionary personal property of the wife, then an infant, to which he was entitled *jure mariti*, subject to his not dying before her without having reduced it into possession, should as soon as it became an interest in possession be settled on trust for the wife for life, with remainder, if the husband should survive her, in trust for him for life or until he should become bankrupt or alienate his interest, with remainder to the children and issue of the marriage. The husband survived the wife, and twenty-five years after the date of the settlement became bankrupt. The fund afterwards fell into possession:—*Held*, first, that as against the trustee in bankruptcy claiming to set aside the settlement, the recital must be disregarded and the settlement treated as voluntary; but in the absence of evidence that the husband was either indebted at the date of the settlement or intended at that date to enter into a business of such a speculative nature as to be likely to result in financial embarrassment, the settlement ought not to be regarded as void *in toto* under the statute 13 Eliz. c. 5, as having been executed with intent to delay or defraud creditors. *Pearson, In re; Stephens, ex parte* (3 Ch. D. 807), dissented from. *Ib.*

— **Equitable Reversionary Interest—Conveyance in Fraud of Creditors—Judgment Creditor—Charging Order—Equitable Execution.**—A

settlement of equitable reversionary personalty may be a settlement made to delay, hinder, or defraud creditors within the scope of 13 Eliz. c. 5, since a creditor may reach such property by a charging order under section 14 of the Judgments Act, 1838, or by the appointment of a receiver by way of equitable execution. *South-Western Loan and Discount Co. v. Robertson* (51 L. J. Q.B. 79; 8 Q.B. D. 17) and *Bolland v. Young* (73 L. J. K.B. 1030; [1904] 2 K.B. 824) followed. *Dixon v. Wrench* (38 L.J. Ex. 113; L. R. 4 Ex. 154) distinguished and questioned. *Tyrrell v. Painton* (64 L. J. P. 33; [1895] 1 Q.B. 202) and *Anglesey (Marquis), In re; De Galve (Countess) v. Gardner* (72 L. J. Ch. 782; [1903] 2 Ch. 727), discussed. *Ideal Bedding Co. v. Holland*, 76 L. J. Ch. 441; [1907] 2 Ch. 157; 96 L. T. 774; 14 Manson, 113; 23 T. L. R. 467—Kekewich, J.

— Avoidance—Creditors—Form of Order.]

—Unless the Court is satisfied that no part of the settled property will be left for the beneficiaries when the creditors have been satisfied, the proper order is that which avoids the settlement as against creditors only. *Ib.*

— Voluntary Settlement for Settlor's Benefit.]

—A voluntary settlement made *bona fide* by a person having ample means outside the settlement for payment of present debts is not void under 13 Eliz. c. 5 because afterwards the effect proves to be to defeat or delay future creditors. *Lane-Fox, In re; Gimblett, ex parte*, 69 L. J. Q.B. 722; [1900] 2 Q.B. 503; 83 L. T. 176; 48 W. R. 650; 7 Manson, 295—Wright, J.

A young lady, just of age, possessed of a considerable fortune, made a voluntary settlement for her own benefit. Her existing debts were paid with money outside the settlement. She subsequently incurred debts and filed her petition in bankruptcy:—*Held*, that the settlement was not void under 13 Eliz. c. 5. *Ib.*

— Assignment of Choses in Action—Defeating Individual Creditor.]

—Since *choses in action* became attachable by sections 60 *et seq.* of the Common Law Procedure Act, 1854, an assignment of them may be void under 13 Eliz. c. 5, as tending to defeat, hinder, or delay creditors. If the effect, not necessarily the object, of the assignment is to defeat, hinder, or delay one particular creditor only, the assignment will be void under the statute. *Edmunds v. Edmunds*, 73 L. J. P. 97; [1904] P. 362; 91 L. T. 568—Gorell Barnes, J.

— Deed of Arrangement—Exclusion of Creditor—Resulting Trust.]

—A deed of arrangement is not necessarily void under 13 Eliz. c. 5 either because it contains provisions in favour of the debtor or because a particular creditor is intentionally excluded from its operation. *Alton v. Harrison* (38 L. J. Ch. 669; L. R. 4 Ch. 622) and *Boldero v. London &c. Discount Co.* (5 Ex. D. 47) followed. *Spencer v. Slater* (43 L. J. Q.B. 204; 4 Q.B. D. 13) commented on. *Maske-lyne v. Smith*, 71 L. J. K.B. 476; [1902] 2 K. B. 158; 86 L. T. 832; 9 Manson, 139—D.

— Marriage Settlement—After-acquired Property.]

—A covenant by a husband in a settlement made in consideration of marriage to settle all his after-acquired property except

business assets is not fraudulent and void as against creditors under 13 Eliz. c. 5. *Per VAUGHAN WILLIAMS, L.J.*—*Bolland, Ex parte; Clint, In re* (43 L. J. Bk. 16; L. R. 17 Eq. 115), is no longer to be treated as an authority on this point. *Reis, In re; Clough, ex parte*, 73 L. J. K.B. 929; [1904] 2 K.B. 769; 91 L. T. 592; 53 W.R. 122; 11 Manson, 229; 20 T. L. R. 547—C.A. See s.c. in *H.L. sub nom. Clough v. Samuel, ante*, BANKRUPTCY.

— **Voluntary Conveyance—Intent to Defraud Creditors—Assignment of Policy of Assurance—Investment of Policy-Moneys on Mortgage—Injunction—Receiver.**—In an action brought to set aside an assignment of a policy of assurance as fraudulent and void against creditors under 13 Eliz. c. 5, the policy-moneys having been received by the assignee and remaining in his hands, but invested on mortgage and capable of being traced, the Court has jurisdiction to grant an interlocutory injunction restraining the assignee from receiving or dealing with the mortgage debt without the leave of the Court, or to appoint an interim receiver, in order to secure the property until the trial of the action, for the benefit of the creditors. *Mouatt, In re; Kingston Cotton Mill Co. v. Mouatt*, 68 L. J. Ch. 390; [1899] 1 Ch. 831; 80 L. T. 406; 47 W. R. 506—Stirling, J.

2. ABUSE OF CONFIDENTIAL RELATIONSHIP.

Solicitor—Advantage at Expense of Client—Solicitor's Son—Volunteer—Confirmation.—Where a solicitor and trustee of a settlement in 1891 prepared a supplemental deed by which a lady, whom it was his duty to advise, and who trusted in him, deprived herself of a general power of appointment which preceded a limitation in the settlement in favour of two reversioners, one of whom was the solicitor's own son, the Court set aside the deed, so far as it extinguished the general power of appointment, as against both reversioners, on the ground that the lady had not had sufficient independent advice. *Barron v. Willis*, 69 L. J. Ch. 532; [1900] 2 Ch. 121; 82 L. T. 729; 48 W. R. 579—C.A.

Undue Influence—Parent and Child—Mortgage of Child's Interest—Absence of Independent Advice.—In 1878 a widower, who was living with his four daughters, two of whom had recently attained twenty-one years of age and two were minors, was in embarrassed circumstances. He had mortgaged the life interest to which he was entitled under a certain will, and his affairs having become more involved, bankruptcy proceedings were threatened. The eldest of the daughters, then about twenty-two years old, became acquainted with the circumstances, and in order to save her father from being adjudicated a bankrupt she was induced to mortgage her reversionary interest under the same will for the purpose of raising some money to pay his debts. She had no independent legal advice in the transaction. The mortgage was prepared by her father's solicitors, one of the firm being also one of the mortgagees. The mortgage was prepared upon the father's instructions alone before the solicitors had any interview with the daughter. The same solicitors also acted for the mortgagees. In 1881 the

daughter became of unsound mind, and had ever since remained in that condition. Upon the direction of the Master in lunacy an action was brought on behalf of the daughter against A., the survivor of the mortgagees, and her father to set aside the mortgage of her reversionary interest on the ground of undue influence. The father died after the commencement of the action:—*Held*, that the transaction was set in motion by the father and was carried out by his influence over his daughter; that A., the mortgagee, had notice of the true position of affairs at the time of the mortgage; that A. could not therefore be regarded as a lender for value without notice; and that consequently the deed must be set aside. *De Witte v. Addison*, 80 L. T. 207—C.A.

Husband and Wife—Voluntary Settlement—Fiduciary Relation—Presumption.—The relation of husband and wife is not one to which the doctrine of *Huguenin v. Baseley* (14 Ves. 273; 1 Wh. & Tu. L.C. (7th ed.) p. 247) applies. *Barron v. Willis*, 68 L. J. Ch. 604; [1899] 2 Ch. 578; 81 L. T. 321; 48 W. R. 26—Cozens-Hardy, J.

There is no presumption that a voluntary deed executed by a wife in favour of her husband, and prepared by the husband's solicitor, is invalid. The onus of proof lies on the party who impugns, not on the party who upholds, the instrument. *Nedby v. Nedby* (21 L. J. Ch. 446; 5 De G. & Sm. 377) followed. *Ib.*

— **No Consideration—Want of Knowledge of Effect—Independent Advice.**—F., who was indebted to B., obtained from his wife, the defendant, a guarantee in favour of B. to cover his debts then due to B., a present advance of 500*l.* and future credits, the total liability being limited to 1,500*l.* The defendant was a trader on her own account, and had on previous occasions given F. small amounts of financial aid. The defendant was aware of F.'s financial position and of his indebtedness to B. B., B.'s solicitor, F., and the defendant were the only persons present when the guarantee was signed, and the defendant had no independent advice. The guarantee, a very complicated document, was twice read over by the solicitor, who suggested to B. that the defendant should be separately represented:—*Held*, first, that the defendant did not sufficiently understand the nature of the guarantee; secondly, that the relationship of husband and wife was one where in the case of a large voluntary benefit influence was presumed to exist; thirdly, that, the transaction being challenged, the burden was on the donee to prove that the giving of the guarantee was free from the influence of the husband, and that, in the absence of independent advice, this had not been discharged; fourthly, that B. was sufficiently put on enquiry to be affected with the equitable flaws in the transaction. *Bischoff's Trustee v. Frank*, 89 L. T. 188—Wright, J. And see **UNDUE INFLUENCE**.

3. UNCONSCIONABLE BARGAINS.

Sale of Reversion at Undervalue—Expectant Heir—"Unfair dealing."—The plaintiff, who was thirty years of age, sold 1,000*l.* part of a reversion expectant on the death of his mother, then aged seventy-two, to the defendant for

300*l.*, with a condition that the plaintiff might re-purchase the same for 600*l.* within two months. The market value of the reversion at the time of the sale was about 675*l.* The plaintiff had no independent advice, and there was evidence that the defendant induced the plaintiff to conceal from the trustees of the settlement and their solicitors the fact that he was selling or raising money on his reversion:—*Held*, that, independently of undervalue, there was evidence of unfair dealing which took the case out of the Sales of Reversions Act, 1867; that the plaintiff was in the position of an expectant heir; and that the transaction must be set aside as an unconscionable bargain. *Aylesford (Earl) v. Morris* (42 L. J. Ch. 546; L. R. 8 Ch. 484) followed. *Brenchley v. Higgins*, 70 L. J. Ch. 788; 83 L. T. 751—C.A.

Quare, how far undervalue alone may amount to evidence of unfair dealing so as to take a case out of the Sales of Reversions Act, 1867. *Ib.*

4. MONEY-LENDING TRANSACTIONS.

Jurisdiction—Harsh and Unconscionable Bargain—Excessive Interest.—A transaction may be reopened under section 1, sub-section 1 of the Money-lenders Act, 1900, if the Court is satisfied that the interest or charges are excessive and that the transaction is “harsh and unconscionable,” though it would not have given rise to a claim for relief in a Court of equity before the passing of the Act. Excessive interest may by itself be sufficient to satisfy the Court that the transaction is “harsh and unconscionable.” *Wilton v. Osborne* (70 L. J. K.B. 507; [1901] 2 K.B. 110) overruled. *Debtor, In re; Debtor, ex parte*, 72 L. J. K.B. 382; [1903] 1 K.B. 705; 88 L. T. 401; 51 W. R. 370; 10 Manson, 130—C.A.

— “Otherwise such that a Court of equity would give relief”—**Excessive Interest.**—The jurisdiction conferred by the Money-lenders Act, 1900, is a new jurisdiction conferred on all the Courts, and is not confined to cases in which Courts of equity would have intervened before the Act. *Wilton & Co. v. Osborne* (70 L. J. K.B. 507; [1901] 2 K.B. 110) overruled. *Debtor, In re* (72 L. J. K.B. 382; [1903] 1 K.B. 705), approved. *Samuel v. Newbold*, 75 L. J. Ch. 705; [1906] A.C. 461; 95 L. T. 209; 22 T. L. R. 703—H.L. (E.)

Excessive interest may of itself shew that a transaction is “harsh and unconscionable” within the meaning of the Act. *Ib.*

A bargain in which the agent of the money-lender receives commissions from both sides and is a co-adventurer with the money-lender is fraudulent apart from the Money-lenders Act, 1900. *Ib.*

Contract for Loan Made Abroad—Contract Intended to be Performed Abroad—Jurisdiction of Court in England.—Section 1 of the Money-lenders Act, 1900, does not apply to a contract for a loan made and intended to be performed abroad. *Shrichand v. Lacon*, 22 T. L. R. 245—Ridley, J.

“Money-lender”—Legitimate Art Business—

Payment by Bills—Loans to Private Friends.]

—Not every man who lends money at interest carries on the business of money-lending within the meaning of the Money-lenders Act, 1900. Speaking generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry provided that they are, from his point of view, eligible. But this does not mean that a money-lender can avoid the Act by limiting his *clientèle* to those whom he chooses to designate “friends.” Each case must be decided on the particular facts. *Litchfield v. Dreyfus*, 75 L. J. K.B. 447; [1906] 1 K.B. 584; 22 T. L. R. 385—Farwell, J.

— “Business not having for its primary object the lending of money”—“Excessive” Bonus.]

—The defendant upon several occasions lent money to the plaintiff, a company promoter, taking from him by way of bonus and for renewals shares in limited companies in which the plaintiff was interested. It was the defendant’s custom to lend money upon these terms. He was not registered as a money-lender. The money was lent not to facilitate the business of the companies, but for the private purposes of the borrowers:—*Held*, first, that the defendant carried on the business of lending money, and was therefore a money-lender within section 6 of the Money-lenders Act; and secondly, that, although it was impossible to assess the value of the shares at any particular time, they were “exacted” from the plaintiff as bonuses arbitrarily fixed without any stated ascertainable proportion to the accommodation; and that therefore, although it was doubtful whether they could be said to be “excessive” within section 1, sub-section 1 of the Money-lenders Act, the transactions were harsh and unconscionable within that section, and ought to be re-opened upon the terms of the plaintiff repaying to the defendant the loans, together with 20 per cent. interest, and the defendant returning to the plaintiff the shares given him as bonuses. *Bonnard v. Dott*, 92 L. T. 822; 53 W. R. 678; 21 T. L. R. 491—Kekewich, J.

— Carrying on Other Business—Lending Money in the Course of that Business—Surveyor and Valuer.]

—The plaintiff, who carried on business as an auctioneer, surveyor, and valuer, was in the habit of advancing money upon bills of sale to any person, against whom there was no personal objection, where the security was sufficient, charging 15 per cent. interest. He did so because by that means he obtained a valuation fee in the first instance, and the business brought him into contact with a class of persons from whom he got other business. He never lent money on personal security:—*Held*, that the plaintiff carried on a *bona fide* business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lent money, within the meaning of section 6 (d) of the Money-lenders Act, 1900, and that therefore he did not require to be registered as a money-lender. *Furber v. Fieldings*, 23 T. L. R. 362—Phillimore, J.

— Non-registration—Illegal and Void Contract—Right of Borrower to Recover Securities—Terms—Repayment of Money Received—Recovery of Money Paid by Borrower—Action for

Money Had and Received—Equitable Action.]—In an action by a borrower against a money-lender for a declaration that a money-lending transaction is illegal and void on account of the non-registration of the money-lender, and for the delivery up of the securities given for the loan, the borrower is only entitled to succeed on the terms formerly imposed by Courts of equity in cases arising under the Acts against usury—namely, on repayment of the money actually received by him. And the same terms will be imposed as a condition of his recovering money paid by him in the course of the transaction, an action for money had and received being an equitable action. *Moses v. Macferlan* (2 Burr. 1005) followed. *Lodge v. National Union Investment Co.*, 76 L. J. Ch. 187; [1907] 1 Ch. 300; 96 L. T. 301; 23 T. L. R. 187—Parker, J.

Whether such terms would be imposed on a plaintiff suing in trover or detinue, *quære*. *Fitzroy v. Gvillim* (1 Term Rep. 153) discussed. *Ib.*

Contracting without being Registered—Prohibitory Statute—Illegal Contract.]—If a money-lender enters into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or takes any security for money in the course of such business, without having registered himself as a money-lender, as required by section 2, sub-section 1 (a) of the Money-lenders Act, 1900, his contract is rendered illegal by section 2, sub-section 1 (c), and cannot be enforced. Decision of BUCKLEY, J., in *Victorian Daylesford Syndicate v. Dott* (74 L. J. Ch. 673; [1905] 2 Ch. 624) approved and followed. *Bonnard v. Dott*, 75 L. J. Ch. 446; [1906] 1 Ch. 740; 94 L. T. 656; 22 T. L. R. 399—C.A.

Where by a statute a penalty is imposed—not solely for protection of the revenue, but solely or partly for that of the public—for doing or omitting any act, such act or omission is impliedly prohibited by the statute, and is illegal. So if a money-lender enters into any agreement or takes any security in contravention of section 2, sub-section 1 (c) of the Money-lenders Act, 1900, without having registered himself as required by section 2, sub-section 1 (a), his contract cannot be enforced, and there is no transaction to re-open under the powers of section 1, sub-section 1. *Victorian Daylesford Syndicate v. Dott*, 74 L. J. Ch. 673; [1905] 2 Ch. 624; 93 L. T. 627; 54 W. R. 231; 21 T. L. R. 742—Buckley, J.

Unregistered Money-lender—Action for Obtaining a Loan by Fraud.]—An unregistered money-lender can maintain an action to recover damages for fraudulent misrepresentations whereby he was induced to advance money on loan. *Dott v. Brickwell*, 23 T. L. R. 61—Swinfen Eady, J.

Re-opening Transaction—Terms of Loan—Rate of Interest—Position of Borrower.]—*Per* VAUGHAN WILLIAMS, L.J.—The intention of the Legislature in the Money-lenders Act, 1900, was to deal with cases of persons in financial distress coming to money-lenders to borrow money in

order to get out of their financial distress, which was often urgent and pressing, and not to deal with the case of persons who were in a position to make their own bargain on terms of equality with the money-lender. *Per* ROMER, L.J.—The Judge in any cases under the Act should consider the various circumstances under which the loan was effected and the terms of the loan, such as the rate of interest, and the security, &c. *Per* COZENS-HARDY, L.J.—The interest charged by a money-lender may possibly be deemed so extravagantly excessive as alone to satisfy the Court that the particular transaction is harsh and unconscionable; but no fixed general rule as to rate of interest can be laid down. The circumstances of each case have to be considered, including the necessities of the borrower, his pecuniary position, the presence or absence of security, the relation in which the money-lender stood to the borrower, and the total remuneration derived by the money-lender from the whole transaction. *Poncione v. Higgins*, 21 T. L. R. 11—C.A.

Fraud—Material Misrepresentation—Identity of Contracting Party.]—The plaintiff, one Isaac Gordon, who, according to his own account of himself, was an extortionate and usurious money-lender and one of the bitterest of creditors, in order to induce the defendant to borrow from him, fraudulently concealed from the defendant the fact that he was Isaac Gordon; and the defendant, upon the plaintiff's representation that the name of the lender was Addison, and that Addison was a person who advanced money without any of the objectionable features of the ordinary loan office, borrowed 100l. from the plaintiff at 50 per cent. interest, and gave a promissory note to secure the advance. Upon discovering that the real lender was Isaac Gordon, the defendant repudiated the contract, and in an action by Gordon upon the note paid the amount of the advance, together with interest at 5 per cent., into Court:—*Held*, that the misrepresentation by Gordon was material and that the defendant was entitled to judgment. *Gordon v. Street*, 69 L. J. Q.B. 45; [1899] 2 Q.B. 641; 81 L. T. 237; 48 W. R. 158—C.A.

Misstatement of Fact.]—A misstatement made by a money-lender to a borrower during negotiations is a fact to be borne in mind in determining whether the transaction is harsh and unconscionable. *Victorian Daylesford Syndicate v. Dott*, 74 L. J. Ch. 673; [1905] 2 Ch. 624; 93 L. T. 627; 54 W. R. 231; 21 T. L. R. 742—Buckley, J.

Harsh and Unconscionable Bargain—Excessive Interest—"Risk" Incurred.]—The Court, when asked to re-open a money-lending transaction under section 1 of the Money-lenders Act, 1900, on the ground of excessive interest charged by the lender, is entitled to consider, amongst "all the circumstances," the fact that the borrower thoroughly understood the transaction, and without any misrepresentation or pressure, other than the mere request to pay so much interest, voluntarily agreed to pay it; and when the Court finds these to be the facts it ought to hold that the interest which the borrower agreed to pay is reasonable and not excessive within the meaning of the Act. *Carringtons, Lim. v. Smith*, 75 L. J. K.B. 49;

[1906] 1 K.B. 79; 93 L. T. 779; 54 W. R. 424; 22 T. L. R. 109—Channell, J.

In considering the "risk" incurred by the money-lender in making an advance, it is not the real risk as ascertained after the event which has to be looked at, but how the matter presented itself to the money-lender at the time he made the advance, with the experience he would have of borrowers. *Ib.*

— **Excessive Rate of Interest—Absence of Risk.**—Money-lenders advanced to a borrower 2,000*l.* repayable by twelve consecutive monthly instalments, with interest amounting in all to 3,300*l.*, and in the event of default being made in any one payment the whole amount remaining unpaid was to become immediately payable. There was evidence that the money-lenders were aware when making the loan that, owing to the borrower's financial position, they were running no risk:—*Held*, that, having regard to the lenders' knowledge of the absence of risk, the rate of interest was excessive, and the transaction was harsh and unconscionable within the meaning of sub-section 1 of section 1 of the Money-lenders Act, 1900, and it ought to be re-opened and an order made for repayment of the amount actually advanced, with interest at 10 per cent. *Saunders v. Newbold*, 74 L. J. Ch. 120; [1905] 1 Ch. 260; 92 L. T. 67; 53 W. R. 162; 21 T. L. R. 104—C.A.

— **Re-opening Closed Transaction.**—Sub-section 1 of section 1 gives the borrower relief only in respect of the transaction the subject of an action brought by the money-lender, and the power of the Court to re-open under that sub-section is limited to that transaction, and the account can only be taken in that transaction, or some transaction which is relevant to it, and not in a previous transaction altogether closed. *Ib.*

— **Time for Relief—"Liable."**—Under sub-section 2 a borrower can obtain relief in proceedings taken by him, and he may take proceedings either when he is sued by the money-lender, or before he is sued. The sub-section applies even after the loan has been repaid, and under it the Court could re-open a closed transaction. "Liable" in that sub-section is not to be read as "liable in fact." *Ib.*

— **"Harsh and unconscionable" Transaction—Free and Voluntary Agreement.**—Transaction re-opened under section 1, sub-section 1 of the Money-lenders Act, 1900, after payment of the amount had been made under pressure of a writ of summons in an action, upon the ground that the interest charged was excessive and the transaction was harsh and unconscionable, the borrower being at the time in such a position that his agreement to repay was no guide as to what was a reasonable rate of interest to be charged. *Samuel v. Bell*, 22 T. L. R. 118—Channell, J.

— **Absence of Risk—Excessive Interest.**—*P.*, a widow, was in 1903 in need of a loan. Against the advice of her solicitors, she authorised an architect, with whom she had become acquainted, to obtain it for her; and he eventually obtained an advance of 1,000*l.* at 45 per cent. per annum from a registered firm of

money-lenders, on the security of a second mortgage of certain life interests and a reversion to which *P.* was entitled under settlements and of a life policy which was comprised in the first mortgage, which was to an insurance company. *P.*'s total income under the settlements amounted to about 1,200*l.* a year; but it was reduced to 600*l.* by the interest and premiums payable on the first mortgage and policy. The solicitor of the money-lenders having threatened to enforce the security by sale, *P.* in 1904 obtained through her solicitors a loan at 5½ per cent., and discharged the claims of the money-lenders. She brought an action against them to obtain the re-opening of the transaction on the ground that it was harsh and unconscionable, and the rate of interest excessive, and repayment of the excess of interest paid by her:—*Held*, that under the circumstances of the case the transaction was harsh and unconscionable, and that the defendants must repay all interest paid above 10 per cent. *Part v. Bond*, 94 L. T. 390; 22 T. L. R. 253—C.A.

In an action to recover damages for trespass and conversion of the plaintiff's goods, which had been seized under a bill of sale, the question arose whether the defendants were money-lenders, and whether, if so, the interest charged and certain other charges were excessive; and whether the transaction was harsh and unconscionable. It was contended that those questions, except as to whether the defendants were money-lenders, were for the Court and not for the jury:—*Held*, that if there was any evidence upon them, the questions must be left to the jury. *Burton v. Companies Registration Agency*, 23 T. L. R. 151—Bucknill, J. See s.c. in C.A. *infra*. *S.P. Samuel v. Pazolt*, 23 T. L. R. 622—Ridley, J.

— **Bill of Sale—Invalidity.**—Appeal from BUCKNILL, J. (*supra*), dismissed, upon the ground that the jury were justified in finding that the bill of sale was given for a sum under 30*l.*, and was therefore void; and that the grantee thereof could only recover the sum advanced with interest at the proper rate (in this case 5 per cent. per annum). The Court expressed no opinion upon the course adopted by the learned Judge in leaving to the jury the questions whether the interest and charges were excessive and whether the transaction was harsh and unconscionable. *Burton v. Companies Registration Agency*, 23 T. L. R. 337—C.A.

— **Excessive Interest.**—Where, in consideration of an advance of 50*l.*, a promissory note for 70*l.* was taken by a money-lender from a borrower, the 20*l.* being for interest, and the 70*l.* was payable by twenty-two weekly instalments, and upon default in payment of any instalment the whole sum was to become due, the Court re-opened the transaction upon the ground that the interest might turn out to be very excessive, and the rate was not understood by most people. *Levene v. Titchener*, 23 T. L. R. 508—Channell, J.

— **Repayment by Monthly Instalments—Default Clause—"Harsh and unconscionable transaction."**—The Court has jurisdiction to re-open a transaction between a borrower and a money lender where it appears that by reason

of a term of the bargain between them understood by the money-lender, but not explained to or understood by the borrower, the rate of interest is considerably increased beyond that contemplated by the borrower. *Levene v. Greenwood*, 20 T. L. R. 889—Channell, J.

— **Payment by Monthly Instalments—Default Clause—Rate of Interest.**—In response to an advertisement by the plaintiff, a registered money-lender, offering advances without publicity “repayable by easy instalments,” the defendant, a farmer, in March, 1903, obtained an advance of 70*l.* on his note for 100*l.*, 25*l.* whereof was repayable in five monthly instalments, and the balance (75*l.*) payable in September, 1903, with a clause that, on default in payment of any instalment the whole debt should become due and payable. This note was paid off and a renewal in the same terms was made on September 5, 1903, a note being given in the same form and 70*l.* being advanced. Of this the defendant paid four instalments of 5*l.* each, and a writ having been issued against him for 80*l.*, he paid 30*l.*, and signed a new note for 74*l.* in April, 1904, payable by five consecutive monthly instalments of 5*l.* each, and the balance (49*l.*) in October, 1904. On this note he paid 5*l.*, and the writ in the action was issued for the balance of 69*l.* in July, 1904:—*Held*, that the transaction was harsh and unconscionable within the meaning of the Money-lenders Act, 1900, and should be re-opened, judgment being entered for a sum which the Court considered reasonable as representing unpaid principal and interest. *Wells v. Joyce*, [1905] 2 Ir. R. 134—Lord O’Brien, C.J.

5. RECOVERY OF MONEY OBTAINED BY FRAUD.

Conviction—Civil Proceedings not Based on Fraud.—Money obtained by fraud can be recovered with interest, whether the proceedings be taken in a Court of equity or in a Court of law. But the fraud must be proved in the proceedings by which the money is recovered, otherwise no interest will be allowed; and it is not sufficient that the fraud has been proved in other proceedings in a criminal Court. *Johnson v. Regem*, 73 L. J. P. C. 113; [1904] A. C. 817; 91 L. T. 234; 53 W. R. 207; 20 T. L. R. 697—P. C.

6. MISREPRESENTATION.

Use of Name—Partnership—Injunction.—Where a plaintiff establishes that the defendant has represented him as his principal or partner or responsibly connected with him in a venture, and there is tangible probability of injury to the property of the plaintiff in consequence of such representation, he is entitled to an injunction restraining the representation. *Routh v. Webster* (10 Beav. 561) followed. *Walter v. Ashton*, 71 L. J. Ch. 839; [1902] 2 Ch. 282; 87 L. T. 196; 51 W. R. 131—Byrne, J.

Sham Antiques—Misrepresentation—“Res ipsa loquitur.”—*Seemle, per LORD KYLLACHY.*—The offer of articles appearing to be, but which are not in fact, antiques, is in itself a misrepresentation, on the principle of *res ipsa loquitur*, and the seller is not entitled to leave the articles to

speak for themselves, but is bound to displace the inferences which to his knowledge their appearance is calculated to suggest. *Patterson v. Landsberg*, 7 F. 675—Ct. of Sess.

Fraudulent Misrepresentation—Innocent Person induced to Participate in Criminal Offence—Belief in Honesty of Purpose—Indemnity for Penal Consequences between Wrongdoers—Damages for Losses Sustained.—An innocent person who has by the fraudulent misrepresentations of others been induced to take part with them in the commission of a criminal offence—*malum prohibitum*—for which he has been neither tried nor convicted, and who has been induced by those who procured his participation to believe the proceeding neither criminal nor against public policy, can maintain an action against those by whose inducements and false statements he was led to commit it, and recover damages from them for losses he has sustained:—*Seemle*, he could have maintained an action for indemnity for the penal consequences of his offence notwithstanding he had been tried for it and convicted. *Burrows v. Rhodes*, 68 L. J. Q. B. 545; [1899] 1 Q. B. 816; 80 L. T. 591; 48 W. R. 13; 63 J. P. 532—D.

Fictitious Security—Knowledge of Third Party—Duty to Disclose.—M. was fraudulently induced to advance money on mortgage to W. on the security of certain leases, which were subsequently proved to be fictitious. The leases had been previously mortgaged to C., who was paid off by M. when the latter advanced the money to W. At this date C. had become aware that the leases were fictitious, and that he had been defrauded by W., but he made no disclosure of this fact to M., and executed a re-assignment to him of the so-called leasehold premises as if they had been genuine. In an action by M. against W. and C., claiming damages against the latter for assisting in the fraud by which M. was induced to advance his money on the security of the fictitious leases, the personal security of W., who was now undergoing penal servitude, being valueless,—*Held*, that under the circumstances C. was liable to M. for the loss and damage so suffered by him, the amount to be ascertained by an enquiry in chambers. *Marnham v. Weaver*, 80 L. T. 412—Romer, J.

Advertisement, by.—See *Ajella v. Warsley*, 67 L. J. Ch. 172; [1898] 1 Ch. 274; 77 L. T. 788; 46 W. R. 245—Stirling, J. MISREPRESENTATION, *infra*.

7. OTHER MATTERS.

Contract, in.—See CONTRACT.

Deed—Misrepresentation as to Contents of—Plea of Non est Factum.—See DEED.

Innocent Misrepresentation—Recovery of Gift.—See GIFT.

Prospectus—Fraud or Misrepresentation in.—See COMPANY.

Settlement.—See SETTLEMENT.

FRAUDS, STATUTE OF.

See CONTRACT.

FRAUDULENT PREFERENCE.

See BANKRUPTCY, col. 125; COMPANY, col. 472.

FREIGHT.

See SHIPPING.

FRIENDLY SOCIETY.

1. *Statutes*, 885.
2. *Rules*, 885.
- 3. *Disputes*, 886.
4. *Jurisdiction of Court*, 887.
5. *Life Policy*, 888.
6. *Nomination to Fund*, 888.
7. *Winding-up*, 889.

1. STATUTES.

Borrowing Powers.—61 & 62 Vict. c. 15 is the *Societies' Borrowing Powers Act*, 1898.

2. RULES.

Rules — Members in Receipt of Benefit — Alteration of Rules — Diminution of Security for Benefit.—The rules of a friendly society made under the Friendly Societies Act, 1855, do not cease to exist because that Act has been repealed. Where a member joined a friendly society on the basis that the rules might be altered, and became entitled to a benefit in the society, the subsequent alteration of a rule which diminishes his security for that benefit is not *ultra vires*. *Smith and Galloway, In re*, 67 L. J. Q.B. 15; [1898] 1 Q.B. 71; 77 L. T. 469; 46 W. R. 204—D.

— **Alteration of — Validity — Acknowledgment of Registry — Conclusiveness — Power of Society to Alter Rights of their Servants.**—The plaintiff was elected general manager at a weekly salary of the defendant society, which was registered under the Industrial and Provident Societies Act, 1893. At the time of his election a fundamental rule of the society was that the manager could not be dismissed except by a two-thirds majority at a special general meeting; and by another rule of the society, fundamental rules could not be altered except by a two-thirds majority at a special meeting. Subsequently to the plaintiff's election it was resolved at a meeting of the committee of the society that the rule as to the dismissal of the manager should be amended so as to give the committee power to dismiss the manager, and notice of this amendment was given to the Registrar of Friendly Societies, who issued to the society an acknowledgment of the registry of the amendment as provided by section 10, sub-section 3 of the Act. The committee subsequently resolved to dismiss the plaintiff, and gave him one week's notice of dismissal. The plaintiff, when elected manager, was gener-

ally aware of the rules, and knew that he could be dismissed only by a two-thirds majority at a special general meeting. He had no knowledge of the amendment in the rule until after his dismissal:—*Held*, that the acknowledgment of registry by the Registrar was conclusive as to validity of the amendment. *Rosenberg v. Northumberland Building Society* (22 Q.B. D. 373) followed and applied. *Held*, also, that the amendment was binding on the plaintiff so as to render his dismissal valid. *Butler v. Springmount Co-operative Dairy Society*, [1906] 2 Ir. R. 193—C.A.

Expulsion of Member — Rules of Society — Member Ceasing to be Qualified.—The rules of a friendly society provided that the society should be called the Cranmer Loyal Orange Lodge Friendly Society, and that "it shall be exclusively composed of members of the Loyal Orange Institution of England." The rules provided for the expulsion of a member on conviction for felony, and that if a member entered the Army or Navy he should cease to be a member, but there was no rule empowering the expulsion of a member upon his ceasing to be a member of the Loyal Orange Institution of England. The plaintiff, who was a member of the society, was expelled from the Loyal Orange Institution of England for having voted at a Parliamentary election for a certain candidate. The friendly society thereupon passed a resolution expelling him from the society. In an action by the plaintiff claiming to be reinstated a member of the society,—*Held*, that under the rules of the friendly society it was a condition that a member should be and continue to be a member of the Loyal Orange Institution of England, and that when he ceased to be a member of that institution he also ceased to be a member of the society, and that therefore the plaintiff was not entitled to succeed. *Sargeant v. Butterworth*, 23 T. L. R. 450—D.

3. DISPUTES.

Dispute between Members and Society — Wrongful Expulsion — Arbitration Committee.—The domestic jurisdiction created by section 68 of the Friendly Societies Act, 1896, can only be exercised in accordance with the rules of the society, and if not so exercised the party affected is not excluded from applying to a Court of law. *Andrews v. Mitchell*, 74 L. J. K. B. 333; [1905] A.C. 78; 91 L. T. 537—H.L. (E.)

The respondent, after the notice prescribed by the rules, was summoned to attend the arbitration committee of a friendly society on a written charge. After the hearing he was requested to withdraw, and then expelled, in his absence, on a charge of which he had no notice:—*Held*, that the resolution of expulsion was void as not having been made in accordance with the rules of the society. *Ib.*

Dispute with Member — Person no Longer Member.—A lodge of a friendly society having resolved that A B, one of its members, should not receive any further sick allowance unless he complied with a certain condition, A. B. appealed unsuccessfully to the district executive and to the grand executive, the tribunals

by which under the rules disputes between the society and a member were directed to be decided. A B having failed to comply with the condition, and payment of his sick allowance having been suspended, his contributions fell into arrear, and after seven months his lodge resolved that his membership had lapsed. A B sued the society, asking that the above decisions and resolution might be set aside:—*Held*, that, *quoad* the questions decided by the society's tribunals in a dispute between the society and the pursuer while still a member, the Court had no jurisdiction, and that these decisions being in existence there was no ground for setting aside the resolution that A B's membership had lapsed. *Crichton v. Dalry Myrtle Lodge of Free Gardeners*, 6 F. 398—Ct. of Sess.

4. JURISDICTION OF COURT.

Industrial Insurance—Policy Exceeding 20l.—Under section 7 of the Collecting Societies and Industrial Assurance Companies Act, 1896, Justices have no jurisdiction in a dispute as to a policy of life insurance granted by an industrial assurance company for a sum exceeding 20l. *Cowling v. Topping*, 75 L. J. K.B. 176; [1906] 1 K.B. 466; 94 L. T. 209; 54 W. R. 423; 70 J. P. 95; 22 T. L. R. 219—D.

Benefit Society—Unregistered Friendly Society—Partnership—Failure of Scheme—Action for Dissolution—Jurisdiction of Court to Order Winding-up—Principle of Distribution of Existing Funds—Resulting Trust.—The jurisdiction of the Court to deal with funds vested in a number of persons for their joint benefit does not depend upon its being shewn that those persons constitute what is properly and technically a partnership. *Lloyd v. Learing* (6 Ves. 773), *Beaumont v. Meredith* (3 V. & B. 180), and *Silver v. Barnes* (9 L. J. C.P. 118; 6 Bing. N.C. 180) explained. *Lead Co.'s Workmen's Fund Society, In re; Lowes v. Lead Smelting Co.*, 73 L. J. Ch. 628; [1904] 2 Ch. 196; 91 L. T. 433; 52 W. R. 571; 20 T. L. R. 504—Warrington, J.

Where funds belong to a number of persons, who have individually certain interests therein regulated either by a trust deed or by a body of rules, and are vested in trustees for the members of the society, the Court, on being satisfied that the interests of all the members cannot be given effect to *modo et forma* if the society is allowed to continue in its present state, has jurisdiction to order the society to be wound up and its funds equitably distributed amongst the members of the society. *Ib.*

Consequently, in the case of a society formed for the mutual benefit of the workmen employed by a certain company, and not registered under any of the Friendly Societies Acts, but governed by printed rules, under which its funds, derived from fines payable by members on admission and contributions by them until sixty-five years of age, were vested in trustees, members under sixty-five being entitled out of such funds to sick pay and accident allowances, and on attaining sixty-five ceasing to contribute and no longer being able to claim any allowances for accident or sickness but becoming

entitled to a weekly allowance of 6s. for life, where the company had ceased to carry on business or to employ any workmen, so that no new members could come into the society, and it appeared that if the society were allowed to continue to pay the pensions and other allowances the younger members of the society would receive nothing, the Court ordered the society to be wound up, and referred the matter to chambers to settle a scheme for the distribution of the funds amongst the members. *Pearce v. Piper* (17 Ves. 1) applied. *Ib.*

Numerous Members—Service of Notice of Judgment.—In chambers the Judge, treating the case as one of resulting trust, and following *Printers' and Transferors' Society, In re; Challinor v. Maskery* (68 L. J. Ch. 537; [1899] 2 Ch. 184), ordered that the actuary in settling the scheme of distribution of the funds was to act on the principle that the funds were to be divided amongst the members at the date of the judgment in proportion to the amounts contributed by each member for fines on admission and subscriptions, irrespective of any payments made to members in accordance with the rules, but that no interest was to be allowed. In view of the numerous members, and to save expense, the Judge allowed service of the judgment by circular on members whose addresses were known, and by advertisement on members whose addresses were not known. *Ib.*

Winding-up, as to.—See *infra*, and COMPANY (WINDING-UP), col. 449.

5. LIFE POLICY.

Assignability—No Nomination—Assignee for Value.—A policy of assurance for less than 50l. on the life of the assured, issued by a friendly society governed by the Friendly Societies Act, 1875, is, in a case where there has been no nomination by the assured under sub-section 3 of section 15 of the Act of 1875 of a person to take the moneys payable under the policy on his death, assignable by the assured in his lifetime. *Caddick v. Highton* (68 L. J. Q.B. 281; [1901] 2 Ch. 476n), so far as contrary to this, and *Redman, In re; Warton v. Redman* (70 L. J. Ch. 669; [1901] 2 Ch. 471), overruled. *Griffin, In re; Griffin v. Griffin*, 71 L. J. Ch. 112; [1902] 1 Ch. 135; 86 L. T. 38; 50 W. R. 250—C.A.

Notice of Default before Forfeiture—Mode of Service.—Notice of default before forfeiture of an insurance policy, as required by section 3 of the Collecting Societies and Industrial Assurance Companies Act, 1896, is well served within section 16 of that Act if sent by post addressed to the assured at his last known place of abode. *Morgan v. M'Clure*, [1899] 2 Ir. R. 209—Q.B. D.

6. NOMINATION TO FUND.

Revocation in Manner Prescribed by Statute—Subsequent Will—Right of Nominee to Sum Nominated.—A nomination made by a member of a friendly society under section 15, sub-section 3 of the Friendly Societies Act, 1875, to a sum payable by the society on the member's death can only be revoked in the manner pre-

scribed by that sub-section, and consequently cannot be revoked by a will of the member made subsequently to the nomination and duly proved after his death. *Bennett v Slater*, 63 L. J. Q.B. 45; [1899] 1 Q.B. 45; 79 L. T. 324; 47 W. R. 82—C.A.

Sum Insured Exceeding 100%.—Liability of Society as to Payment of Excess.—Where a member of a friendly society has nominated a sum of 100%, but the total amount payable by the society at the death of such member exceeds 100%, the society are bound to pay the sum nominated to the nominee, and the general law will apply with regard to the amount over and above the sum of 100%. *Ib.*

Death of Nominee in Nominator's Lifetime.—Unrevoked Nomination.—Right of Nominee's Executor to Policy Moneys.—Life policies in friendly societies are not assignable by deed, but may be the subject of nomination. Where the nomination has never been revoked and the nominee has died in the lifetime of the nominator, the legal personal representative of the nominee is entitled to stand in the position of the nominee, and upon the death of the nominator to receive the policy moneys from the society. *Caddick v. Highton*, 68 L. J. Q.B. 281; 80 L. T. 527; 47 W. R. 668—Phillimore, J.

7. WINDING-UP.

Unregistered Society.—Jurisdiction of Court—Majority.—The rules of an unregistered friendly society contained no provision for its winding-up. The membership of the society, which at one time had been eighty-eight, decreased to forty-nine, and the funds from 923*l.* to 476*l.* The expenditure had been greater than the receipts for some years. At a meeting to decide whether the society should continue, twenty-seven members being present, a resolution was passed by a majority of one that the society should be dissolved. Subsequently at a committee meeting, at the suggestion of the trustees, the committee decided to continue the society. At a subsequent general meeting thirty-two members were present and paid their subscriptions. The plaintiffs, among whom were some who had paid their subscriptions, brought an action claiming a dissolution of the society:—*Held*, that the Court had jurisdiction to dissolve the society, but that in the circumstances no sufficient reason had been shown for its dissolution. *Blake v. Smither*, 22 T. L. R. 698—Kekewich, J.

Action.—Right of Unregistered Society to Maintain.—See *Marrs v. Thompson*, 86 L. T. 759.

Mortgage.—Sale under Power by Auction.—Purchase by Officer of Society.—Sale set Aside.—See MORTGAGE.

FUGITIVE OFFENDER.

See EXTRADITION.

FURNISHED HOUSE.

See LANDLORD AND TENANT.

GAME.

Statute.—6 Edw. 7 c. 21 is the *Ground Game (Amendment) Act*, 1906.

Ground Game.—Right of Killing.—“Occupier of land”—Owner Occupying his Own Land.—The expression “occupier of land” in section 1 of the Ground Game Act, 1880, includes an owner occupying his own land, in cases where a right to kill ground game on the land has vested subsequently to the date of the passing of the Act in some person other than such occupying owner (A. L. SMITH, L.J., *dissentiente*). *Anderson v. Vicary*, 69 L. J. Q.B. 713; [1900] 2 Q.B. 287; 83 L. T. 15; 48 W. R. 593—C.A.

—Agreement that Owner Compensate Occupier for Damage to Crops in Event of Occupier Leaving Game Unshot.—Agreement Purporting to Divest Right of Occupier.—Agreement Giving Occupier an Advantage for Forbearing to Exercise Right.—An agreement purporting to bind the landlord of a farm in the event of the tenant in occupation, on his part, leaving the ground game unshot, for the benefit of the landlord, to compensate the tenant for damage done by such game to his crops, is void under section 3 of the Ground Game Act, 1880, both as being an agreement purporting to divest or alienate the right of the occupier as declared by the Act, and as giving to the occupier an advantage in consideration of his forbearing to exercise such right. *Sherrard v. Gascoigne*, 69 L. J. Q.B. 720; [1900] 2 Q.B. 279; 82 L. T. 850; 43 W. R. 557—D.

—Reservation of Exclusive Right of Sporting.—Validity of Reservation.—A reservation in a lease of land of the exclusive right of sporting to the lessor is not wholly void as being in contravention of section 3 of the Ground Game Act, 1880, but only so far as it purports to divest the right of the occupier to kill and take ground game. *Stanton v. Brown*, 69 L. J. Q.B. 301; [1900] 1 Q.B. 671; 48 W. R. 333; 64 J. P. 326—D.

Game-dealer's Licence.—Power of Justices to State Case.—Mandamus.—Justices have no power to state a Case for the opinion of the Court on points of law arising before them relating to the granting of a game-dealer's licence. Nor, where the Justices have exercised their discretion on such a matter, can a *mandamus* be issued requiring them to hear and determine the application. *Reg. v. Bird; Jones, ex parte*, 62 J. P. 309—D.

Trespass in Pursuit of Game.—Game Dead and Removed from Land at Time of Trespass.—Interval of Time between Shooting Game and Entry upon Land.—A person who, being on his own land, shoots at and kills a grouse which is on the land of another, but does not at the time enter such land to pick the bird up, commits a trespass by entering land in pursuit of game within the meaning of section 30 of the Game Act, 1831, if some hours after the bird was killed he enters such land and searches for it, even although prior to such entry the dead bird was removed from the land by another person. *Horn v. Raine*, 67 L. J. Q.B. 533; 78 L. T. 654; 62 J. P. 420; 19 Cox C.C. 119—D.

— **Leave and Licence—Evidence.**—The appellant received leave from the wife of the occupier to hunt rabbits, and then coursed a hare. The sporting rights were not in the occupier:—*Held*, that the appellants had not brought themselves within the proviso of section 30 of the Game Act, 1831, and it was not until they had done so that it was necessary to prove strictly—for example, by producing the deed—that the landlord had the rights as against the occupier to take game. *Quære*, whether the wife could give such leave as she had. *Taylor v. Jackson*, 78 L. T. 555; 62 J. P. 424; 19 Cox C.C. 62—D.

“**Search or pursuit**” of Game.]—In order to support a conviction under section 30 of the Game Act, 1831, for trespassing in the daytime in search or pursuit of game, it is not necessary to prove that the searching and pursuing was with the intention to kill at the time. *Stiff v. Billington*, 84 L. T. 467; 49 W. R. 486; 65 J. P. 424; 19 Cox C.C. 680—D.

Several Persons Firing at Pheasant—Non-identification of Person who actually Killed Same.—Where several persons, none of whom holds a game licence, fire at and kill a pheasant or other head of game, they are all liable to be convicted under section 4 of the Game Licences Act, 1860, although it may be impossible to identify the particular person whose shot actually killed the pheasant. *Hunter v. Clark*, 66 J. P. 247—D.

Night Poaching—Indictment—Destruction of Game by Night—Validity of Count Charging Third Offence.—A count of an indictment for a third offence against section 1 of the Night Poaching Act, 1828, of entering by night upon land with a gun for the purpose of taking game, which shews upon the face of it that the first of the two previous convictions named in the count was under section 9 of the Act, for entering by night with three other persons armed with bludgeons on land for the purpose of taking game, is bad, inasmuch as it does not appear from the count that the person charged has “so” offended a third time within the meaning of section 1 of the Act. *Rea v. Lines*, 71 L. J. K.B. 125; [1902] 1 K.B. 199; 85 L. T. 790; 50 W. R. 303; 66 J. P. 24; 20 Cox C.C. 142—C.C.R.

Licence—Tenancy from Year to Year.—See LANDLORD AND TENANT.

GAMING AND WAGERING.

1. *Using Place for Betting*, 891.
2. *Betting Advertisements*, 900.
3. *Lottery*, 901.
4. *Unlawful Game*, 903.
5. *Contract by way of Gaming or Wagering*, 904.
6. *Principal and Agent*, 907.
7. *Other Matters*, 907.

1. USING PLACE FOR BETTING.

Keeping House for Purpose of Betting.—An offence against the Betting Act, 1853, ss. 1 and 3,

may be committed by keeping a house for the purpose of betting therein, although no betting takes place in the house. *Hart v. McCreadie*, 2 F. (Just. Cas.) 1—Ct. of Justy.

Office Kept for Purposes of Money being Received by Occupier as Consideration of Promise to Pay Money on Event of Horse Race—Newspaper Office Used for Coupon Competition.—The defendant was the occupier of an office and the proprietor and part manager of a sporting newspaper published weekly at that office. For several weeks each number of the newspaper contained conditions of a coupon competition, the subject of which was a horse race. A prize, usually of 1,000*l.* but sometimes of 3,000*l.*, was offered to those who succeeded in placing the names of the winning horses in some future specified race or races. The newspaper contained forty-nine coupons, and an intending competitor might fill up with the names of the horses which he selected, and send in to the office, one or more of these coupons. The first coupon was free of charge, but a penny was charged upon each subsequent coupon. If more than one competitor was successful, the prize was equally divided. A large number of persons took part in the competition. Large sums were received by the defendant at the office in respect of coupons, and the prizes were paid by her to the successful competitors:—*Held*, that the defendant had committed an offence under section 1 of the Betting Act, 1853, even if the transactions between her and the competitors did not amount to betting. *Held*, further (*per* LORD ALVERSTONE, C.J., and WILLS, J.), that these transactions did amount to betting. *Reg. v. Stoddart*, 70 L. J. K.B. 189; [1901] 1 K.B. 177; 83 L. T. 538; 49 W. R. 173; 64 J. P. 774; 19 Cox C.C. 587—C.C.R.

Caminada v. Hulton (60 L. J. M.C. 116), *Stoddart v. Sagar* (64 L. J. M.C. 234; [1895] 2 Q.B. 474), and *Reg. v. Hobbs* (67 L. J. Q.B. 928; [1898] 2 Q.B. 647) distinguished. *Hart v. Hay, Nisbet & Co.* (*supra*) approved. *Ib.*

Office used for Purpose of Money being Received by Owner as Consideration of Promise to Pay Money on Event of Horse Race—Newspaper Coupon Competition—Coupons Issued from Office in England—Postal Orders from Competitors Received by Owner of Office at Foreign Address.—The appellant was the owner of an office in London and the registered proprietor of a sporting newspaper published at that office. Each copy of the newspaper contained advertisements relating to coupon competitions, the subjects of which were horse races and football matches, and was accompanied by a supplement containing the coupons and the conditions of the competitions. A prize was offered to those who succeeded in correctly filling up a coupon with the result of some future specified race or matches, a penny being charged in respect of each coupon filled up. The coupons and accompanying remittances were to be sent to the appellant at an address in Holland. Many persons took part in the competitions and sent coupons and remittances in the form of postal orders payable to the appellant to the address in Holland. The postal orders were cashed by the appellant in this country. The appellant paid the prizes to the successful

competitors:—*Held*, that the office had been used for the purpose of money being received by the appellant within the meaning of the second branch of section 1 of the Gaming Act, 1853, inasmuch as the issuing of the newspaper and coupons, which was an essential part of the transaction of the receipt of the money, took place at the office, and that the appellant had been rightly convicted of an offence under that branch of the section. *Stoddart v. Hawke*, 71 L. J. K.B. 133; [1902] 1 K.B. 353; 85 L. T. 687; 50 W. R. 93; 66 J. P. 68; 20 Cox. C.C. 111—D.

Office Used for Purpose of Money being Received by Owner as Consideration for Promise to Pay Money on Event of Horse Race—Receipt of Money Elsewhere than at Office—Newspaper Coupon Competition—Coupons Issued from Office in England—Moneys Paid by Competitors Forwarded to Office Abroad.—The occupier of a house or office who uses it for the purpose of money being received as the consideration for promises to pay money on events or contingencies of or relating to horse races, acts in violation of section 1 of the Betting Act, 1853, although the actual receipt of the money takes place elsewhere. *Stoddart v. Hawke* (71 L. J. K.B. 133; [1902] 1 K.B. 353) affirmed. *Lennox v. Stoddart*; *Davis v. Stoddart*, 71 L. J. K.B. 747; [1902] 2 K.B. 21; 87 L. T. 283; 66 J. P. 469—C.A. Affirming, 50 W. R. 397—Darling, J.

Section 5 of the Betting Act, 1853, is not impliedly repealed by section 1 of the Gaming Act, 1892. *Ib.*

Bar of Licensed House—Betting Business Conducted by Professional Betting-man—Permission by Licensed Keeper of House.—A professional betting-man who by permission of the licensed keeper of a beerhouse is allowed to have the control of a ready-money betting business carried on in a room upon the premises commits the offence prohibited by section 3 of the Betting Act, 1853, of using the premises for the purpose of betting with persons resorting thereto, and the keeper of the premises is liable to be convicted, under section 17, sub-section 2 of the Licensing Act, 1872, of the offence of suffering his house to be used in contravention of the Act of 1853. *Belton v. Busby*, 68 L. J. Q.B. 859; [1899] 2 Q.B. 380; 81 L. T. 196; 47 W. R. 636; 63 J. P. 709—D.

Members of Club—Bookmakers Betting with other Members—Evidence.—The defendants were charged with unlawfully using certain premises occupied by the Whitefield Social Club, Lim., for the purpose of betting therein with persons resorting thereto, and with keeping a common gaming-house. The defendants were respectively chairman and secretary of the club, and the betting was exclusively with other members of the club. It appeared that the various members were not betting with one another indiscriminately, but were divided into two classes, the defendants being the bookmakers and the others going there to bet with them. On many occasions the defendants occupied the same places, sat at the same table, and used the tape list:—*Held*, that there was evidence to go to the jury in support of the charge. *Rea v. Corrie*, 68 J. P. 294; 20 T. L. R. 365—C.C.R.

Assisting in Management of Gaming-house—Purchase of Bank at Pharaoh.—A person who having bought the bank at a game of Pharaoh (an unlawful game within section 2 of the Gaming Act, 1738—12 Geo. 2, c. 23), acts as banker at a club where the game is played is “assisting in conducting the business” of a gaming-house within section 4 of the Gaming Houses Act, 1854. *Derby v. Bloomfield*, 91 L. T. 99; 68 J. P. 391; 20 Cox C.C. 674; 20 T. L. R. 549—D.

“House used for unlawful gaming”—Isolated Occasion.—An isolated instance of an unlawful game of cards being played among friends at the house of one of them does not render the owner of the house liable to the penalties imposed by section 4 of the Gaming House Act, 1854. The question whether a particular game of cards falls within the category of unlawful games is one for the Court and not for the jury. *Reg. v. Davies*, 66 L. J. Q.B. 513; [1897] 2 Q.B. 199; 76 L. T. 786; 18 Cox C.C. 618—C.C.R.

“Place”—Inclosure.—An inclosure on a racecourse to which bookmakers in common with the rest of the public, and on the same terms, are admitted and carry on their business, and the owners of which have no interest in any betting, is not a place which the Betting Act, 1853, forbids to be opened, kept, or used for the purposes therein mentioned. To constitute such a place, there must be a business of betting conducted by an owner, occupier, manager, keeper, or some other person vested with the authority of an owner (*LORD HOBHOUSE* and *LORD DAVEY* dissenting). *Eastwood v. Millar* (43 L. J. M.C. 139; L. R. 9 Q.B. 440), *Haigh v. Sheffield Corporation* (44 L. J. M.C. 17; L. R. 10 Q.B. 102), and *Hawke v. Dunn* (66 L. J. Q.B. 364; [1897] 1 Q.B. 579) overruled. *Powell v. Kempton Park Racecourse Co.*, 68 L. J. Q.B. 392; [1899] A. C. 143; 80 L. T. 538; 47 W. R. 585; 63 J. P. 260; 19 Cox C.C. 265—H.L. (E.)

—Space Inclosed but not Roofed in.—A space of ground inclosed by walls, but not roofed in, which was entered by a door with a lock, and fitted up as a quaiting ground, but which was used primarily as a place for conducting betting transactions,—*Held* to be a “place” used as a betting house within the meaning of section 407 of the Burgh Police (Scotland) Act, 1892, which enables any police constable “having good grounds for believing that any house, room or place is kept or used as a gaming or betting house” to enter same, and imposes penalties upon the persons having the care or management thereof, or who may be conducting any gaming or betting therein. *Flannagan v. Hill*, 7 F. (Just. Cas.) 26—Ct. of Justy.

—“Street”—Common Passage in a Building.—A was convicted of using a common passage as a betting-house. The passage was within a building and formed the entry to two dwelling-houses constituting the lower storey of the building. The passage was completely closed at the back, and at the entrance from the street had a door, which was open during the day, but was generally closed and bolted at night. A had no right or authority to use the passage for any purpose:—*Held*, assuming

that the passage was "a house, room, or place" within the meaning of section 407 of the Burgh Police (Scotland) Act, 1892, that A was not acting in the conducting of betting in a place used as a betting-house in the sense of the section, he not having any relation to the owners or occupiers of the passage, but was merely a trespasser; and therefore that he was not guilty of the offence charged. *Held* further, that the passage in question was not a "street" within the meaning of section 4 of the Act, which defines "street" as including "any road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare and public passage or other place within the burgh used either by carts or foot-passengers. . . ." *Vallance v. Campbell*, 8 F. (Just. Cas.) 62—Ct. of Justy.

— **Defined Spot—User.**—The fact that any one who carries on the business of a professional betting man goes to a particular spot to bet, and remains there for some hours betting, with persons who have been brought together to that spot in the expectation of finding him there to bet with, is sufficient to constitute that spot a "place" within the meaning of section 3 of the Betting Act, 1853. *McInany v. Hildreth*, 66 L. J. Q.B. 376; [1897] 1 Q.B. 600; 76 L. T. 463; 61 J. P. 325; 18 Cox C.C. 604—D.

On the morning of the day upon which a horse-race called the Lincolnshire Handicap was run a crowd of persons assembled upon a piece of vacant ground in the borough of Jarrow, known as the Pit Heap, to which the public had free access at all times upon the day in question. The appellant, a professional bookmaker, went to the Pit Heap in the course of the morning, and took up his stand at a particular spot upon the Pit Heap with his back against a wall. He remained for the space of several hours upon that one spot making bets with, and receiving money in respect of such bets from, a number of persons in the crowd, and entering particulars of these transactions in a betting book. There was no evidence that he had ever used the Pit Heap or any spot upon it for a like purpose before the day in question:—*Held*, that the appellant was rightly convicted of using a place for the purpose of betting with persons resorting thereto, contrary to the provisions of the Betting Act, 1853. *Id.*

— **Archway in Street.**—An archway in a street habitually resorted to by a bookmaker for the avowed purpose of betting with all comers is a "place" within the Betting Act, 1853, and is to be distinguished from an enclosure on a racecourse. *Powell v. Kempton Park Racecourse Co.*, *supra*, commented on. *Reg. v. Humphreys*, 67 L. J. Q.B. 534; [1898] 1 Q. B. 875; 78 L. T. 360; 46 W. R. 543; 62 J. P. 409—C.C.R.

— **Common Passage.**—A local Act authorised a constable to enter "any house, building, room or place" which he suspected to be "kept or used as a gambling house," and subjected to a penalty the owner, or keeper, or person having the management or care of such gambling or betting house:—*Held*, that the words "any house, building, room or place" did not include a common passage leading to a common stair.

Wright v. Smith, 6 F. (Just. Cas.) 18—Ct. of Justy.

— **Structure Carrying Advertisement—Box or Stool Close to Structure—Question of Fact.**—In order to constitute a "place" within the meaning of the Betting Act, 1853, there must be a definite localisation of the business of betting. In each case it is a question of fact whether there is a user of a place analogous to that of an occupier occupying a place at which he is prepared to bet with persons who come there and bet with him. *Brown v. Patch*, 68 L. J. Q.B. 588; [1899] 1 Q.B. 892; 80 L. T. 716; 47 W. R. 623; 63 J. P. 421; 19 Cox C.C. 330—D.

Where a bookmaker uses a box or stool with his name or other words upon it, not merely to indicate that he is a betting man prepared to bet, but in order to indicate that he is using a place for carrying on his business, and at which persons may find him, he is using a "place" within the meaning of the Act. *Id.*

— **Person "conducting betting or gaming."**—A was charged with conducting betting within a certain inclosure. The inclosure was 1,100 square yards in extent. The public were admitted at certain times by a door with an enumerating turnstile, on payment of one penny each. Within the inclosure there were quaiting pitches and quoits, which were to some extent used. A was not the owner or the tenant or a servant of the owner or tenant of the inclosure, but when the public were admitted at the turnstile a servant of the tenant directed them to the place where A was standing making bets, and gave them cards of regulations for betting:—*Held*, that the inclosure was a "place," and that A was a person "conducting betting or gaming" within the meaning of section 407 of the Burgh Police (Scotland) Act, 1892. *Clark v. Dykes*, 8 F. (Just. Cas.) 43—Ct. of Justy.

— **Frequenting Street.**—A bookmaker was charged with frequenting and using a street for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager, or paying or receiving bets, contrary to a by-law which enacted that no person should frequent and use such a place for such purposes. It appeared that the defendant had remained about the place in question between 1.10 and 1.30 p.m., and during that time transacted betting business with various persons:—*Held*, that these facts justified a conviction for frequenting and using the place for betting. *Davies v. Jeans*, 6 F. (Just. Cas.) 37—Ct. of Justy.

— **Newspaper Office—Sale of Newspaper with Coupon—Coupon Competition.**—The proprietor of a newspaper issued with each copy of the paper a coupon so that the purchaser might fill in the names of the probable winners of certain football matches, a prize of 20*l.* being given for the most accurate forecast. No money was paid except the price of the newspaper, and any competitor desiring to send in more than one estimate could do so by obtaining additional copies of the paper. By far the greater number of copies were sold to the public through agents and not at the newspaper office. The appellant purchased copies of the newspaper at the newspaper office and filled in and returned the coupons to the office:—*Held*, that if the money was in fact received for the

coupons and not merely for the newspaper, the proprietors had committed the offence under section 1 of the Betting Act, 1853, of having opened, kept, and used an office for the purpose of money being received in consideration of an undertaking to pay money on a contingency relating to a game. *Caminada v. Hulton* (60 L. J. M.C. 116) discussed. *Hawke v. Hulton*, 22 T. L. R. 169—D.

— **Knowingly and Wilfully Permitting Office to be used for Gaming Purposes—Coupon Competition Abroad—Advertisement in Newspaper—Registered Proprietor.**—The manager of a football coupon competition being a means of receiving money as the consideration for a promise to pay money on the event of football matches, as an essential part of his scheme, published in a newspaper an advertisement of prizes offered to and the rules to be observed and amounts to be paid by intending competitors, who were directed to fill in coupon sheets or forms appended to the advertisement, and to send them, with the amounts payable, to an address in Holland. He also published in the same newspaper lists of the prize-winners in previous competitions. The office of the newspaper was opened and kept for the purpose of the competition:—*Held*, that there was evidence that the manager of the competition was a person using the office of the newspaper for the purpose of money being received by him as the consideration of a promise to pay money on the event of a game within the meaning of section 1 of the Betting Act, 1853; and that the registered proprietor of the newspaper was a person knowingly and wilfully permitting the office to be used as aforesaid within the meaning of section 3 of that Act. *Mackenzie v. Hawke*, 71 L. J. K.B. 561; [1902] 2 K.B. 216; 87 L. T. 122; 51 W. R. 233; 66 J. P. 696; 20 Cox C.C. 305—D.

— **Office used for making Bets or Wagers—Coupon Competition—Information with Respect to Bets or Wagers—Publishing Advertisement of Office.**—Any person publishing an advertisement whereby it is made to appear that an office is used for the purpose of a coupon competition, being a scheme whereby money is received as the consideration for a promise to pay money on the event of a football match, is liable to the penalty mentioned in section 7 of the Betting Act, 1853. *Hawke v. Mackenzie* (No. 1). *Hawke v. Mackenzie* (No. 2), 71 L. J. K.B. 565; [1902] 2 K.B. 225; 87 L. T. 127; 51 W. R. 236; 66 J. P. 709; 20 Cox C.C. 314—D.

Publishing Advertisement of Information.—Any person publishing an advertisement whereby it is made to appear that any person will on application give information or advice with respect to a coupon competition, being a scheme whereby, through the medium of an office, money is received as the consideration for a promise to pay money on the event of a football match, is liable to the penalty mentioned in section 3 of the Betting Act, 1874. *Ib.*

Reg. v. Stoddart (70 L. J. K.B. 189; [1901] 1 K.B. 177) followed; *Stoddart v. Argus Printing Co.* (70 L. J. K.B. 711; [1901] 2 K.B. 470) disapproved. *Ib.*

Bar of Licensed House—Betting Business Conducted by Professional Betting-Man—Permis-
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sion by Licensed Keeper of House.—A professional betting-man who by permission of the licensed keeper of a beerhouse is allowed to have the control of a ready-money betting business carried on in a room upon the premises commits the offence prohibited by section 3 of the Betting Act, 1853, of using the premises for the purpose of betting with persons resorting thereto, and the keeper of the premises is liable to be convicted under section 17, sub-section 2 of the Licensing Act, 1872, of the offence of suffering his house to be used in contravention of the Act of 1853. *Belton v. Busby*, 68 L. J. Q.B. 859; [1899] 2 Q.B. 380; 81 L. T. 196; 47 W. R. 636; 63 J. P. 709; 19 Cox C.C. 392—D.

Betting Business Conducted by Professional Bookmaker—Business Carried on under Arrangement with Landlord—Person "Using" House.—A professional bookmaker was in the habit of frequenting a licensed house for the purpose of there carrying on in the bar at stated hours a ready-money betting business with persons resorting thereto. The carrying on of such business was known to such persons, and was also known to and pursued under an arrangement with the landlord. The bookmaker had no interest either in the licensed house or in the business carried on there:—*Held*, that he was properly convicted of "using" the bar for the purpose of betting with persons resorting thereto, contrary to the provisions of section 3 of the Betting Act, 1853. *Tromans v. Hodgkinson*, 72 L. J. K.B. 21; [1903] 1 K.B. 30; 87 L. T. 549; 51 W. R. 286; 67 J. P. 30; 20 Cox C.C. 360—D.

Permission of User for Purpose of Betting.—Upon an indictment under the Betting Act, 1853, for using a house for the purpose of betting with persons resorting thereto, it is necessary, in order to justify a conviction, if there is a place which is not in law or fact in possession for the time being of the person charged but which is a common place to which persons have access for other purposes, to have evidence from which the jury can conclude that the person who owns the place authorises that to be done which he need not have permitted in view of his own rights over the place. Therefore, where a bookmaker upon several days went to the vaults or an adjacent public room of a licensed beerhouse, and received on each occasion money from persons by way of bets on horses, and on several of these occasions paid money to persons in respect to winnings on bets made, but no evidence was given that the occupier or his servants saw or knew what was going on, it was held that the bookmaker could not be convicted of using the house for the purpose of betting with persons resorting thereto. *Rea v. Deaville*, 72 L. J. K.B. 272; [1903] 1 K.B. 468; 88 L. T. 32; 51 W. R. 604; 67 J. P. 32; 20 Cox C.C. 389—C.C.R.

Where, however, in such a case there is evidence that the occupier of the house is present on several of the occasions and can see what is going on, the occupier may be convicted of permitting the house to be used for the purpose of a person using the house betting with persons resorting thereto, inasmuch as there is something in the nature of a right or licence to use the place for the purpose of a betting business. *Ib.*

Penny-in-the-Slot Machine.—The occupier of a sweet-shop kept on his counter an automatic machine, known as a penny-in-the-slot machine, intended to be used by customers. The customer inserted a penny through the slot and then drew down a knob, which compressed a spring. The knob was then suddenly released and the penny was shot forward by means of the spring into any one of seven compartments. If it found its way into either of two compartments, it was returned to the sender; if it went into any one of four other compartments, it was retained in the machine; if it went into the seventh compartment, the sender received a ticket entitling him to two-pennyworth of sweets. A large number of persons used the machine:—*Held*, that the occupier of the shop was rightly convicted under section 4 of the Gaming Houses Act, 1854, of using the shop for the purpose of unlawful gaming. *Fielding v. Turner*, 72 L. J. K.B. 542; [1903] 1 K.B. 867; 89 L. T. 273; 51 W. R. 543; 67 J. P. 252; 20 Cox C.C. 531—D.

— **Game of Chance.**—The appellant kept in his shop a penny-in-the-slot machine. A person desirous of working this machine put a penny into the slot and pulled down a spring by means of a knob, and then suddenly released the knob, whereupon the spring flew up and the penny was projected into one of five compartments. If in the course of its flight the penny found its way into either of two compartments it was returned to the operator; if it went into either of two other compartments it was retained in the machine and was lost to the operator; if it went into the fifth compartment the operator received a ticket entitling him to receive from the appellant a threepenny cigar or its value at his option. The magistrate found that the game was one of chance and that it was not proved that the chances were alike favourable to all, and convicted the appellant of having permitted his shop to be used for the purpose of unlawful gaming, contrary to section 4 of the Gaming Houses Act, 1854:—*Held*, that the conviction was right. *Thompson v. Mason*, 90 L. T. 649; 68 J. P. 270; 20 Cox C.C. 641; 20 T. L. R. 298—D.

Resorting — User.—The defendant was charged in several counts of an indictment with using a certain place, to wit, the yard and garden ground situate at the back of 187 Q. Street, Walsall, and of the adjoining messuages, for the purpose of betting with persons resorting thereto and for receiving money as the consideration for an undertaking by him to pay money on the contingency of horse races. It appeared that 187 Q. Street was occupied by the defendant's father, and that it, with eight similar houses adjoining, backed on to a piece of inclosed land, which formed a common yard and garden ground for the whole of the houses. This land was crossed by a footpath which ran parallel to and immediately behind the houses. There was some shedding behind No. 187, which was occupied by the defendant's father. The ground was approached by an entry from Q. Street, this entry running alongside No. 187. It was further proved that on three consecutive days a large number of people were seen to go up this entry, and that on one of the days a bet was made with the defendant, who was sitting by

the wall in the garden behind No. 187; that on another day another bet was made, and a payment made by the defendant in respect of a bet made previously. On each of the three days there was some one keeping a look-out at or near No. 187:—*Held*, that there was evidence to go to the jury of a "resorting," and of a "user" of a "place" by the defendant within the meaning of section 1 of the Betting Act, 1853. *Rea v. Russell*, 69 J. P. 247—C.C.R.

Betting-house Raid—Arrest of Persons en masse—Jurisdiction of Magistrate to Bind by Recognisances.—The power of binding by recognisances persons "haunting, resorting, and playing" in gaming-houses given by section 14 of the Unlawful Games Act, 1541, is exercisable by a magistrate where, in the case of a suspected betting-house, he has issued his warrant to the police under section 14 of the Betting Act, 1853, and persons found on the premises have been arrested and brought before him. *Murphy v. Arrow*, 66 L. J. Q.B. 865; [1897] 2 Q.B. 527; 77 L. T. 485; 46 W. R. 94; 62 J. P. 38; 18 Cox C.C. 662—D.

Betting Slips—Horse Races—Wagering on a Game of Chance—Vagrancy Act.—A bookmaker betting on horse races in a public place and receiving slips of paper recording the bets and the money, does not commit an offence, within the Vagrancy Act, 1824, as amended by the Vagrant Act Amendment Act, 1873, of betting by way of wagering with tokens at a game of chance. *Lester v. Qvested*, 85 L. T. 487; 50 W. R. 207; 66 J. P. 54; 20 Cox C.C. 66—D.

2. BETTING ADVERTISEMENTS.

Invitation to Bet by Circulars.—In order to a conviction for a contravention of section 3, sub-section 3 of the Betting Act, 1874, by sending out circulars inviting persons to bet, and containing an address to which communications are to be sent, it is not necessary that the circulars should invite persons to resort to the address for the purpose of betting, or that the bets should be accepted at the address. *Stott v. Renton*, [1907] S.C. (J.) 88—Ct. of Justy.

Publishing Advertisement of Information.—Any person publishing an advertisement whereby it is made to appear that any person will on application give information or advice with respect to a coupon competition, being a scheme whereby, through the medium of an office, money is received as the consideration for a promise to pay money on the event of a football match, is liable to the penalty mentioned in section 3 of the Betting Act, 1874. *Hawke v. Mackenzie* (No. 1); *Hawke v. Mackenzie* (No. 2), 71 L. J. K.B. 565; [1902] 2 K.B. 225; 87 L. T. 127; 66 J. P. 709—D.

Reg. v. Stoddart (70 L. J. K.B. 189; [1901] 1 K.B. 177) followed; *Stoddart v. Argus Printing Co.* (70 L. J. K.B. 711; [1901] 2 K.B. 470) disapproved. *Ib.*

Advertisement of Office used for Betting—Illegality.—The publication in a newspaper of an advertisement relating to a "coupon competition"—that is to say, of a promise by

the proprietor of an office to pay a certain specified sum of money to such persons as shall correctly guess the result of a horse race shortly to be run, and shall write their guesses upon certain forms called coupons issued with each number of the newspaper, and return the coupon so filled up to the office together with the sum of one penny in respect of each guess made—does not constitute an offence under section 7 of the Betting Act, 1853, or section 3 of the Betting Act, 1874, inasmuch as the advertisement does not relate to a house to which persons physically resort for the purpose of betting. *Stoddart v. Argus Printing Co.*, 70 L. J. K.B. 711; [1901] 2 K. B. 470; 85 L. T. 110; 49 W. R. 666; 65 J. P. 694—D.

Evidence of Betting.—In order that an advertisement shall come within section 7 of the Betting Act 1853, it must appear by reasonable inference from the advertisement that illegal betting is being carried on at some house, office, room, &c., or that it contains an invitation to do something which shall form part of illegal betting. Where the advertisement, reasonably understood by the person by whom it is read, indicates one of the two offences prohibited by section 1 of the Act, the offence under section 7 is complete. *Ashley & Smith v. Hawke*, 89 L. T. 538; 67 J. P. 361; 20 Cox C.C. 558—D.

Football Matches—Skill Competition—Forecast of Winners in.—The proprietors of a sporting paper in successive weeks inserted an advertisement in their paper to the effect that they offered a prize of 50*l.* to any one who should send in a list containing a correct forecast of the winners in eleven football matches specified, which were to be played, and that if no one succeeded in sending in a correct list, they would give 30*l.* to the person whose list was most nearly correct. Competitors were to send in their lists on coupons, of which there were sixteen in each copy of the paper. The first coupon was free. One penny stamp had to be sent for every other coupon used. Any number of coupons might be used:—*Held*, that the newspaper proprietors in so acting were guilty of an offence under section 1 of the Betting Act, 1853. *Hart v. Hay, Nisbet & Co.*, 2 F. (Just. Cas.) 39—Ct. of Justy.

3. LOTTERY.

Sweepstake—Profit to Person Suffering Lottery to be Drawn.—A sweepstake for money prizes in respect of winning horses in a steeplechase is, where the person suffering it to be drawn makes a profit, an unlawful lottery within the meaning of section 2 of the Gaming Act, 1802. *Hardwick v. Lane*, 73 L. J. K.B. 96; [1904] 1 K.B. 204; 89 L. T. 630; 52 W. R. 591; 68 J. P. 94; 20 Cox C.C. 576; 20 T. L. R. 87—D.

—**Money Payable on Contingency of Horse Race.**—The organiser of a sweepstakes on a horse race, to be subscribed for and drawn at his house, commits no offence within section 1 of the Betting Act, 1853, because the subscriptions he receives are not moneys payable on the contingency of a horse race, but on the contingency of the drawing of the sweepstakes. *Reg. v. Hobbs*, 67 L. J. Q.B. 928; [1898] 2 Q.B. 647; 79 L. T. 160; 47 W. R. 79; 62 J. P. 551; 19 Cox C.C. 154—C.C.R.

Offer of Prize for Prediction of Number of Births and Deaths in London during Specified Week—Chance—Skill.—The proprietor of a newspaper, by advertisement therein, offered to the readers of the paper a prize of money for a correct prediction of the number of male and female births and the number of deaths in London during a specified future week:—*Held*, that the offer did not constitute a lottery within the meaning of any of the statutes declaring lotteries to be unlawful. *Hall v. Cox*, 68 L. J. Q.B. 167; [1899] 1 Q.B. 198; 79 L. T. 653; 47 W. R. 161—C.A.

Sale of Chances—Proposal or Scheme for Sale of Chances in Newspaper—"Spot" Competition in Newspaper—Conviction.—It was announced in an issue of an evening newspaper belonging to a limited company and sold for the price of one halfpenny, that for a certain period in certain issues of the newspaper spots of varying size and configuration would be printed in various parts of the issues. Some of such spots were distinguished as winning spots. It was also stated in the paper that on a specified day an announcement would appear in the paper shewing the exact configuration of such spots as were declared to be winning spots; and it was stated in all the issues in question that the person who cut from the newspaper and sent to the offices of the same the portion of the newspaper containing any spot the facsimile of which had been declared to be a winning spot, would receive a prize. The winning spots were arbitrarily selected by the proprietors of the newspaper, and the winning of the prizes depended wholly upon chance. The appellant, the printer and publisher of the newspaper, was summoned under section 41 of the Lotteries Act, 1823 (4 Geo. 4, c. 60), for unlawfully publishing a proposal and scheme for the sale of chances in a lottery—namely, the proposal and scheme called "spots"—and was convicted under the section as a rogue and vagabond:—*Held*, that the sale of the newspapers was the publishing a proposal and scheme for the sale of chances in a lottery not authorised by any Act of Parliament within the meaning of the section, and that the appellant was properly convicted under the section. *Hall v. McWilliam*, 85 L. T. 239; 65 J. P. 742; 20 Cox C.C. 33—D.

Distribution of Prizes by Lot or Chance—Mechanism Operated by Spring.—The defendant exposed on the counter of his shop a machine called the Automatic Tivoli Cigar machine, intended to be and actually used by his customers. The machine was put in operation by putting a penny in a slot and by pressing a spring. The amount of the pressure applied to the spring determined the course taken by the penny inside the machine, and this in turn determined whether the person who had put in the penny got it back, lost it to the defendant, or won from him a cigar valued at twopence. A certain amount of skill might be acquired in giving the requisite pressure to the spring, but it was not shewn that the defendant's customers had any opportunity or ever attempted to acquire such skill:—*Held*, that the machine as worked and used was a lottery within the meaning of section 22 of the Glasgow Police (Further Powers) Act, 1892, which provides that "no person shall keep or be con-

cerned in the keeping, management, or conduct of any place, or exercise, keep open, show, or expose to be played, drawn or thrown at, or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance or device whatsoever, any lottery." *Santongeli v. Neilson*, 3 F. (Just. Cas.) 10—Ct. of Justy.

Gratuitous Distribution of Numbered Discs—Winning Numbers Announced in Paper—No Compulsory Purchase of Paper.]—Newspaper proprietors distributed gratuitously thousands of metal discs, each bearing a distinctive number and the words "Keep this, it may be worth 100l. See the *Weekly Telegraph* to-day." Periodically numbers corresponding to those on some of the discs distributed were published in the above paper, and it was announced that holders of these discs on forwarding them would receive a prize. No charge was made for the discs, and it was not necessary for a disc-holder either to purchase or produce a copy of the paper in order to have a chance of winning a prize. Information as to the winning numbers could be obtained gratuitously at the office of the paper. It was found that the scheme was formulated in order to induce people to buy the paper, and that as a consequence its circulation had increased 20 per cent. *Held*, that this was a lottery, on the ground that as, in fact, most of the recipients had to buy a paper, the chances of winning were paid for by them, and the prize-money was provided by them in the aggregate, and that therefore the discs were not distributed gratuitously. *Willis v. Young*, 76 L. J. K.B. 890; [1907] 1 K.B. 448; 96 L. T. 155; 71 J. P. 6; 23 T. L. R. 23—D.

"Keeping" Office or Place for Exercising Lottery—User of Place on One Occasion.]—A person who, on one occasion only, holds a lottery in a place does not thereby "keep" such a place for exercising a lottery therein within the meaning of section 2 of the Gaming Act, 1802. The word "keep" in that section points to something like an habitual keeping of the place for the prohibited purpose. *Martin v. Benjamin*, 76 L. J. K.B. 81; [1907] 1 K.B. 64; 96 L. T. 197; 71 J. P. 30; 23 T. L. R. 53—D.

4. UNLAWFUL GAME.

Implement for Practising Game of Hazard.]—A confectioner was charged with exhibiting in his shop a machine or implement for playing a game of hazard in order to induce persons to play thereat. It was proved that the machine was put in motion by placing a penny in a slot, that this enabled a spring to be worked which propelled a ball into the upper part of the machine whence it descended past pins (which caused irregularity in its course) to the bottom of the machine, unless it was intercepted by a sliding cup manipulated by the player, who, if he succeeded in intercepting the ball, received a metal disc entitling him to twopence worth of goods in the shop, and if he failed forfeited his penny. There was no part of the machine where the ball could descend that the manipulator could not reach with the sliding cup. It was found by the magistrate that, although a certain amount of success in working the machine could be acquired by practice, yet that to an ordinary member of the public having no

special opportunity of acquiring skill at it, its working depended on chance:—*Held*, that the machine was an implement for playing a game of hazard:—*Held*, also, in a case as to another machine of the same type, that it was not sufficient to prevent a conviction that the player, irrespective of success or failure, received an article of some value, but of less value than the sum paid for playing. *Forte v. Dewar*, 7 F. (Just. Cas.) 82—Ct. of Justy. *And see supra* as to the game of Pharaoh—*Faro, Derby v. Bloomfield*, 91 L. T. 99; 68 J. P. 391; 20 Cox C.C. 674.

5. CONTRACT BY WAY OF GAMING OR WAGERING.

Gaming or Wagering—Betting Debts—Compromise of Claim—Consideration.]—The defendant, who had lost 120l. to the plaintiff in respect of bets on horse-races, was written to by the plaintiff's solicitor asking for payment of the amount. The defendant thereupon offered to pay "30l. within a fortnight and 30l. within a month in full satisfaction of the account." This offer was accepted. The plaintiff knew that the original claim was unenforceable, and there was no evidence that he threatened to sue or to take any step to the detriment of the defendant. In an action to recover the 60l.,—*Held*, that there was no consideration for the promise to pay that sum, and that therefore the action would not lie. *Chapman v. Franklin*, 21 T. L. R. 515—D.

Recovery of Money—Person "using" Office—"Any such person aforesaid."]—The defendant used a house in London for the purpose of correspondence relating to bets on horse races, and in receiving money in connection therewith. The plaintiff placed a sum of money to the defendant's credit at his bank to be used by the defendant for the purpose of making bets on behalf of the plaintiff. Bets were from time to time made by the defendant, acting on the telegraphed instructions of the plaintiff, with varying results. The plaintiff sued to recover the amount of the deposit, and the defendant alleged that the money had been used in executing betting commissions for the plaintiff, and that the plaintiff's losses had exhausted the deposit, and that he was not liable:—*Held*, that section 5 of the Betting Act, 1853, applied, and that the plaintiff was entitled to recover. *Vogt v. Mortimer*, 22 T. L. R. 763—Joyce, J.

Betting Partnership—Losses Paid by One Partner—Contribution by Co-partner—Implied Contract for Repayment—Money paid "in respect of" a Void Contract.]—The plaintiff and the defendant entered into partnership for the carrying on of a business of betting on horse races. The business resulted in a loss, which was paid by the plaintiff. In an action by the plaintiff claiming contribution in respect of the losses which he had paid,—*Held*, that the money paid by the plaintiff had been paid by him "in respect of" contracts of betting which were null and void under 8 & 9 Vict. c. 109; and that therefore the action was not maintainable. *Saffery v. Mayer*, [1901] 1 Q.B. 11; 83 L. T. 894; 49 W. R. 54; 64 J. P. 740—C.A.

Bill Paid by Acceptor—Recovery of Amount so Paid.—C. and W. were engaged in transactions null and void under the Gaming Act, 1845. In respect of such transactions C. drew a bill which was accepted by W. C. indorsed it to the C. bank, who sued W. and recovered the money. In an action to recover the money so paid from C.,—*Held*, that W. could not recover. *Crawley v. White*, 78 L. T. 167—Kennedy, J.

Contracts for Differences on Sales and Purchases of Stock—Bona fide Purchase of Stock with Profits of Gaming Transactions—Damages for Non-delivery of Stock.—Gaming contracts for differences on sales and purchases of stocks entered into between the respondent and the debtor having resulted in a profit to the respondent, the respondent directed the debtor to use the profit for a *bona fide* purchase of stock, and the debtor thereupon sent a contract note to the respondent to the effect that he had sold the stock to him and debited him with the price of the stock, stamp, and fees. The debtor died before the stock was delivered, and the respondent claimed to prove against his estate for damages for the non-delivery of the stock:—*Held*, that the transaction was not equivalent to a payment by the debtor to the respondent of the price of the stock, and that the respondent was precluded by the Gaming Act, 1845, s. 18, from so proving. *Cronmire In re; Waud*, *ex parte*, 67 L. J. Q.B. 620; [1898] 2 Q.B. 383; 78 L. T. 483; 46 W. R. 679; 5 Manson, 30—C.A.

—Deposit of Money as "Cover"—Recovery of Deposit.—The respondent had deposited with the debtor money as cover to secure him against loss upon the gaming transactions. The money was never required or appropriated for that purpose, and the events in respect of which it was deposited had resulted in favour of the respondent:—*Held*, that the respondent was entitled to prove for it against the estate of the debtor. *Ib.*

Transactions in Stocks and Shares on "Cover" System—Payment of Differences—Power to Demand Delivery or Acceptance.—A contract for the sale or purchase of stocks or shares which is, in effect, a bargain for differences only, is a contract by way of gaming or wagering within section 18 of the Gaming Act, 1845, and is none the less so because there is superadded to it a proviso that the dealer will deliver the stock sold by him if the purchaser chooses to pay him an additional one-eighth, or will accept the stock bought by him subject to a discount for cash, the other party not being bound either to take up or deliver the stock. *Universal Stock Exchange v. Strachan* (65 L. J. Q.B. 429; [1896] A.C. 166) applied. *Gieve, In re; Trustee, ex parte*, 68 L. J. Q.B. 509; [1899] 1 Q.B. 794; 80 L. T. 438; 47 W. R. 441; 6 Manson, 136—C.A.

A dealer in stocks and shares sent to a customer a contract note in this form: "I beg to advise having sold to you"—then followed the description and amount of the shares sold, the amount of "cover," and the price—"plus 1/4th if stock is taken up . . . subject to the conditions at back." The conditions related to the "cover," and to "contangoes" and "backwardations," and contained this clause: "It is to be distinctly understood that I am prepared to deliver the stock or shares to which this

contract refers, if demanded, but require cash on the first day of the account for securities I have to deliver customers":—*Held*, by LINDLEY, M.R., and RIGBY, L.J., that the contract on the face of it was a gaming transaction, because it was plain from its terms that the parties did not contemplate the stock being taken up, and it was not a bargain for the purchase and sale of the stock. *Held*, by VAUGHAN WILLIAMS, L.J., that he was not prepared to say that the contract was a gambling transaction on the face of it, but it could be shewn to be so; and the inference he drew from the transaction was that the parties intended to treat it as one of differences only, and that no stock should be delivered or accepted. *Ib.*

Money Paid "in respect of" a Contract of Gaming—Partnership Fund for Betting—Action for Contribution to Losses.—A person paid a sum of money to the defendant as a contribution to a partnership fund to be used for betting on horses for the joint benefit of himself and the defendant, profits and losses to be shared equally. The whole of the money was lost on bets made by the defendant in pursuance of the partnership agreement:—*Held*, that an action to recover one-half of the money was not maintainable by reason of the provisions of section 1 of the Gaming Act, 1892, the money being money paid under or in respect of a contract or agreement rendered null and void by the Gaming Act, 1845. *Tatham v. Reeve* (62 L. J. Q.B. 30 [1893] 1 Q.B. 44) approved of. *Saffery v. Mayer*, 70 L. J. K.B. 145; [1901] 1 K.B. 11; 83 L. T. 394; 49 W. R. 54; 64 J. P. 740—C.A.

—Implied Promise—Deposit with Stakeholder—Action to Recover Deposit.—The Gaming Act, 1892, which provides that no action shall be maintained to recover any sum of money paid by any person under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845—that is, any contract or agreement, whether by parol or in writing, by way of gaming or wagering—does not apply to a deposit of money with a stakeholder, so as to prevent the depositor from maintaining an action against the stakeholder for the recovery of a deposit which he has demanded back from the stakeholder before it was paid over by him. *O'Sullivan v. Thomas* (64 L. J. Q.B. 398; [1895] 1 Q.B. 698) approved and followed. *Burge v. Ashley*, 69 L. J. Q.B. 538; [1900] 1 Q.B. 744; 82 L. T. 518; 48 W. R. 438—C.A.

Money Deposited with Stakeholder to Abide Result of Billiard Match.—A, an undischarged bankrupt, and B entered into an agreement to play a billiard match for 100l. a side, and deposited 100l. respectively with stakeholders to abide the result of the match. A won the match, and the 200l. was claimed both by him and by his trustee in bankruptcy:—*Held*, that the 200l. was deposited under a wagering contract, and therefore under the Gaming Act, 1845, that sum was not recoverable either by A. or by his trustee. *Shoolbred v. Roberts*, 68 L. J. Q.B. 998; [1899] 2 Q.B. 560; 81 L. T. 522; 6 Manson, 397—Phillimore, 7. *See s.c.* in C.A., 69 L. J. Q.B. 800; [1900] 2 Q.B. 497—C.A.

Held also, that there was nothing in the Gaming Act, 1892, which took away the right

of a gamester to recover back money paid upon a consideration which in law did not exist, and therefore that A's deposit of 100*l.* could be recovered by and belonged to his trustee in bankruptcy. *Diggle v. Higgs* (46 L. J. Ex. 721; 2 Ex. D. 422) followed. *Ib.*

Betting on Horse Races—Cheque for Money Won on Bets—Illegal Consideration—Indorsee for Value with Notice.]—An indorsee for value of a cheque given for money won on bets on horse races cannot maintain an action upon the cheque if he has taken it with notice of the consideration for which it was given, since by section 1 of the Gaming Act, 1835, the cheque must be deemed to have been given for an illegal consideration. *Woolf v. Hamilton*, 67 L. J. Q.B. 917; [1898] 2 Q.B. 337; 79 L. T. 49; 47 W. R. 70—C.A.

Cheque for Gambling Debt Incurred Abroad—Right of Action in England.]—See *Saxby v. Fulton*, 43 L. J. P. 488, and INTERNATIONAL LAW.

Interest on, in Winding-up.]—See COMPANY, col. 468.

6. PRINCIPAL AND AGENT.

Principal and Agent—Bets Lost by Agent, but Unpaid—Indemnity against Liability to Pay—“Any sum of money paid.”]—The words “any sum of money paid” in section 1 of the Gaming Act, 1892, are not confined to money actually paid, but apply equally to money to be paid; and a betting agent who has lost bets made on behalf of his principal, and who has not paid them, cannot maintain an action against his principal to recover his unpaid losses or to indemnify him against his liability to pay them. *Levy v. Warburton*, 70 L. J. K.B. 708—D.

7. OTHER MATTERS.

By-law as to.]—See LOCAL GOVERNMENT; METROPOLIS.

English Cheque Payable in London—Right of Action.]—See INTERNATIONAL LAW.

Marine Insurance Policy.]—See INSURANCE.

Notice of Statutory Defence.]—See COUNTY COURT.

Penalty under Betting Act, 1853—Share of.]—See JUSTICE OF THE PEACE.

Stakeholder—Liability.]—See INTERPLEADER.

Suffering Gaming on Licensed Premises.—See INTOXICATING LIQUORS.

GARNISHEE.

See ATTACHMENT OF DEBTS.

Garnishee Order as Working Forfeiture.]—See *In re Greenwood, Sutcliffe and Gledhill*, 70 L. J. Ch. 326; *post*, WILL.

GAS AND GASWORKS.

Laying Pipes in Street—Bridge Carrying Street over Railway—Laying Pipe against

Girders of Bridge.]—A railway company were the owners of an iron bridge which carried a public road over their line of railway. A gas company broke up the metalling of the road on the bridge and laid a gas main under the metalled surface of the road, resting in places on the crowns of the girders of the bridge, but in no case did the gas company cut into the structure of the bridge.—*Held*, that the gas company were entitled under section 6 of the Gasworks Clauses Act, 1847, to lay their gas main as they had done, and that they were not prevented from doing so by section 7. *Taff Vale Railway v. Cardiff Gas, Light, and Coke Co.*, 71 J. P. 350; 5 L. G. R. 993; 23 T. L. R. 528—Swinfen Eady, J.

Nuisance—Permissive Powers.]—The Gasworks Clauses Act, 1871, having provided by section 9 that nothing therein or in the special Act shall exonerate the undertakers from proceedings for nuisance in the event of nuisance being caused by them, a gas company incorporated by Act of Parliament and subject to the Gasworks Clauses Act, 1871, with power to buy land by agreement, but not compulsorily, is liable to an action for a nuisance caused by it in carrying out its works, although it is bound under penalty to supply gas within certain limits and its works are carried out on lands specified in its special Act. To escape liability it would have to shew some statutory authority, express or by necessary implication, to do the particular thing complained of in the way in which it was being done, and that it was impossible to exercise the powers conferred without causing damage. *London, Brighton, and South Coast Railway v. Truman* (55 L. J. Ch. 354; 11 App. Cas. 45) distinguished. *Att.-Gen. v. Leeds Corporation* (39 L. J. Ch. 254, 711; L. R. 5 Ch. 583) followed. *Jordeson v. Sutton, Southcoates, and Drypool Gas Co.*, 67 L. J. Ch. 666; [1898] 2 Ch. 614; 79 L. T. 478; 47 W. R. 222; 63 J. P. 137—North, J. Affirmed, 68 L. J. Ch. 457; [1899] 2 Q.B. 217; 80 L. T. 815; 63 J. P. 692—C.A.

Opening Road—Reinstatement by Local Authority—Injury owing to Negligent Filling in.]—Where a gas company has under its statutory powers opened a street, but the local authority have under section 114 of the Metropolitan Management Act, 1855, reinstated such street, the gas company are not liable for damage caused owing to such reinstatement having been done negligently. *Cressy v. South Metropolitan Gas Co.*, 94 L. T. 790; 70 J. P. 405; 4 L. G. R. 1049—D.

Supply—Statutory Charges—Remedy for Overcharge—Rights of Individual Customers.]—Where powers are given to a statutory company for the supply of a commodity, the Act providing that in certain specified events the price is to be reduced, and the municipality is authorised to audit the company's annual statement and verify their accounts, an aggrieved consumer, in the absence of any pecuniary penalty for default or of the reservation of any right of action to individuals, has no right of action against the company for non-compliance with the provisions of the Act. To the corporation only in such a case is the duty confided of seeing that the Act is obeyed. *Johnston v. Toronto Gas Consumers Co.*, 67 L. J. P.C. 83; [1898] A.C. 447; 78 L. T. 270—P.C.

— **Lighting Passage not Dedicated to Public—Requiring Gas Company to Lay Pipe in Passage—Objection by Owner.**—A gas company was required to supply gas to a lamp on a wall which lighted a passage which had never been dedicated to the public use. On proceeding to do so, the owner of the passage objected to the laying of the pipe through the passage, whereupon the gas company stopped:—*Held*, that in view of the provisions of section 7 of the Gasworks Clauses Act, 1847, the company were not liable to be proceeded against for penalties under section 36 of the Gasworks Clauses Act, 1871, for neglecting or refusing to supply gas. *Bellamy v. Liverpool United Gas Co.*, 68 J. P. 540; 2 L. G. R. 1182—D.

— **Right to Cut Off—Supply Cut Off from One House for Default in respect of Another.**—Under a statute enacting that if any person supplied with gas by a gas company shall neglect to pay any rate, rent, or charge due to the company, it shall be lawful for the company "to stop the gas from entering the premises service pipes or lamps of any such person," the company is empowered to cut off the gas supplied to one set of premises of a customer for default made by him in respect of another set of premises, the liability attaching not to the premises, but to the customer, and being a liability for the whole of his debt to the company at the time. *Montreal Gas Co. v. Cadieux*, 68 L. J. P.C. 126; [1899] A.C. 589; 81 L. T. 274—P.C.

Arrears Due to Gas Company by Outgoing Tenant—Liability of Incoming Tenant for such Arrears—Incoming Tenant not Requiring Supply.—An incoming tenant who buys and continues the business of the outgoing tenant, but is not and does not intend to be a customer of the gas company, is not liable under section 18 of the Gas Light and Coke Company's Act, 1872, for arrears due for gas supplied to his predecessor. Decision of the COURT OF APPEAL (72 L. J. K.B. 303; [1903] 1 K.B. 593) reversed and that of the KING'S BENCH DIVISION restored. *Gas Light and Coke Co. v. Mead* (45 L. J. M.C. 71) approved. *Cannon Brewery Co. v. Gas Light and Coke Co.*, 73 L. J. K.B. 747; [1904] A.C. 331; 91 L. T. 110; 52 W. R. 657; 68 J. P. 461; 2 L. G. R. 949; 20 T. L. R. 543—H.L. (E.)

Gas Lamp—Knocking Down—Summary Remedy not Exclusive.—By the Gas Works Clauses Act, 1847: "Every person who shall carelessly or accidentally break, throw down, or damage any pipe, pillar, or lamp belonging to the undertakers, or under their control shall pay such sum of money by way of satisfaction to the undertakers for the damage done, not exceeding 5*l.*, as any two Justices or the sheriff shall think reasonable":—*Held*, where a lamp-post had been knocked down by the negligent driving of the defendants' servant, that the plaintiffs could maintain an action for negligence in the County Court against the masters, as the section was not exclusive. *Crystal Palace Gas Co. v. Idris*, 82 L. T. 200; 64 J. P. 452—D.

Lamp-post—Damage to—"Carelessly."—The appellant was summoned under section 20 of the Gasworks Clauses Act, 1847, for that he did "unlawfully and carelessly" damage a certain

public lamp. The Justices were of opinion that there was evidence of carelessness on the part of the appellant, and they found as a fact that he was careless and that his carelessness caused the damage; they accordingly made an order against him:—*Held*, that, although the summons did not charge the appellant with having damaged the lamp "carelessly or accidentally," there was evidence of carelessness short of what might be called negligence upon which the Justices could act in making the order. *Ashton v. Eccles Corporation*, 71 J. P. 55—D.

Injury to Pipes by Steam Rollers Used for Repair of Roads—Injunction.—A gas company were held entitled to an injunction to restrain a road authority from using steam rollers in such a way as to injure their pipes then properly laid under the roads, regard being had to what at the time of the laying of the pipes was the ordinary traffic and the reasonable means of repairing the roads. *Alliance and Dublin Consumers Gas Co. v. Dublin County Council*, [1901] 1 Ir. R. 492—C.A.

Testing Gas on Sundays—"Daily"—Right of County Council to Sue.—The London County Council, as successors of the Metropolitan Board of Works, are empowered by a series of Acts of Parliament, commencing in 1869, to appoint gas examiners to make "daily" testings of the defendant company's gas in respect of illuminating power and purity. There is no express exclusion of or reference to Sundays in any one of the Acts, but it appeared that throughout the period from 1868 to 1903, when the London County Council first claimed the right to test on Sundays, the practice had been to test on weekdays only:—*Held*, that the *prima facie* meaning of "daily" is "every day of the week," and that no artificial meaning for the word had in the circumstances of this case been created by the practice which had hitherto obtained. *Yewens v. Noakes* (50 L. J. Q.B. 132) distinguished. *London County Council v. South Metropolitan Gas Co.*, 73 L. J. Ch. 136; [1904] 1 Ch. 76; 89 L. T. 618; 52 W. R. 161; 68 J. P. 5; 2 L. G. R. 161; 20 T. L. R. 83—C.A.

Held also, that an action lay by the London County Council as plaintiffs to enforce the right of the gas examiners to test on Sundays. *Ib.*

Dividend—Maximum Rate Fixed by Statute—Payment of Dividend Free of Income Tax.—Where a gas company is prohibited by its special Acts from paying a dividend in excess of a specified rate, it cannot pay dividends at the maximum rate free of income tax. In calculating the maximum dividend payable, income tax on the dividend must be included. *Ashton Gas Co. v. Att.-Gen.*, 75 L. J. Ch. 1; [1906] A.C. 10; 93 L. T. 676; 70 J. P. 49; 13 Manson, 35; 22 T. L. R. 82—H.L. (E.)

Sale of Mains, Pipes, &c., of Gas Company to District Council at a Price to be Assessed—Principle of Valuation.—By an agreement made between a gas company and a district council, in whose district the company were in fact supplying gas, although the district was not within their statutory limits of supply, it was agreed that the company should sell and the council should purchase the works, pipes,

mains, meters, and other gas apparatus, and all other real and personal property (if any), and all effects of the company laid down or situate within the district, freed and discharged (as between the company and the council) from all debts, outgoing, and liabilities, and all easements, rights, powers, and privileges (if any) enjoyed or exercisable by the company at a price to be fixed in default of agreement by arbitration; and it was further agreed that "in the case of arbitration and in the event of the council not continuing to take a supply of gas in bulk from the company," the arbitrator, in fixing the purchase-money, should take into consideration the value of apparatus provided by the company outside the district for the purpose of supplying gas within the district which by reason of the sale would be rendered useless to the company. By a second agreement of even date, terminable on twelve months' notice, the council agreed to take a supply of gas in bulk from the company:—*Held*, on the construction of the first agreement, that the purchase-money was to be assessed on the basis that the sale was a sale of a portion of a gas undertaking as a going concern, and not a mere sale of apparatus *in situ*; and that, in fixing the purchase-price, the value of the apparatus provided outside the district for supplying gas within the district was to be taken into consideration by the arbitrator, as the words "in the event of the council not continuing to take a supply of gas in bulk from the company" referred to a contingent loss of the council as customers of the company, which the arbitrator was bound to consider. *Hucknall-under-Huthwaite Urban Council and South Normanton Gas Co., In re*, 3 L. G. R. 704; 69 J. P. 329—C.A.

Construction of Tramway—Notice—Counter-notice—Limit of Time.—*See* TRAMWAYS.

Expenses of Re-instatement.—*See* METROPOLIS.

Mains—Removal of—Order by Arbitrator.—*See* TRAMWAYS.

Nuisance—Works Causing.—*See* NUISANCE.

GIFT.

Principles of Construction—Deed—Will.—In construing the words of a gift, the same principles are equally applicable whether the document in question is a deed or a will. *Friend's Settlement, In re*; *Cole v. Allcot*, 75 L. J. Ch. 14; [1906] 1 Ch. 47; 93 L. T. 739; 54 W. R. 295—Farwell, J.

Delivery—Passing of Property—Church Organ—Parties.—A mission church in a parish was vested in trustees upon trust that it should be used under the direction of the vicar of the parish for public worship. A parishioner bought an organ and lent it to the church, and it was erected there, the property in the organ remaining in him. The then vicar of the parish gave to the parishioner a letter evidencing the fact that the organ was only lent. The plaintiff was the organist at the church, and the owner of the organ told him at his rooms that he wished to give him the organ, and thereupon handed to him the vicar's letter and

the receipts for the purchase-money of the organ as *indicia* of title, and subsequently, when in the church, he placed his hand upon the organ and said to a third person in the plaintiff's presence either that he had given or that he gave the organ to the plaintiff. The organ remained in the church. The plaintiff subsequently claimed the organ, and the vicar disputed his title to it. The plaintiff brought an action against the vicar and churchwardens for a declaration of his title to the organ:—*Held*, that the delivery of the *indicia* of title to the plaintiff constituted a complete and valid gift of the organ to him; that even if it was not then a complete gift, it was completed subsequently at the church; and that the action was properly brought against the vicar for a declaration of title. *Rawlinson v. Mort*, 93 L. T. 555; 21 T. L. R. 774—Bray, J.

Banker's Deposit Receipt—Death of Donor—Donee Executor of Donor—Equitable Assignment.—The indorsement and delivery of a banker's deposit receipt (not transferable) is a complete gift where the donor appoints the donee his executor, although no notice is given to the bank by the donor. *Griffin, In re*; *Griffin v. Griffin*, 68 L. J. Ch. 220; [1899] 1 Ch. 408; 79 L. T. 442—Byrne, J.

Undue Influence—Guardian and Ward—Irrevocable Gift—Independent Advice—Separate Solicitor—Solicitor's Duties.—If a solicitor, purporting to act as the independent adviser of a youthful donor about to make an irrevocable voluntary settlement on a donee standing in a fiduciary relationship to the donor, acts also in the same transaction as solicitor to the donee, then he is not such an independent adviser as the law in the circumstances requires for the protection of the donor. He must be independent of the donee in fact as well as in name. *Powell v. Powell*, 69 L. J. Ch. 164; [1900] 1 Ch. 243; 82 L. T. 84—Farwell, J.

A solicitor who acts for such a donor does not discharge his duty by merely satisfying himself that the donor understands and wishes to carry out the particular transaction—he must also satisfy himself that the gift is one that it is right and proper in all the circumstances for the donor to make; and if he is not so satisfied, his duty is not only to advise his client not to complete the transaction, but also to refuse to act further for him if the client persists. *Id.* And *see* UNDUE INFLUENCE and FRAUD.

Right to Recover—Misrepresentation—Innocent Intention—Common Mistake.—A voluntary subscription to a charitable institution given in response to an appeal which innocently misrepresents the construction of the will of a testator can be recovered by a subscriber who has given his subscription on the faith of the misrepresentation, when it is subsequently discovered to be untrue. Statement of JAMES, L.J., to the contrary effect in *Wilson v. Thornbury* (L. R. 10 Ch. 239) not followed. *Glibb, In re*; *Bamfield v. Rogers*, 69 L. J. Ch. 278; [1900] 1 Ch. 354; 82 L. T. 412—C.A.

Purchase of Shares—Passing Wife's Name as Name of Purchaser—Death of Donor before Transfers Executed.—A testator a few days before his death bought through a broker on

the Stock Exchange certain stocks and shares. On the day before his death, this being also "name day" on the Stock Exchange, in accordance with the testator's instructions, his wife's name was passed as the transferee of the stocks and shares. The testator died before the transfers were executed;—*Held*, that the gift of the stocks and shares was complete. *Smith, In re; Bull v. Smith*, 84 L. T. 835—Byrne, J.

Charitable Gift.—See CHARITY.

Mortis Causa.—See WILL.

Will—Gift by.—See WILL.

GLEBE.

See ECCLESIASTICAL LAW.

GOODS.

Assignment of, by Way of Security.—See BILL OF SALE.

Execution on.—See EXECUTION.

Sale of.—See SALE OF GOODS.

GOODWILL.

Sale of Business—Soliciting Customers.—The rule which prohibits the vendor of a business from soliciting his former customers applies in the case of customers who, although remaining customers of the business sold, have also of their own accord become customers of a new competing business established by the vendor, or in which he is interested. *Curl Brothers v. Webster*, 73 L. J. Ch. 540; [1904] 1 Ch. 685; 90 L. T. 479; 52 W. R. 413—Farwell, J.

Name of Firm—Sale of Business and Goodwill—Right of Individual Partner to Trade in her own Name.—The defendant, whose married name was Scalé, carried on business as "Mrs. Pomeroy," a name which she had adopted and by which she was known. She sold her business, including the goodwill, to a company called "Mrs. Pomeroy (Limited)," and that company having gone into liquidation, the liquidator sold the business to the plaintiffs, who were another company with the same name. The defendant carried on business under the name of Mrs. Jeannette Pomeroy, but in her advertisements she stated that she was no longer connected with Mrs. Pomeroy (Limited). The plaintiffs applied for an interlocutory injunction to restrain her from carrying on the business under the name of Mrs. Pomeroy:—*Held*, that, as the defendant had assumed the name of Pomeroy, and was identified with that name, and as she expressly stated in her advertisements that she was not connected with the plaintiffs' business, the plaintiffs were not entitled to an injunction. *Pomeroy, Lim. v. Scalé*, 22 T. L. R. 795—Buckley, J. And see TRADE NAME.

Guarantee.—See PRINCIPAL AND SURETY and CONTRACT, col. 509.

HABEAS CORPUS.

Jurisdiction—Writ Directed to Person out of

Jurisdiction.—The High Court of Justice has no jurisdiction to issue a writ of *habeas corpus* directed to a person who is out of the jurisdiction of the Court. *Rex v. Pinckney*, 73 L. J. K.B. 475; [1904] 2 K.B. 84; 90 L. T. 468; 52 W. R. 338; 68 J. P. 361; 20 T. L. R. 363—C.A. See EXTRADITION.

HABITUAL INEBRIATES.

Statute.—61 & 62 Vict. c. 60 is the *Inebriates Act*, 1898.

HACKNEY CARRIAGE.

Statute.—7 Edw. 7 c. 55 is the *London Cab and Stage Carriage Act*, 1907.

Licence—Light Railway.—A carriage similar to a tramcar, and used to carry passengers at separate fares over a light railway by virtue of provisional orders made under the Light Railways Act, 1896, is not a hackney carriage within the meaning of the Towns Police Clauses Act, 1847, and the proprietor so using such a carriage does not commit the offence, under section 45 of the Act of 1847, of permitting the carriage to be used as a hackney carriage plying for hire without having obtained the licence required by section 37 of that Act. *Yorkshire Electric Tramways v. Ellis*, 74 L. J. K.B. 172; [1905] 1 K.B. 396; 92 L. T. 202; 53 W. R. 303; 69 J. P. 67; 3 L. G. R. 139; 20 Cox C.C. 795; 21 T. L. R. 163—D.

Standing for Hire without a Licence—"Street."—A railway company provided a cab-stand upon a piece of ground which was their private property subject to a public right of footway along it, and which was metalled and paved like an ordinary street and formed the side approach to one of their stations:—*Held*, first, that the piece of ground was not a "street" within section 3 of the Towns Police Clauses Act, 1847; secondly, that the driver of a carriage for which a licence under the Act had not been obtained, by standing for hire upon the cab-stand, which was within the prescribed distance in a borough, committed no offence under the latter part of section 45 of the Act. *Jones v. Short*, 69 L. J. Q.B. 473; 82 L. T. 197; 48 W. R. 251; 64 J. P. 247; 19 Cox C.C. 472—D.

Plying for Hire.—A cab proprietor, the owner of licensed and unlicensed carriages, solicited customers on the cab rank for his licensed carriages. A party of nine persons came on to the stand and wished a carriage to take them all. There was no licensed carriage there sufficient for this, but the cab proprietor in question stated to the party that he had at his stables a waggonette suitable for their purpose. The party accordingly went there and engaged the waggonette (which was unlicensed) for a drive:—*Held*, that the cab proprietor had not plied for hire with the waggonette within the meaning of section 45 of the Towns Police Clauses Act, 1847. *Cavill v. Amos*, 64 J.P. 309—D.

By-law—Concealment of Number—"Standing or plying for hire"—Carriage Sent out on Special Order.—The term "hackney carriage"

in section 38 of the Towns Police Clauses Act, 1847, includes every wheeled carriage which is in fact used from time to time for the purpose of "standing or plying for hire" in the street. The time during which such a carriage is to be deemed a hackney carriage is not limited to the periods during which it is actually standing or plying for hire. *Hawkins v. Edwards*, 70 L. J. K.B. 597; [1901] 2 K.B. 169; 84 L. T. 532; 49 W. R. 487; 65 J. P. 423; 19 Cox C.C. 692—D.

Negligence of Driver—Liability of Proprietor—Partnership Firm—Unregistered Partner.]—In an action for personal injuries caused by the negligence of the driver of a cab belonging to a partnership firm, it appeared that the licence for the cab under section 6 of the Metropolitan Public Carriage Act, 1869, was granted to one partner in his own name, and he appeared on the register of licences as the proprietor. At the trial of the action the jury found that the registration was made on behalf of the firm:—*Held*, that judgment was rightly entered against an unregistered partner, the liability of cab proprietors by virtue of the London Hackney Carriages Act, 1843, not being limited to registered proprietors. *Gates v. Bill*, 71 L. J. K.B. 702; [1902] 2 K. B. 38; 87 L. T. 288; 50 W. R. 546—C.A.

Cab—Distress for Rent.]—See *Lavell v. Ritchings*, *post*, LANDLORD AND TENANT, col. 1193.

HARBOURS.

See SHIPPING.

HAWKER.

Hawking without Licence—Corporation—"Person."]—A co-operative society registered under the Industrial and Provident Societies Act, 1893, is a "person" within the meaning of section 2 of the Hawkers Act, 1888, and may be convicted under section 6 of that Act if it trades as a hawker without a licence. *Co-operative Drapery and Furnishing Co. v. Bligh*, 4 F. (Just. Cas.) 97—Ct. of Justy.

Person Travelling with Horse and Cart—Selling Oil to Customers—Absence of Previous Orders.]—A person who travels with a horse and cart carrying a cask of oil, and calls at the houses of customers in compliance with their request, and delivers oil there without having received previous orders for any specified quantities, is a "hawker" within the definition of that term in section 2 of the Hawkers Act, 1888, and is required to take out a licence under section 3. *O'Dea v. Crowhurst*, 68 L. J. Q.B. 655; 80 L. T. 491; 63 J. P. 424—D.

Carrying to Sell—Carrying Goods to Shew on Approval with a view to Sell—Previous Request to a Canvasser to send Goods on Approval—Necessity of Licence.]—The respondent was sent out by his employers, who were manufacturers of sewing-machines, with a horse and van in which were some sewing-machines, with instructions to call at certain specified houses in different places and shew the machines on

approval for the purpose of selling them, and he did so. None of the persons in the houses called at had bought or agreed to buy machines, but they had previously been visited by a canvasser, to whom they had expressed a desire to see a machine to decide whether they would purchase it. The machines were shewn at these houses on approval, and if approved of they would be sold there:—*Held*, that the respondent was going "from place to place carrying to sell" within the meaning of section 2 of the Hawkers Act, 1888, and was therefore a "hawker" and required a hawker's licence; and that he was none the less a hawker because he had offered the machines only to persons who had previously been visited by a canvasser. *Holland v. Hall*, 86 L. T. 355; 50 W. R. 525; 66 J. P. 424; 20 Cox C.C. 167—D. And see MARKET.

HEALTH (PUBLIC).

See LOCAL GOVERNMENT; METROPOLIS.

HEIRLOOMS.

See SETTLED LAND.

HERIOTS.

See COPYHOLDS.

HIGHWAY.

See WAY.

HOMICIDE.

See CRIMINAL LAW.

HORSE.

See ANIMAL.

HOSPITAL.

Statute.]—1 Edw. 7 c. 8 is the *Isolation Hospitals Act*, 1901.

HOTCHPOT.

See EXECUTOR, col. 842, AND WILL.

HOTEL.

See INNKEEPER.

HOUSE OF LORDS.

Appeal to.]—See APPEAL.

Peerage.]—See PEERAGE.

HOUSING OF THE WORKING CLASSES.

* **Statute.**—3 Edw. 7 c. 39 is the *Housing of the Working Classes Act, 1903.*

Compensation for Taking Land.—See LANDS CLAUSES ACT.

HUSBAND AND WIFE.

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1. STATUTES.

Colonial Marriages.—6 Edw. 7 c. 30 is the *Colonial Marriages (Deceased Wife's Sister) Act, 1906.*

Deceased Wife's Sister.—7 Edw. 7 c. 47 is the *Deceased Wife's Sister Marriage Act, 1907.*

Marriage.—61 & 62 Vict. c. 58 is the *Marriage Act, 1898.*

— **Legalisation.**—1 Edw. 7 c. 23 is the *Marriages Legalisation Act, 1901.*

— 62 & 63 Vict. c. 27, is the *Marriages Validity Act, 1899.*

— 3 Edw. 7 c. 26 is the *Marriages Legalisation Act, 1903.*

Married Women's Property.—7 Edw. 7 c. 18 is the *Married Women's Property Act, 1907.*

Matrimonial Causes.—7 Edw. 7 c. 12 is the *Matrimonial Causes Act, 1907.*

Provisional Order.—5 Edw. 7 c. 23 is the *Provisional Order (Marriages) Act, 1905.*

2. MARRIAGE.

(a) *Validity.*

Conflict of Laws—Marriage between British Subject and Foreigner—Marriage before British Consul—Invalid by Law of Foreign Spouse's Domicil—Validity in England.—A marriage which has been solemnised between a British subject and a foreigner at a British consulate abroad in conformity with the provisions of the Consular Marriage Act, 1849, has a statutory validity in this country, and will be recognised as valid by the English Court, notwithstanding that the act of marriage has been declared null and void by a competent Court of the country of the foreign spouse's domicil on the ground that, according to the law of such domicil, the British consul was not qualified to receive such act. *Simonin v. Mallac* (29 L. J. P. & M. 97; 2 Sw. & Tr. 67) applied. *Hay v. Northcote*, 69 L. J. Ch. 586; [1900] 2 Ch. 262; 82 L. T. 656; 48 W. R. 615—Farwell, J.

Colonial Marriage—Validity—Expert Evidence.—The validity of a marriage celebrated abroad in a case where the usual expert evidence cannot be obtained may be proved by the evidence of a member of the English Bar who shews that he is well acquainted with the law of the country where the marriage was celebrated for reasons connected with his profession or business. *Wilson v. Wilson*, 72 L. J. P. 53; [1903] P. 157; 89 L. T. 77—Jeune, P.

— **Expert Evidence as to Validity—Restitution of Conjugal Rights.**—Where the parties to a suit for restitution of conjugal rights were married in Hong Kong, and it became necessary to call expert evidence to prove the validity of the marriage according to the law of the colony, —THE COURT, being satisfied that the only acknowledged expert in the law of Hong Kong refused to give evidence except at a fee higher than the petitioner could afford to pay, accepted

an affidavit of a former Governor as to the marriage law of the colony. *Cooper King v. Cooper King*, 69 L. J. P. 33; [1900] P. 65—Gorell Barnes, J.

Foreign Marriage—Proof of—Onus.—Foreign law is always a question of fact for the tribunal in England which has to determine what the law is. Where a magistrate in an application by a wife for a separation order found as a fact that there had been a marriage ceremony between the parties in Russia and that the absence of proof of its registration did not invalidate the marriage, the Court refused to differ from the magistrate's finding and dismissed the appeal. *Carlin v. Carlin*, 70 J. P. 143—D.

— **Proof—Expert Evidence.**—Expert evidence is required to prove the validity of a foreign marriage, even though in a suit previously determined in the Probate and Divorce Division, between the same petitioner and respondent, to annul that marriage, it has been proved and admitted that the marriage was valid upon the assumption that a decree of divorce, upon which the capacity of the parties to contract the marriage depended, was a valid decree. *Bater v. Bater*, [1907] P. 333—Bucknill, J.

Jewish Marriage Abroad—Uncle and Niece—British Subjects Domiciled in England—Validity of Marriage.—The Marriage Act, 1835, which deals with capacity, applies to all persons. The exception in favour of Quakers and Jews in the Marriage Acts, 1836 and 1840, and subsequent Acts, relates only to the formalities of marriage. Where, therefore, a Jew and his niece, both British subjects domiciled in England, went through, in 1876, at Wiesbaden, the form of civil marriage and afterwards of marriage according to the custom of the Jews, and subsequently, the niece having in the meantime been admitted a Jewess in Paris, they there went through the form of marriage according to the Jewish custom, such marriage being valid according to the law in force at Wiesbaden and the Jewish law, it was held that the marriage was not valid according to the law of England. *Lindo v. Belisario* (1 Hag. Cons. 216) and *Reg. v. Millis* (10 Cl. & F. 534) discussed and distinguished. *De Wilton, In re*; *De Wilton v. Montefiore*, 69 L. J. Ch. 717; [1900] 2 Ch. 481; 83 L. T. 70; 43 W. R. 645—Stirling, J.

Marriage before Registrar—Misdescriptions in Notice—False Place of Residence—False Surname—Validity.—A widow was liable to forfeit certain property in the event of her re-marriage. She went through a form of second marriage at a registry office, her surname, condition, and the places of residence of both husband and wife being wrongly stated in the formal notice that was handed in to the Registrar:—*Held*, that, notwithstanding these irregularities, the marriage was valid, and that the estate of the widow in the property had been forfeited. *Rutter, In re*; *Donaldson v. Rutter*, 77 L. J. Ch. 34; [1907] 2 Ch. 592—Swinfen Eady, J.

Ireland—Proof of Marriage in Certificate.—A certificate purporting to be a copy of an entry in a church register in Ireland, and pur-

porting to be signed and certified as correct by the clergyman of the parish, is sufficient to prove the marriage in Ireland according to the law of that country. *Whitton v. Whitton*, 69 L. J. P. 126; [1900] P. 178; 64 J. P. 329—Jeune, P.

Presumption of Marriage from Cohabitation—Rebutting Evidence—Presumption.—Where a man and woman are proved to have lived together as man and wife for a considerable time, the law will presume, unless the contrary is clearly proved, that they were living together in consequence of a valid marriage. *Shepherd, In re*; *George v. Thyer*, 73 L. J. Ch. 401; [1904] 1 Ch. 456; 90 L. T. 249—Kekewich, J.

Where it is proved that there was an intention to marry, and that some form was gone through to perfect that intention, those who claim by virtue of the marriage are not bound to prove that all necessary ceremonies were performed according to law. *Ib.*

Repute—Marriage by—Divided Repute—Illicit Commencement—Evidence—Presumption.—A and B lived together with two children from about 1878 to 1893. They were generally reputed to be husband and wife and the children their lawful children, although there was some evidence dividing the repute. The eldest child, a daughter, was born in 1873 in her maternal grandmother's house, and registered by B in her maiden name. The second child, a son, was born in 1879, while A and B were living together, and was registered in A's name. No record of any marriage could be found:—*Held*, that A and B had been husband and wife, but that the son was their only legitimate child. *Haynes, In re*; *Haynes v. Carter*, 94 L. T. 431—Kekewich, J.

(b) Conditions in Restraint of.

See CONDITION, col. 487.

(c) Promise to Marry.

Promise to Marry on Death of Wife—Legality—Public Policy.—The plaintiff in her statement of claim alleged that the defendant promised to marry her upon the death of his wife, who was then living; that the defendant's wife died subsequently; and that the defendant refused to marry her. The defendant pleaded (*inter alia*) that the alleged promise was contrary to public policy, and was illegal and void:—*Held*, upon the point of law raised upon the pleadings, that a promise by a married man to marry another woman on the death of his wife, the woman knowing that he was a married man, was not necessarily void as being contrary to public policy, and that therefore the action must go to trial. *Wilson v. Carnley* (No. 1), 23 T. L. R. 578—Channell, J.

A promise by a married man to a woman to marry her on the death of his wife, the woman knowing at the time that he is married, is not void as being contrary to public policy. *Wilson v. Carnley* (No. 2), 23 T. L. R. 757—Lord Coleridge, Commissioner. Overruled, 77 L. J. K.B. *Wilson v. Carnley*, [1908] 1 K. B. 729—C.A.

Breach of—Corroboration.]—In an action for breach of promise of marriage, in addition to the evidence given by the plaintiff, a letter was put in evidence written by the defendant to the plaintiff, in which he said: "If I were well would you marry me little girl? Do tell me all now":—*Held*, that the letter was a conditional offer that was accepted by the plaintiff, and that therefore there was evidence under the hand of the defendant of the offer. *Hansen v. Dixon*, 96 L. T. 82; 23 T. L. R. 56—*Bray, J.*

Supervening Insanity—Breach.]—A fortnight before the date fixed for his marriage, a man, feeling that his mind was giving way, wrote to the father of the lady to whom he was engaged, stating that the marriage could not take place at the date fixed. Ten days later he entered an asylum as a voluntary patient, and was shortly afterwards certified and detained as a lunatic. He never recovered, and died in the asylum two years afterwards. After his death the lady raised an action of damages against his testamentary trustees:—*Held*, first, that, as the man had done nothing except postpone the marriage, and had never been able subsequently to fulfil his engagement, the pursuer was not entitled to damages for breach of promise to marry; and secondly, that the pursuer was not entitled to recompense for the loss of salary which she was unable to earn on account of ill-health caused by the marriage not taking place. *Semble* (per the LORD JUSTICE CLERK), that, even if there had been a breach of promise to marry, the breach was, in the circumstances, justifiable. *Hall v. Wright* (29 L. J. Q.B. 43; E. B. & E. 746) commented on. *Liddell v. Easton's Trustees*, [1907] S.C. 154—*Ct. of Sess.*

(d) *Other Matters.*

Contract—Agreement to Leave Share on Death.]—See *Fickus, In re*, 69 L. J. Ch. 161; *ante*, CONTRACT.

Evidence—Administration Suit.]—See *Wigley v. Solicitor to the Treasury*, 71 L. J. P. 115; *post*, WILL.

Foreign Marriage—Validity.]—See INTERNATIONAL LAW.

Marriage Brokage.]—See CONTRACT.

Marriage Settlement.]—See SETTLEMENT.

Proof of.]—See EVIDENCE.

Revocation of Will by.]—See WILL.

3. LEGITIMACY.

Presumption of.]—The presumption of legitimacy in the case of a child born during wedlock is not one *juris et de jure*. The question is one of fact; but the presumption is of enormous strength, and will not be rebutted, in an ordinary case where husband and wife live together, by mere evidence, or even proof, that a person or persons other than the husband had improper relations with the wife. In such a case the law, on grounds of public policy and decency, will not allow an inquiry as to who is the father. *Yool v. Ewing*, [1904] 1 Ir. R. 434—*M.R.*

Action to Obtain Declaration of Illegitimacy—No Claim to Property Involved.]—Where no claim to property or any right legally enforceable is involved, the Court will not entertain an action brought to obtain a declaration that another person is illegitimate. *Ib.*

Child Born in Wedlock—Repudiation by Father of Paternity—Statements by Husband and Wife—Admissibility of Evidence.]—The presumption in favour of the legitimacy of a child born in wedlock, within the usual period of gestation, is a presumption which may be rebutted by appropriate evidence. *Anon. v. Anon.* (22 Beav. 481; 23 Beav. 273) overruled. *Poulett Peerage Claim*, 72 L. J. K.B. 924; [1903] A.C. 395—*H.L. (E.)*

In a suit to perpetuate testimony, Earl Poulett, who died in 1899, deposed that he had never had intercourse with his wife (who less than six months after the marriage gave birth to a full-grown child) before marriage; that soon after the marriage his wife confessed that she was pregnant by another man, and that thereupon he separated from his wife and never acknowledged the child:—*Held*, that this evidence was admissible against the child's legitimacy. *Ib.*

Effect of Wife's Adultery.]—The adultery of the wife, although throwing the greatest doubt upon the paternity of the child, is not conclusive. It must be shewn that the husband could not have had access which might result in his paternity; otherwise the presumption of sexual intercourse between husband and wife, and consequently of legitimacy of the child, must prevail. *Gordon v. Gordon and Granville Gordon*, 72 L. J. P. 33; [1903] P. 141—*Jeune, P.*

Trial of Issue.]—See *Evans v. Evans* (No. 1), 73 L. J. P. 87; [1904] P. 274—*Gorell Barnes, J.*

4. JUDICIAL SEPARATION AND DIVORCE.

(a) *Jurisdiction.*

Domicil—Residence—Locus delicti.]—If the parties are resident within the jurisdiction at the time of the beginning of the suit, the Court has jurisdiction to grant a wife a judicial separation on the ground of her husband's cruelty, although the matrimonial domicile is foreign, and although the acts of cruelty were committed in foreign countries. If the Court grants a wife a judicial separation under such circumstances, it has also power to give her the custody of the children of the marriage. *Armstrong v. Armstrong*, 67 L. J. P. 90; [1898] P. 178; 78 L. T. 689—*Gorell Barnes, J.*

Practice.]—There is no necessity, in spite of Divorce Rule 220, to allege a separate domicile for the wife, unless it be different from that of the husband. *Clark, In the matter of*, 75 L. J. P. 7; 22 T. L. R. 158—*Bargrave Deane, J.*

Foreign Court—Decree of Divorce of—Suppression of Material Facts—Recognition of Decree by English Court.]—An English Court can recognise as binding and give effect to the decree of a foreign Court dissolving a marriage, though the decree has been obtained by fraud

or the suppression of material facts, the decree being good in the foreign country until set aside and being one which affects the status of the parties. *Bater v. Bater*, 21 T. L. R. 517—Gorell Barnes, J. And see *Ogden v. Ogden*, 77 L. J. P. 34; [1903] P. 46—C.A., and INTERNATIONAL LAW.

Parties Resident in England but Domiciled Abroad—Proceedings for Divorce in Foreign Country—Stay of Proceedings.—A wife brought a suit in this country against her husband for a judicial separation upon the ground of her husband's cruelty and adultery. The domicile of the parties was German, but their matrimonial residence was in England. The husband subsequently took proceedings in Germany for dissolution of marriage upon the ground of "wifely disobedience" on her part in refusing to dismiss her medical attendant; and he applied to stay the suit in this country pending the hearing of the German suit for service:—*Heidl*, that the Court had jurisdiction to entertain the suit for judicial separation, and no reason had been shown for a stay. *Von Eckhardstein v. Von Eckhardstein*, 23 T. L. R. 539—Bargrave Deane, J. Appeal withdrawn, 23 T. L. R. 593.

(b) General Principles.

Duty of Petitioner to Place Material Facts before the Court.—It is the duty of a petitioner to place all material facts before the Court. To do otherwise is a fraud upon the Court. *Evans v. Evans*, 75 L. J. P. 27; [1906] P. 123; 94 L. T. 616; 22 L. J. 322—Gorell Barnes, P.

Unreasonable Delay—Respondent in Lunatic Asylum and not Expected to Live.—Where a husband, in June, 1899, filed a petition for dissolution, alleging adultery committed as far back as 1888, the fact that the respondent was insane and had been confined in a lunatic asylum for many years, and that the husband was in constant expectation of release from the marriage by her death, was held to be a sufficient answer to a plea of unreasonable delay. *Johnson v. Johnson* 70 L. J. P. 44; [1901] P. 193; 84 L. T. 725—Jeune, P.

Condonation—Return to Cohabitation—Effect of, on Cause of Complaint.—Condonation is a doctrine not limited to the Ecclesiastical Courts or their successor, the Probate, Divorce, and Admiralty Division of the High Court of Justice, nor is it the creation of statute, but a broad general principle of law. *Williams v. Williams*, 73 L. J. P. 31; [1904] P. 145; 90 L. T. 174; 68 J. P. 188; 20 T. L. R. 213—D.

Wife's Petition—Husband Appearing under Protest—Act on Petition Alleging Scotch Domicil—Subsequent Proceedings for Divorce Commenced by Husband in Scotch Courts—Injunction.—A wife commenced proceedings for a judicial separation in England against her husband. He appeared under protest and filed his act on petition alleging a Scotch domicil. Before the act on petition came on for hearing the husband commenced proceedings against the wife in the Scotch Courts for a divorce. The Court, on the motion of the wife, granted her an injunction, with costs, restraining the

husband from proceeding in Scotland until the hearing of the act on petition in this country, or until further order. *Christian v. Christian*, 67 L. J. P. 18; 78 L. T. 86—Jeune, P.

(c) Grounds for.

(i.) Adultery.

Uncorroborated Evidence of Petitioner.—As a general rule of practice the Court will not act upon the uncorroborated evidence of a petitioner; but there is no rule of law which prohibits it from acting on such evidence if it is satisfied that the story put forward is a true one and that there is no collusion. *Curtis v. Curtis*, 21 T. L. R. 676—Bargrave Deane, J.

Uncorroborated Confession of Adultery.—There is no absolute rule that the Court will not act upon an uncorroborated confession of adultery. The true test is whether the Court is satisfied from the surrounding circumstances that the confession is one of truth; but it is not invariably necessary that such surrounding circumstances should take the form of independent corroborative evidence. *Getty v. Getty*, 76 L. J. P. 158; [1907] P. 334—Bucknill, J.

Particulars of Adultery.—Under an order to give further and better particulars of the dates and places when and where alleged acts of adultery extending over ten months were committed, the petitioner must give the best particulars which he can extract from the witnesses upon whom he relies to prove his case. It is not a sufficient compliance with such an order to allege generally that the respondent and co-respondent were constantly meeting and were in the respondent's boudoir and bedroom together, and that they were frequently out riding and driving alone together, from which the Court will be asked to infer that they committed adultery. *Hartopp v. Hartopp*, 71 L. J. P. 78; 87 L. T. 188—C.A.

Adultery of Wife—Condonation by Husband—Revival by Wife's Desertion.—The conditional character of condonation—that is, its dependence on the proper observance of the relationship of marriage and future abstinence from any matrimonial offence on the part of the spouse whose guilt has been condoned—is a doctrine applying equally to both sexes. *Copsey v. Copsey*, 74 L. J. P. 40; [1905] P. 94; 91 L. T. 363; 20 T. L. R. 728—Gorell Barnes, J.

Desertion by a wife for the statutory period of two years will revive her antecedent, though condoned, adultery, and entitle her husband to dissolution of his marriage. *Houghton v. Houghton* (72 L. J. P. 31; [1903] P. 150) followed. *Ib.*

Deed of Separation—Covenant not to take Proceedings for Misconduct Previous to Date of Deed—Subsequent Adultery by Husband—Deed not Pleading in Answer to Wife's Petition—Revival.—A husband was guilty of cruelty towards his wife, in consequence of which they separated in 1897. A deed of separation was executed whereby they covenanted, among other things, that neither of them should take any proceeding for divorce or judicial separation against the other "in respect of any misconduct

which has heretofore taken place." There was a further provision that if they became reconciled, or if the marriage should be afterwards dissolved or a judicial separation granted "by reason of any misconduct on the part of either occurring after the date" of the deed, the covenant should be void. The respondent committed adultery subsequently to the date of the deed, and did not set up the deed in answer to his wife's petition:—*Held*, that, inasmuch as the respondent had not pleaded the deed, the case was distinguishable from *Rose v. Rose* (52 L. J. P. 25; 8 P. D. 98), and that the respondent's previous cruelty was revived by his subsequent adultery. The Court granted the wife a decree nisi for a dissolution of her marriage. *Dowling v. Dowling*, 68 L. J. P. 8; [1898] P. 228—Gorell Barnes, J.

Foreigners—Residence within Jurisdiction—Particulars.—An action for judicial separation, on the ground of the adultery of her husband, is maintainable by an English lady whose husband is a German, the parties being domiciled abroad, but the matrimonial residence being in England. The petitioner, having made a general charge of adultery against the respondent, was granted leave to deliver particulars of the charge, though the respondent did not ask for particulars. *E. v. E.*, 23 T. L. R. 364—Bargrave Deane, J.

(ii.) *Cruelty.*

False Charge against Wife—Injury to Health.—A husband left his wife and children without any means of support, and afterwards filed a petition against his wife for a dissolution of his marriage on the ground of her adultery, alleging that she had given birth to a child after he had left her, of which he was not the father. Upon proof being given that the allegation had had the effect of injuring the health of the wife, it was held that such conduct on the part of the husband constituted legal cruelty so as to entitle the wife to relief. *Jeapes v. Jeapes*, 89 L. T. 74—Jeune, P.

Wife in Delicate State of Health.—The petitioner was a lady of delicate health, and was so to her husband's knowledge. On many occasions her husband had shaken her—sometimes with considerable violence—and when he was violent towards her she became ill; he had also threatened her with a pistol, and though it did not appear that he intended to carry his threats into execution, his threats tended to injure her in her health; he had also taken her roughly up in his arms and carried or dragged her upstairs so violently that she swooned, whereby she was injured in her health:—*Held*, that the husband had been guilty of legal cruelty. *Barrett v. Barrett*, 20 T. L. R. 73—Buckmill, J.

Adultery of Husband with Servants in House—Breakdown of the Health of the Wife.—If the conduct of the husband is such as to cause a breakdown of the health of the wife, by reason of the disgrace and shock arising out of a conviction of the husband under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), the Court will hold this to constitute legal cruelty on the part of the husband, and will grant a decree nisi to the wife, the adultery having been also proved. *Thompson v. Thompson*, 85 L. T. 172—Jeune, J.

Separation Deed—Acts of Cruelty Subsequent to Deed.—A husband and wife separated under a separation deed which provided that the wife should not take any proceedings of any sort against her husband in respect of anything done up to that date. Subsequently, while they were living apart, the husband committed two acts of cruelty towards his wife:—*Held*, that she was not precluded by the separation deed from suing for a judicial separation. *Kunski v. Kunski*, 23 T. L. R. 615—Buckmill, J.

Knowledge of Habitual Drunkenness.—If a woman marry a drunkard, with full knowledge that he is a drunkard, she is not on that account to be held to take, without redress, the risk of anything that may happen to her as a result of his drunken habits. *Walker v. Walker*, 77 L. T. 715—Gorell Barnes, J.

Charges of Pre-marital Misconduct—Admissibility of Evidence.—In a case where a wife charges her husband with cruelty, and complains (*inter alia*) that he has made against her in the presence of other persons charges of pre-marital misconduct, which he stated to her he had discovered some time after the marriage, although documents may be admitted as tending to prove the *bona fides* of the husband in making the charges, yet neither oral evidence nor documents are admissible in proof of the facts alleged by the husband against the wife, unless he himself be called to state upon oath that he believed and acted upon the reports which reached him as to his wife's former conduct. *Ib.*

Particulars—Persons.—Where a wife alleged acts of cruelty against her husband, such acts consisting partly of abusive language alleged to have been used by him to her in the presence of servants, THE COURT, confirming the decision of the Registrar, ordered the wife to give particulars of the names of the servants in whose presence it was alleged the abusive language had been used by him to her. *Bishop v. Bishop*, 70 L. J. P. 93; [1901] P. 325; 85 L. T. 173—Jeune, P.

Evidence—Statements to Third Persons.—A witness called to prove a husband's cruelty may be asked whether the wife made a complaint about the husband on a certain occasion. *Berry v. Berry*, 78 L. T. 688—Jeune, P.

Corroboration—Previous Finding of Cruelty by Court of Summary Jurisdiction.—The amount and nature of independent evidence necessary to corroborate a party claiming relief on the ground of cruelty depends upon the circumstances of each particular case. Where a Court of summary jurisdiction has previously acted upon the same charges of cruelty on an application for a separation order under the Summary Jurisdiction (Married Women) Act, 1895, its order, when produced on the trial of a subsequent petition alleging the cruelty, may be accepted in the Divorce Division as sufficient corroboration of the party claiming relief, if the Court is satisfied that the order was obtained on proper materials and the absence of other corroborative evidence is sufficiently accounted for. *Judd v. Judd*, 76 L. J. P. 120; [1907] P. 241; 23 T. L. R. 538—Bargrave Deane, J.

(iii.) *Desertion.*

What is—By Whom Committed.]—Desertion is not to be tested merely by ascertaining which of the parties left the matrimonial home first. That fact may be immaterial. The party who by his or her act intends bringing the cohabitation to an end commits the desertion. There is no substantial difference between a husband who puts an end to cohabitation by leaving his wife and a husband who puts an end to it by persisting in a course of conduct which obliges his wife to leave him. *Sickert v. Sickert*, 68 L. J. P. 114; [1899] P. 278; 81 L. T. 495; 48 W. R. 268—Gorell Barnes, J.

What Amounts to.]—A husband, a member of a firm of solicitors that was about to become bankrupt for over 300,000*l.*, left England and could not be traced, in consequence of which a warrant was issued for his arrest. Shortly before this he had been co-respondent in a divorce suit, in which the jury were discharged, being unable to agree. At a final interview with his wife he told her he was ruined and could not bear the disgrace and scandal, and must go away for a few months till the matter had blown over. She begged him to remain, but he declined to do so. At the time she thought his remarks applied to the divorce suit, not knowing of his financial difficulties. She never saw him again. About a year later he wrote asking for assistance, and begging her to reply through his brother. Beyond this he neither then nor at any other time gave her any clue to his whereabouts, of which she was entirely ignorant. Having discovered that before leaving England he had been carrying on an adulterous intrigue with an actress, she petitioned for a dissolution of her marriage on the ground of her husband's adultery coupled with desertion after he had been away from her for the full statutory period of two years:—*Held*, that the respondent's conduct amounted to desertion. *Drew v. Drew* (57 L. J. P. 64; 13 P. D. 97) followed. *Wynne v. Wynne* (No. 1), 67 L. J. P. 5; [1898] P. 18; 46 W. R. 560—Jeune, J.

A husband, shortly after deserting his wife, had requested her to resume cohabitation, which request the wife disregarded as not made *bona fide*, and had, on the few isolated occasions on which they met casually, disregarded her or made insulting gestures, but not otherwise communicated with her for nine years:—*Held*, that the facts constituted such a sufficient desertion as coupled with adultery to give the wife a right to a divorce. *Martin v. Martin* (No. 2), 78 L. T. 568—Gorell Barnes, J.

Unreasonable Denial of Marital Rights—“Reasonable excuse”—Adultery of Husband.]—A wife has no right without cause to refuse to allow her husband to have sexual intercourse with her; and if she refuses to live under the same roof with him except upon his undertaking not to exercise his full marital rights, he is justified in separating himself from her, and is not guilty of desertion “without reasonable excuse” even though he may have committed adultery while separated from her. *Synge v. Synge*, 70 L. J. P. 97; [1901] P. 317; 85 L. T. 83—C.A.

Husband Found to have Committed Adultery—Wife Guilty of Desertion—Decree of Judicial Separation in Favour of Wife.]—Desertion by a wife is no bar to her obtaining a decree for judicial separation on the ground of her husband's adultery. Whether “conduct conducing to adultery” is or is not a bar to a wife obtaining a decree of judicial separation has not yet been decided, but, in any case, refusal by a wife of marital rights to her husband is not “conduct conducing” so as to justify or excuse the commission of adultery by the husband, at all events to the extent of amounting to a bar to relief. *Duplany v. Duplany* (61 L. J. P. 49; [1892] P. 53) followed. *Id.*

Husband Willing to Live with Wife, but Refusing to give up Adulterous Intercourse.]—A husband habitually committed adultery with a servant in the house in which he was cohabiting with his wife. Upon the wife discovering his adultery she offered to forgive him if he would give up the *liaison*. He declined to do so, or even to discharge the servant. The wife then left her home. The husband went after her, and endeavoured to persuade her to return. She offered to do so if he would give up the *liaison*, which he again refused to do. She continued to live apart from him for more than two years:—*Held*, that the husband had deserted his wife. *Koch v. Koch*, 68 L. J. P. 90; [1899] P. 221; 81 L. T. 61—Gorell Barnes, J.

A wife is not bound to continue in cohabitation with a husband who is carrying on an adulterous intercourse, and if she is willing to continue to live with him provided he will give it up, and he refuses to do so, and she thereupon withdraws from cohabitation, the husband must be taken to intend the consequences of his own act, the situation produced is the same as if he had left her, and, if the attitude of the parties remain the same for two years, the offence of desertion contemplated by the statute is complete. *Graves v. Graves* (33 L. J. P. 66; 3 Sw. & Tr. 350), *Dickinson v. Dickinson* (62 L. T. 330), *Pizzala v. Pizzala* (68 L. J. P. 91*n*), and *Koch v. Koch* (68 L. J. P. 90; [1899] P. 221) considered. *Id.*

Separation Deed.]—A husband, before leaving his wife, told her that, if she would sign a deed of separation, he would make her an allowance of *l.* a week, otherwise he would give her nothing. He thereupon took her to his solicitor's office, where the deed of separation was already drawn up. The solicitor told her that the only way to get any money from her husband was to sign the deed. At first she refused to do so, but at length consented, her child being then three months old. She had no independent advice. She received the allowance under the deed for some years. The husband having subsequently committed adultery, she brought an action for divorce alleging adultery and desertion:—*Held*, that, on the facts, the wife was not a consenting party to the deed, having been forced into signing it by the circumstances of her position, and that therefore she was not prevented from relying on the desertion. *Adamson v. Adamson*, 23 T. L. R. 434—Bucknill, J.

Parties Living Apart—Discontinuance of Allowance by Husband.]—A husband and wife

separated under a verbal agreement, the husband agreeing to pay the wife a weekly allowance. While they were thus living apart, the wife alleged that conjugal relations continued between them. Subsequently, the husband having refused to continue the allowance (he alleging that she had committed adultery), the wife took out a summons for desertion. Without calling upon the husband, the magistrate dismissed the summons on the ground that in view of the verbal agreement for separation there had been no desertion by the husband:—*Held*, that the case must go back to the magistrate, as there was evidence of desertion. *Edwards v. Edwards*, 69 J. P. 344—D.

Cohabitation—What is.]—Cohabitation does not necessarily imply the daily and nightly residence together of a husband and wife under the same roof. Circumstances of life, such as business duties, domestic service, and other things, may separate husband and wife, and yet notwithstanding there may be an existing state of cohabitation. *Huxtable v. Huxtable*, 68 L. J. P. 83—D.

— Separation Caused by Party Complaining of Desertion—Refusal of Judicial Separation—Remedy by Restitution of Conjugal Rights—Petitioner's Conduct Inconsistent with Complaint of Desertion.]—Cohabitation of husband and wife does not necessarily mean that they should be under one roof, but in order to maintain cohabitation no suspension must have taken place of such conjugal relations as have normally existed; whichever of them brings these to an end cannot afterwards complain of desertion by the other of them. *Bradshaw v. Bradshaw* (66 L. J. P. 31; [1897] P. 24) approved and explained. *Kay v. Kay*, 73 L. J. P. 108; [1904] P. 382; 91 L. T. 360; 20 T. L. R. 521.—Gorell Barnes, J.

A finding by a jury of desertion as having commenced under such circumstances subsequent to the separation is irrelevant, and a judicial separation will not be granted. The available remedy is by restitution of conjugal rights. The party complaining of desertion must have so acted towards the other party as to permit his or her return during the statutory period of two years. The filing, prosecution, and maintaining of a petition for dissolution of marriage are proceedings which prevent such return by shewing an unwillingness to receive back, and a party resorting to them cannot subsequently complain of desertion. *Ib.*

No Previous Cohabitation.]—A husband and wife were married at a registry office in Edinburgh. From there they drove immediately in a carriage alone together to the Roman Catholic cathedral, where the religious ceremony was performed, after which they walked arm in arm to the church door. There they parted, and never met again except at a railway station for a few minutes. They never cohabited together and, except as above, were never alone together after the ceremony. The marriage was never consummated. The wife's father refused to consent to any cohabitation between them until the husband was in a position to keep his wife. The husband made no attempt to cohabit with his wife, and was not heard of for some years, when it was discovered that he was living in

adultery with another woman. During all this time the wife was always ready and willing to cohabit with her husband, until she discovered his adultery. On the wife's petition for a dissolution of her marriage on the ground of her husband's adultery and desertion,—*Held*, that the respondent had been guilty of desertion, although there had been no previous cohabitation between the parties. *De Laubenque v. De Laubenque*, 68 L. J. P. 20; [1899] P. 42; 79 L. T. 708—Jeune, P.

Separation Order by Justices—Two Years' Desertion before Order.]—A wife having been deserted by her husband for more than two years, obtained from a Court of summary jurisdiction a separation order under the Summary Jurisdiction (Married Women) Act, 1895. She subsequently discovered that her husband had both before and after the separation order committed adultery. She then filed a petition for divorce:—*Held*, that, as there had been desertion for two years and upwards at the time when the separation order was made, and as her husband had then committed adultery, the jurisdiction of the Court was complete, and that, as she was unaware of her husband's adultery at the time when she obtained the separation order, the latter was no bar to her setting up the desertion with his adultery as a ground for divorce. *Lett v. Lett*, 23 L. T. R. 569.—Bucknill, J.

— Payment of Maintenance—Adultery of Husband.]—A husband deserted his wife, and she applied to Justices under the Summary Jurisdiction (Married Women) Act, 1895, for an order upon him for the payment to her of an allowance. The Justices made an order for separation and also for the payment of an allowance. The husband, who was living in adultery with a woman, made some payments under the order, and some years afterwards he was committed for non-payment of arrears of the allowance, and the wife filed a petition for divorce upon the ground of his adultery and desertion. Subsequently she agreed to accept a smaller sum than the full amount due for the arrears of the allowance, and he was released from prison:—*Held*, that after the order of the Justices there was no desertion, and that the petition for divorce upon that ground must fail. *Taylor v. Taylor*, 23 T. L. R. 566.—Bucknill, J.

Effect of Non-compliance with Order for Restitution of Conjugal Rights—Condonation—Revival.]—The statutory desertion arising under section 5 of the Matrimonial Causes Act, 1884, from non-compliance with a decree for restitution of conjugal rights has all the consequences of ordinary desertion for two years, and is therefore capable after its condonation of revival by subsequent adultery. *Paine v. Paine*, 73 L. J. P. 1; [1903] P. 263; 89 L. T. 588; 52 W. R. 271; 20 T. L. R. 12—Gorell Barnes, J.

Revival of Condoned Adultery by Subsequent Desertion.]—Desertion will operate equally with cruelty or adultery to revive an antecedent matrimonial offence which has been condoned, notwithstanding that desertion is constituted an offence under the Divorce Act, 1857, for certain specified purposes, and revival is not one of them. *Houghton v. Houghton*, 72 L. J. P.

81; [1903] P. 150; 89 L. T. 76; 52 W. R. 272—Jeune, A.

Where a wife commits adultery and is afterwards forgiven and taken back by her husband, but subsequently to the condonation she deserts him, such desertion revives the condoned adultery, and entitles the husband to petition for a dissolution of his marriage. *Houghton v. Houghton* (72 L. J. P. 31; [1903] P. 150) considered and made applicable to the case of a husband as well as that of a wife. *Copsey v. Copsey*, 91 L. T. 363; 20 T. L. R. 728—Gorell Barnes, J.

(iv.) *Other Grounds.*

Rape—Indecent Assault—Conviction of Husband—Breakdown of Health of Wife—Conduct Amounting to Cruelty.—A wife may obtain a divorce from her husband for rape, though he has been prosecuted and convicted for indecent assault only. Alternatively a wife will be entitled to a decree of judicial separation on the ground of cruelty if the conduct of the husband has been such as to cause a breakdown of her health, by reason of the disgrace and shock arising out of his conviction. *Coffey v. Coffey* (see below) and *Thompson v. Thompson* (85 L. T. 172) followed. *Bosworthick v. Bosworthick*, 86 L. T. 121; 50 W. R. 217—Gorell Barnes, J.

— **Respondent Convicted at Assizes of Criminal Assault only.**—Where a respondent was indicted under the Criminal Law Amendment Act, 1884, s. 5, sub-s. 1, for a criminal assault, and convicted of that offence only and sentenced to eighteen months' imprisonment with hard labour, THE COURT, being satisfied on the evidence that his conduct amounted to rape, found that he had actually been guilty of that offence, and pronounced a decree *nisi* for the dissolution of his marriage on that ground on his wife's petition. *Coffey v. Coffey*, 67 L. J. P. 86; [1898] P. 169; 78 L. T. 796—Gorell Barnes, J.

Sodomy with Wife—Matrimonial Offence.—Sodomy committed by a husband with his wife against her consent is a matrimonial offence within section 27 of the Matrimonial Causes Act, 1857. *C. v. C.*, 22 T. L. R. 26—Bargrave Deane, J.

(d) *Discretion of Court.*

(i.) *Generally.*

Petitioner Guilty of Adultery—Principles on which Discretion will be Exercised.—The object of the Legislature in enacting section 31 of the Matrimonial Causes Act, 1857, which gives the Court a discretion to grant a decree of dissolution of marriage to a petitioner guilty of adultery, was that the old practice of the House of Lords on Divorce Bills should be followed in this respect rather than the maxim of *compensatio criminis* adapted from the civil law by the Ecclesiastical Courts. *Constantinidi v. Constantinidi*, 72 L. J. P. 82; [1903] P. 246; 89 L. T. 340; 52 W. R. 190—Jeune, P.

There is now no specific limitation to the discretion of the Court, and the category of cases

for its exercise is not a fixed one. Whilst the discretion is judicial and not arbitrary, the class of cases for its exercise may from time to time be extended. The discretion cannot on principles of justice be exercised in favour of a petitioner—whose guilt has in any serious degree contributed to the misconduct of the respondent; nor is a respondent to be allowed to evade the consequences of misconduct by alleging misconduct of the petitioner for which the respondent has been in any serious degree responsible. *Symons v. Symons* (66 L. J. P. 81; [1897] P. 167) followed. *Ib.*

A wife who leaves her husband because she has transferred her affections to another man, and whose husband correctly assumes this to be so, is in a serious degree responsible for the subsequent misconduct of the husband, and will not be allowed to evade the consequences of her own misconduct by alleging that of the husband. *Ib.*

Adultery of Petitioner—Principle on which Court Acts.—The guiding principle on which the Court will exercise its discretion under section 31 of the Matrimonial Causes Act, 1857, in favour of a petitioner guilty of adultery, is that the Court must have regard not only to the rights and liabilities of the matrimonial person wronged and the wrongdoer respectively, but also to the interests of society and public morality. It is insufficient to excuse the adultery of a petitioner that a separation prior to such adultery was brought about by the conduct of the respondent. *Constantinidi v. Constantinidi* (72 L. J. P. 82; [1903] P. 246) questioned. *Evans v. Evans*, 75 L. J. P. 27; [1906] P. 125; 94 L. T. 616; 22 T. L. R. 322—Gorell Barnes, P.

The petitioner was an actress, and was at the time of her marriage sixteen years old and an orphan. The respondent seduced her and afterwards married her; he took her to various places and compelled her to obtain money by prostitution, he taking the money and ill-treating her. After about two years she ran away, and while away occasionally obtained money by prostitution, as she was destitute. The Court held that the facts of the case justified it in pronouncing a decree in the petitioner's favour, notwithstanding her adultery. *Dodson v. Dodson*, 54 W. R. 220—Bargrave Deane, J.

Suppression of Material Fact—Refusal to Exercise Discretion of Court in Favour of Petitioner Guilty of Wilful Suppression—Adultery of Wife Brought About by Coercion and Threats of Husband.—Although the adultery of a petitioner is not an absolute bar to his or her suit, and may be such as the Court in the exercise of its discretion would ordinarily relieve against, such adultery is a material fact, and should be disclosed by the petitioner. The wilful suppression of such adultery, and the deception practised on the Court by such suppression, are reasons for the refusal of the Court to exercise its discretion. It is immaterial that such adultery on the part of a wife was brought about by the coercion and threats of her husband. *Roche v. Roche*, 74 L. J. P. 50; [1905] P. 142; 92 L. T. 668; 21 T. L. R. 332—Bargrave Deane, J.

Semble, the undisclosed adultery of a petitioner, when brought before the notice of the Court by the King's Proctor as a material fact which has been suppressed, is on a par with collusion, although the latter would have been an absolute bar at the first trial. *Ib.*

Adultery of Husband Petitioner.]—Where a wife left her husband and some years afterwards he committed adultery with another woman, the COURT, on the husband's petition for dissolution of marriage on the ground of his wife's adultery, in the exercise of its discretion in the circumstances of the case refused to make a decree, and dismissed the petition. *Constantinidi v. Constantinidi* (72 L. J. P. 82; [1903] P. 246) not followed. *Todd v. Todd*, 23 T. L. R. 9—Bargrave Deane, J.

Husband Continuing to Live with Second Wife after Knowledge that First Wife Alive—No Reasonable Grounds for Believing First Wife Dead.]—In a petition for divorce by a husband it appeared that the parties were married in 1865, that they lived together till 1874, when the wife left the petitioner owing to his straitened circumstances and went to live with her brother-in-law. Subsequently she wrote to him that she was dying, and this was corroborated by a letter from her sister-in-law. He afterwards heard from his mother that his wife had died. Believing her to be dead, he re-married in 1875, and did not discover until 1887 or 1888 that the first wife was still alive. Enquiries were then made which shewed she had gone through the form of marriage with another man in 1882:—*Held*, on the evidence, that the petitioner had no reasonable grounds for believing his first wife to be dead, and that having lived with the second wife for a number of years after knowing of the first wife's adultery, and having delayed so long in presenting his petition, it was not a case in which the Court would exercise its discretion by granting relief under section 31 of the Matrimonial Causes Act, 1857, and that the petition should therefore be dismissed. *Pegg v. Pegg*, 20 T. L. R. 353—Gorell Barnes, J.

Husband's Petition—Adultery of Petitioner—Adultery after Filing Petition for Divorce—Warning by Solicitor.]—The petitioner and respondent, who were married in 1872, lived together till 1882, when the wife disappeared. In 1898 the petitioner, in the honest belief that his wife was dead, formed a *liaison* with a woman, which continued to April, 1903, when the petitioner learned that the respondent and co-respondent were living together in Australia, whereupon he filed his petition for divorce. In his evidence the petitioner admitted that he had had intimate relations on several occasions with the woman with whom he had had this *liaison* since the petition had been filed, notwithstanding that his solicitors had warned him not to renew his relations with her *pendente lite*:—*Held*, that the Court would not exercise its discretion in favour of the petitioner, and that the petition must be dismissed. *Hynes v. Hynes*, 20 T. L. R. 781—Gorell Barnes, J.

Respondent found Guilty of Adultery—Petitioner Guilty of Cruelty.]—The discretion conferred upon the Court by section 31 of the

Matrimonial Causes Act, 1857, is not absolute or arbitrary, but judicial. Where a wife has been found guilty of adultery and at the same time the husband has been found guilty of cruelty, the principle upon which the Court ought to act in considering whether the husband's cruelty is of such a nature as to constitute a bar to relief, so as to prevent it from exercising its discretion in its favour, turns, as a general rule, on the consideration of the question whether or no the petitioner's cruelty has in any way conduced to the wife's adultery. Such, at all events, is the effect of the decisions of the House of Lords previous to the passing of the Act of 1857, and the framers of that Act must be deemed to have had those decisions in view in drafting section 31. *Pryor v. Pryor*, 69 L. J. P. 99; [1900] P. 157—Jeune, P.

Nevertheless, the exercise of its discretion by the Court is not absolutely limited by this general rule, and there may be cases where the cruelty is of so wanton and unprovoked a character that, even though it has not conduced to the adultery of the respondent, the Court ought to refuse to grant a divorce. *Ib.*

Although it is usual to put a petitioner upon terms where the Court grants him relief under the above circumstances, there is no general rule as to what such terms should be. The Court will consider every case on its own merits, and make such order as may be best for the benefit of the parties and the children of the marriage. *Ib.*

Husband Petitioner Guilty of Cruelty—Respondent Guilty of Adultery.]—In order that the Court should exercise its discretionary power under section 31 of the Matrimonial Causes Act, 1857, to deprive a husband, petitioning for a divorce on the ground of his wife's adultery, of his decree, on the ground that he has himself been guilty of cruelty, it is not of itself a material circumstance that the conduct of the petitioner caused the separation of the parties antecedent to the adultery of the wife. The cruelty of the husband must conduce to, if it does not cause, the adultery of the wife; and if that adultery is, in the opinion of the Court, brought about by other causes than the cruelty of the husband—for example, the habits and inclination of the wife—the husband who has been guilty of cruelty is nevertheless entitled to his decree. *Pryor v. Pryor* (69 L. J. P. 99; [1900] P. 157) followed. *Squire v. Squire*, 74 L. J. P. 1; [1905] P. 4; 92 L. T. 472; 21 T. L. R. 41—Jeune, P.

Husband's Petition—Wife not Appearing—Husband formerly Convicted of Desertion—Separation and Allowance—Subsequent Adultery of Wife.]—Where a husband who presents a petition for a dissolution of his marriage has been previously convicted of desertion under the Summary Jurisdiction (Married Women) Act, 1895, the Court will exercise its discretion as to granting a decree dissolving his marriage. The mere fact of conviction will not be sufficient to establish a bar. The whole circumstances of the case will be considered, and if the Court is of opinion that the petitioner acted upon reasonable grounds he will not be deprived of the relief prayed for. *Lloyd v. Lloyd*, 84 L. T. 723—Jeune, P.

(ii.) *Where Conduct conducing to Adultery.*

Antecedent Misconduct.]—Where a wife has committed several acts of adultery with a co-respondent, and the husband has been guilty of conduct conducing to some of these acts, the husband will not lose his right to a divorce if the first of these acts occurred prior to any such conduct. *Millard v. Millard*, 78 L. T. 471—Gorell Barnes, J.

— Necessary Consequence to Adultery.]—To enable the Court to exercise its discretion in favour of a wife who is petitioning for a divorce and who has herself committed adultery, she must shew that her adultery was the necessary and reasonable consequence of her husband's conduct. *Tulke v. Tulke*, 23 T. L. R. 120—Gorell Barnes, P.

— Desertion by Petitioner Conducing to Adultery of Respondent—Amended Prayer for Judicial Separation—Desertion as a Bar to Judicial Separation on the Ground of Adultery Considered.]—Desertion not having been a matrimonial offence in the Ecclesiastical Courts, it is necessary, in considering how far it might be a bar to a petition for judicial separation, to consider how far a party who has been guilty of it has thereby conduced to the guilt of the other, it being an apparent principle of the Ecclesiastical Courts to refuse relief to a petitioner guilty of such conduct. Whatever might be the effect of mere desertion, desertion directly conducing to the adultery of the other party bars a petitioner guilty of such desertion from a claim to judicial separation. *Hodgson v. Hodgson*, 74 L. J. P. 140; [1905] P. 233; 93 L. T. 446; 53 W. R. 623; 21 T. L. R. 601—Gorell Barnes, P.

Adultery—Discretion of Court.]—A wife who had been driven by her husband's threats and cruelty to earn money by prostitution for his benefit left him in 1890, and from 1892 to 1895 cohabited with another person. From that date to the time of filing a petition for dissolution in 1899, on the ground of her husband's adultery and cruelty, she had led a respectable life:—*Held*, that, under the circumstances, her misconduct was the continuing result of the original misconduct of her husband, and that, although she was not under his control at the time, nevertheless his misconduct had conduced to her adultery from 1892 to 1895, and therefore the Court was justified in exercising the discretion conferred by section 31 of the Matrimonial Causes Act, 1857, and granting a decree in her favour. *Symons v. Symons* (66 L. J. P. 81; [1897] P. 167) followed. *Burdon v. Burdon*, 69 L. J. P. 118—Gorell Barnes, J.

Delay.]—In a petition for divorce by the wife it appeared that some time after her marriage with the respondent he had been guilty of various acts of misconduct. They lived together, however, after these acts had been committed, and then separated by mutual consent. Shortly after this separation the respondent asked the petitioner to return to live with him, and because she would not promise to do so he assaulted and pushed her. After this interview she went to live with another man, as, she said, she had no means of keeping herself and her

children. While she was living with this man, the respondent committed bigamy, for which he was convicted in 1901, and sentenced to a term of penal servitude. In 1903 the petitioner filed her petition:—*Held*, that the petitioner had failed to shew that her husband's misconduct had directly conduced to her adultery, and that therefore she had failed to make out any ground which would justify the Court in exercising its statutory discretion in her favour by granting a decree for a divorce. *Shaw v. Shaw*, 20 T. L. R. 795—Gorell Barnes, J.

Wife Driven to Prostitution.]—A wife who had been driven by her husband's threats and cruelty to earn money by prostitution for his benefit left him in 1890, and from 1892 to 1895 cohabited with another person. From that date to the time of filing a petition for dissolution in 1899, on the ground of her husband's adultery and cruelty, she had led a respectable life:—*Held*, that, under the circumstances, her misconduct was the continuing result of the original misconduct of her husband, and that, although she was not under his control at the time, nevertheless his misconduct had conduced to her adultery from 1892 to 1895, and therefore the Court was justified in exercising the discretion conferred by section 31 of the Matrimonial Causes Act, 1857, and granting a decree in her favour. *Symons v. Symons* (66 L. J. P. 81; [1897] P. 167) followed. *Burdon v. Burdon*, 69 L. J. P. 118; [1901] P. 52—Gorell Barnes, J.

Pleading.]—If it appears to the Court, as the result of the evidence, that a petitioner has been guilty of such wilful neglect and misconduct as has conduced to the adultery, THE COURT, taking cognisance of it, may dismiss the petition, although no charge of such neglect or misconduct has been pleaded. Tacit acquiescence may amount to such neglect or misconduct. *Robinson v. Robinson*, 72 L. J. P. 63; [1903] P. 155; 89 L. T. 74—Bucknill, J.

(e) *Intervention of King's Proctor.*

Petitioner Guilty of Adultery.]—The Court will not exercise its discretion under section 31 of the Matrimonial Causes Act, 1857, merely on the ground that the adultery of the petitioner is more or less pardonable or capable of excuse. The question for decision is whether or not the misconduct of the petitioner has been directly caused by that of the respondent. Where the King's Proctor brings the adultery of the petitioner to the notice of the Court, although the conduct of the petitioner may be more or less pardonable and capable of excuse—as, for example, where the petitioner has been compelled to leave the respondent by reason of the incestuous adultery of the latter—yet, nevertheless, if the subsequent adultery of the petitioner appears to have been not directly caused by the conduct of the respondent, the Court, in the exercise of its discretion, may allow the intervention and rescind the decree *nisi*. *Constantinidi v. Constantinidi* (72 L. J. P. 82; [1903] P. 246), and previous cases therein cited, discussed. *Wyke v. Wyke*, 73 L. J. P. 38; [1904] P. 149; 90 L. T. 172; 20 T. L. R. 193—Bucknill, J.

Concealment of Material Facts.]—Concealment

of material facts as a bar to a divorce is on a different footing to collusion unless the concealment is the result of collusion, collusion being an absolute bar; while concealment of facts is not a bar, either absolute or discretionary, unless the facts, if before the Court, would have caused the Court to withhold a decree. Where on a disclosure of all the facts a decree would in the first instance, in the exercise of the discretion of the Court, have properly been pronounced, mere non-disclosure is no ground for rescinding a decree, already pronounced. The effect of *Roche v. Roche* (74 L. J. P. 50; [1905] P. 142) and *Butler v. Butler* (59 L. J. P. 25; 15 P. D. 66) upon the authority of *Alexandre v. Alexandre* (39 L. J. P. 84; L. R. 2 P. & D. 164) discussed. *Hunter v. Hunter*, 74 L. J. P. 157; [1905] P. 217; 93 L. T. 451; 53 W. R. 666; 21 T. L. R. 602—Gorell Barnes, P.

Rejection of Intervention.]—Where after decree *nisi* in an undefended case the King's Proctor brings the adultery of the petitioner to the notice of the Court, but it is clear that the adultery of the petitioner has not in any way conduced to the adultery of the respondent on which the decree *nisi* proceeded, the Court, in the exercise of its discretion, may reject the intervention of the King's Proctor and allow the petitioner to retain the decree. *Constantinidi v. Constantinidi and Lance* (72 L. J. P. 82; [1903] P. 246) followed. *Coombs v. Coombs*, 73 L. J. P. 23—Jeune, P.

No Answer Filed—Duty to Prove Facts.]—The petitioner having obtained a decree *nisi* for a divorce, the King's Proctor intervened and filed a plea alleging that the petitioner had committed adultery. The petitioner's solicitors wrote to the King's Proctor that their client denied the allegations in the plea, but that she had not the means to contest the matter:—*Held*, that the King's Proctor need not prove the allegations in the plea, but might proceed by motion. *Crowden v. Crowden*, 23 T. L. R. 143—Bargrave Deane, J.

(f) Evidence.

Identification by Photograph Alone.]—Circumstances in which the Court acted upon identification by a photograph only. *Dawson v. Dawson*, 23 T. L. R. 716—Bucknill, J.

Questions put to Respondent as to Acts of Adultery on Serving Citation and Petition.]—It is an improper practice for the person who serves the respondent to a divorce petition to take that opportunity to interrogate him to obtain admissions of guilt. *Hallam v. Hallam*, 20 T. L. R. 34—Bucknill, J.

Evidence—Application for Commission to Examine Witnesses Abroad before Service of Citation—Costs.]—On being satisfied by affidavit that the matter was urgent, THE COURT, before service of citation, gave to a wife petitioner leave to send out a commission to examine witnesses abroad at her own expense, subject to the admissibility of such evidence at the trial, and reserved the question of costs. *Brown v. Brown* (33 L. J. P. 203) followed. *Vallentine v. Vallentine*, 70 L. J. P. 89; [1901] P. 293; 85 L. T. 171—Jeune, P.

Respondent and Co-respondent Shewn to have Committed Acts of Familiarity Suggestive of Adultery before Date of Petition—Evidence of Actual Adultery Later than Date of Petition.]—Where a husband who petitioned for a dissolution of his marriage on the ground of his wife's adultery with the co-respondent was only able to prove that they had been guilty of acts of great familiarity suggestive of adultery previous to the date of the petition, THE COURT allowed the petitioner to give evidence of actual adultery committed by the respondent and co-respondent after the date of the petition, on the ground that such evidence tended to shew what inferences ought to be drawn from the acts of familiarity proved to have been committed before the date of the petition. *Wales v. Wales and Cullen*, 69 L. J. P. 34; [1900] P. 63—Gorell Barnes, J.

Fresh Evidence—Re-hearing—Principle on which Granted.]—The Court will grant a new trial or re-hearing, where fresh evidence has been obtained since the original trial or hearing, if it is of opinion that the proposed fresh evidence is such that, if brought before a jury, a different verdict to that in the former trial or hearing would probably be given. *Anderson v. Titmas* (36 L. T. 711) followed. *Taylor v. Taylor*, 68 L. J. P. 116; 81 L. T. 494—D.

Petitioner of Unsound Mind—Refusal by Superintendent of Asylum to allow Her to be Seen for Purpose of Swearing Affidavit—Peremptory Order against Commissioners in Lunacy.]—A wife, being certified of unsound mind and confined in an asylum, desired to file a petition against her husband for judicial separation. Such desire being communicated to her solicitors by her son, a petition was in due course prepared by them. When their managing clerk, accompanied by a commissioner for oaths, called at the asylum for the purpose of enabling the proposed petitioner to swear the affidavit in support, as required by the Matrimonial Causes Act, 1857, s. 41, and rule 2, Divorce Court Rules, 1865, the superintendent refused to allow her to be seen, producing as his authority a certain circular from the Commissioners in Lunacy. The Commissioners, on being applied to, supported the action of the superintendent. The solicitors to the petitioner, having obtained special leave on the ground of urgency, and after due notice to the Commissioners, moved the Court for an order to the said Commissioners ordering them to authorise the superintendent of the asylum to allow the representative of her solicitors and a commissioner for oaths to have access to the proposed petitioner to enable her to swear the necessary affidavit in support of the petition. THE COURT made the order as prayed, to be drawn up forthwith. *Beecham, In re, or Ex parte*, 70 L. J. P. 20; [1901] P. 65; 84 L. T. 63—Jeune, P.

Irish Divorce Bill—Evidence taken in India.]—Evidence taken in India on commission, and received and acted on by the Queen's Bench Division of the High Court of Justice in Ireland, admitted to be used on the second reading of an Irish divorce bill. *Jones' Divorce Bill*, [1899] A.C. 848—H.L. (Ir.)—*And see supra*, GROUNDS FOR, col. 924.

Liability of Witness to Answer Question tending to Shew Adultery.]—*See EVIDENCE*, col. 817.

(g) *Co-respondent: Damages.*

Decree Nisi—Intervention of Co-respondent—Decree Absolute.—A co-respondent entered an appearance in a divorce suit, but did not defend the action. A decree *nisi* was obtained by the petitioner.—*Held*, that the co-respondent could not afterwards intervene to shew cause why the decree should not be made absolute. *Harries v. Harries*, 86 L. T. 262—Gorell Barnes, J.

Co-respondent Dying during Pendency of Suit.—Where a co-respondent dies during the pendency of a suit, *semble* that the proper course is to apply by motion to strike his name out of the petition. *Walpole v. Walpole and Chamberlain* (No. 1), 70 L. J. P. 23; [1901] P. 86; 84 L. T. 63—Jeune, P.

Two Trials—First Trial Abortive—Petitioner and Respondent both found Guilty of Adultery.—A husband's petition for dissolution, on which the wife made counter-charges of adultery and cruelty, was heard in May, 1901, when the jury intimated that they were agreed that the petitioner had been guilty of cruelty and adultery, but were unable to agree as to the adultery of the respondent and co-respondent. No verdict was entered on these findings, and the jury were discharged. On a second trial in November, 1901, the jury found—first, that the respondent and co-respondent had been guilty of adultery; secondly, that the petitioner had been guilty of adultery with one girl, but not otherwise; thirdly, that the respondent had condoned that adultery; and fourthly, that the petitioner had not been guilty of cruelty. The Court was not asked to exercise its discretion under section 31 of the Matrimonial Causes Act, 1857, though it intimated that it would not in any case have done so.—*Held*, that the wife should have her full costs of both trials, and the co-respondent was condemned in the costs of all the issues on which he had failed in both trials. *Morgan v. Morgan and Porter* (38 L. J. P. 41; L. R. 1 P. & D. 644) and *Grosvenor v. Grosvenor* (34 W. R. 140) commented on and explained. *Waudby v. Waudby*, 71 L. J. P. 43; [1902] P. 85; 86 L. T. 123; 50 W. R. 176; 66 J. P. 280—Gorell Barnes, J.

Damages Claimed against Co-respondent—Amount of Damages not Specified.—In a husband's petition for divorce, by reason of his wife's adultery with the co-respondent, when there is a claim for damages the amount claimed must be specified in the petition. *Pegler v. Pegler*, 85 L. T. 649—Gorell Barnes, J.

Claim for Damages—Duty of Jury to Assess Damages.—Where a husband in a petition for dissolution of marriage claims damages from the co-respondent, and the adultery of the respondent and co-respondent is proved, the jury are not bound, if they think the case is not one for damages, to assess the damages at some sum, however small. *Gibson v. Gibson*, 94 L. T. 619; 22 T. L. R. 361—Gorell Barnes, P.

Amount Assessed by Jury Greater than that Claimed in Petition—Practice.—Where, in an

undefended suit, the jury assesses the damages at an amount higher than that claimed in the petition, the proper course is for the petitioner to take out a summons in chambers, on notice to the co-respondent, for leave to amend and reserve the petition. *Beckett v. Beckett and Jones*, 70 L. J. P. 17; [1901] P. 85; 84 L. T. 272—Jeune, P.

Assessment of.]—Loss of consortium is not the only ground on which damages ought to be assessed against a co-respondent. Although one main ground for damages is the breaking up of the matrimonial home, it is not the only ground. If a separation had taken place between the husband and wife before she committed adultery with the co-respondent, that would be a good reason for assessing the damages at a lower rate. At the same time, a man is wronged by the seduction of his wife far beyond the loss which he sustains by the breaking up of his home, and the mere fact that he was separated and living apart from his wife at the time she was seduced is no answer to a claim for damages by the husband against the adulterer. *Evans v. Evans and Platts*, 68 L. J. P. 70; [1899] P. 195; 81 L. T. 60—Jeune, P.

Married Woman—No Evidence of Knowledge of Co-respondent.—Where a man commits adultery with a woman, who is in fact a married woman, but there is no evidence that he knew that she was married, he takes the risk as regards damages being assessed against him; but where the woman held herself out to commit adultery as if she were not a married woman, then the damages, if any, should be reduced to next to nothing. *Watson v. Watson*, 21 T. L. R. 320—Gorell Barnes, P.

Co-respondent Unaware that Respondent was married—Evidence—Onus Probandi.—In a proceeding for dissolution of marriage the burden of showing that the co-respondent knew that the respondent was a married woman is cast on the petitioner, and, in the absence of evidence, a jury should assume that the co-respondent had no reason for believing the respondent was other than a single woman. *Lord v. Lord and Lambert*, 69 L. J. P. 54; [1900] P. 297—Gorell Barnes, J.

Damages may, however, be recovered from a co-respondent, whether he knew the respondent was a married woman or not. On the other hand, although a co-respondent accepts the risk of his conduct, if he did not know the respondent was married, then, the wrong he did to the petitioner was done unwittingly, and, in assessing the amount of damages, the jury ought to bear this in mind. *Ib.*

Adultery of Wife—Claim by Husband for Damages Only—Husband Guilty of Matrimonial Offence—Discretion.—A petition for damages only presented by a husband under section 33 of the Matrimonial Causes Act, 1857, is by the same section to be dealt with subject to all the enactments of the same Act with reference to petitions presented thereunder. A consequence is that such a husband, who has himself been guilty of a matrimonial offence disentitling him to the exercise in his favour of the discretion of the Court under section 31 of the same

Act, had he been petitioning for dissolution of marriage, is incompetent for a like reason to prosecute a petition under section 33 for damages only. *Cox v. Cox*, 75 L. J. P. 75; [1906] P. 267; 95 L. T. 546; 22 T. L. R. 557—Gorell Barnes, P.

Provable Debt.—Damages obtained by a petitioner in a suit in the Divorce Court against the co-respondent which are subject to any order of the Court appropriating them to any particular purpose are a debt or liability which is provable in the bankruptcy of the co-respondent. *O'Gorman, In re; Bale, ex parte*, 68 L. J. Q.B. 650; [1899] 2 Q.B. 62; 80 L. T. 501; 47 W. R. 543; 6 Manson, 204—Wright, J.

(h) *Effect of Judicial Separation or Divorce.*

Husband's Liability — Decree for Judicial Separation — Second Divorce Petition — Alimony — Costs — Taxation — Retainer of Solicitor.—Section 26 of the Matrimonial Causes Act, 1857, is a positive enactment superseding the old law and exempting the husband from all liability in respect of the wife's contracts entered into after a decree for judicial separation, with the exception that he is liable for the wife's necessities if he makes default in the payment of alimony; but the section does not enact that under a continuing contract on which the husband was originally liable his liability is determined as from the date of the decree. *Wingfield & Blew, In re*, 73 L. J. Ch. 797; [1904] 2 Ch. 665; 91 L. T. 783—C.A.

Accordingly the retainer of a solicitor by a wife, as agent of her husband under her implied authority to pledge his credit, to defend divorce proceedings instituted by her husband, and a similar retainer to conduct an action of detinue against her husband, are not determined by virtue of a decree for judicial separation, and the husband is liable to the solicitor for solicitor and client costs incurred after as well as before the date of the decree, notwithstanding section 26 of the Matrimonial Causes Act, 1857; but by virtue of that section the husband is not liable to the solicitor on a retainer which is first given by the wife after a decree for judicial separation, he not being in default in the payment of alimony. *Ib.*

For this purpose the costs of subsequent applications for alimony are covered by the retainer in the original proceedings in which they are made; but a second divorce petition is not to be treated as a continuation of a former divorce petition, so as to be covered by the former retainer. *Ib.*

Peer Divorced on His Wife's Petition—Remarriage of Petitioner with a Commoner—Petitioner's Use of Title—Injunction.—An injunction will not be granted to restrain the former wife of a peer, whose marriage with him has been dissolved and who has subsequently married a commoner, from using her former title. The peer by such user suffers no legal wrong or damage. *Cowley (Earl) v. Cowley (Countess)*, 70 L. J. P. 83; [1901] A.C. 450; 85 L. T. 254; 50 W. R. 81—H.L. (E.)

Effect of Divorce on Marriage Settlement.—*See SETTLEMENT.*

(i) *Alimony and Maintenance.*

Allowance to Wife—Dum Casta Clause.—The object of the Court in ordering a provision for a guilty wife is that she should be protected from temptation and lead a respectable life; at the same time, a husband should not be called upon to support a wife who is leading an immoral life, and on this ground, as well as for the protection of the wife, the provision for her should be limited *dum casta*. *Lander v. Lander* (60 L. J. P. 65; [1891] P. 161) commented on. *Squire v. Squire*, 74 L. J. P. 1; [1905] P. 4; 92 L. T. 472; 21 T. L. R. 41—Jeune, P.

"Dum sola et casta" clause.—The words *dum sola vixerit* may be inserted in a deed securing permanent maintenance to a wife without the addition of the words *et casta*. *Smith v. Smith (No. 1)*, 67 L. J. P. 54; [1898] P. 29; 78 L. T. 28—Jeune, P.

In deciding whether a permanent allowance as above should be limited *dum sola et casta vixerit* or not, the Court should consider—first, the conduct of the parties; secondly, their position in life, ages, and respective means; thirdly, the amount of provision actually made; fourthly, the existence or non-existence of children, and who has the custody of them; and fifthly, any other circumstances which may be important in the particular case. *Wood v. Wood* (60 L. J. P. 66; [1891] P. 272) followed. *Kettlewell v. Kettlewell*, 67 L. J. P. 16; [1898] P. 138; 77 L. T. 631.

Permanent Maintenance—Basis of Calculation—Wife Petitioner.—Although the general rule is that one-third of the joint income of husband and wife should be allotted as permanent maintenance to a wife petitioner who has been successful in obtaining a dissolution of her marriage, this rule does not apply where such income is very large. In such a case the Court, following the opinion of Lord Ludlow, L.J., and Chitty, L.J., in *Sykes v. Sykes* (66 L. J. P. 162; [1897] P. 306), held that the proper test is what would be considered an adequate jointure for the wife (as widow) in case of her husband's death. *Ib.*

Gross Sum of Money.—Where, on a petition for permanent maintenance, the Registrar recommended "that the respondent secure to the petitioner the sum of 721*l.* a year during their joint lives, or a gross sum of money of 6,000*l.*,"—THE COURT on the application of the petitioner, there being no issue of the marriage, and the respondent not opposing, ordered that the respondent should pay the sum of 6,000*l.* direct to the petitioner. *Kirk v. Kirk*, 71 L. J. P. 78; [1902] P. 145; 87 L. T. 148—Gorell Barnes, J.

Lump Sum—Security.—The Court has no power either to order a lump sum to be paid over to a wife absolutely for her permanent maintenance, or to order such lump sum to be secured to her or to the issue of the marriage by settlement for a longer period than her own life. *Twentymen v. Twentymen*, 72 L. J. P. 36; [1903] P. 82; 88 L. T. 571; 51 W. R. 575—Jeune, P.

— **Gross Sum Ordered to be Paid to Wife without Settlement.**—By section 32 of the Matrimonial Causes Act, 1857, "the Court may, if it shall think fit," after pronouncing a decree for the dissolution of a marriage, "order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money . . . as . . . it shall think reasonable." Where a wife, who had obtained a decree absolute for the dissolution of her marriage, filed a petition for permanent maintenance, and it appeared that, as far as could be ascertained, the only property belonging to the husband was a sum of 320*l.* standing to his credit in a Chancery action, the Court (confirming the report of the Registrar) ordered that that fund should be applied, in the first instance, to the payment of the wife's costs, and that the balance should be paid over to her absolutely without settlement. *Morris v. Morris* (31 L. J. P. 33) followed. *Stanley v. Stanley*, 68 L. J. P. 7; [1898] P. 227; 79 L. T. 104; 47 W. R. 272—Gorell Barnes, J.

Security.—On an application for permanent maintenance by a wife petitioner who had obtained a decree *nisi* on the ground of the husband's cruelty and adultery, the registrar, treating the husband's property as producing 4 per cent. per annum, recommended that an annual sum should be secured to the wife on the husband's property, such sum amounting to one-third of the income thereof at 4 per cent. The Court varied the report by ordering that this sum should be secured on a third only of the husband's property, and that, as to the difference between this sum and the sum produced by such third invested in trust securities, the wife must be content with the husband's personal covenant. *Shorthouse v. Shorthouse*, 78 L. T. 687—Jeune, P. Affirmed, 79 L. T. 366—C.A.

Variation of Order—Practice—Appeal.—A wife obtained a dissolution of marriage and filed a petition for maintenance. A large portion of the respondent's income was derived from a mortgage producing 5 per cent. The Registrar made his report and the Court confirmed it on the basis of the respondent's income during the subsistence of this mortgage. Notice that the mortgage was to be paid off had now been given. Application was now made to vary the order on the ground that after payment of the mortgage interest at the rate of 5 per cent. could not be obtained, and that under the circumstances the respondent would be deprived of an undue amount of income:—*Held*, that the point not having been taken or reserved at the hearing of the motion to confirm the Registrar's report, the Court had now no power to vary the order, and that, except by consent, no variation thereof could be obtained except by appeal. *Shorthouse v. Shorthouse* (*supra*) distinguished. *Smith v. Smith* (No. 2), 79 L. T. 124—Jeune, P.

Compassionate Allowance—Wife Guilty of Adultery—Discretion of Court.—The Court under section 32 of the Matrimonial Causes Act, 1857, has an absolute discretion to order a husband to provide for a guilty wife, if it should be of opinion that the circumstances of the case warrant it in so doing. *Robertson v. Robertson and Favagrossa* (8 P. D. 94) considered.

Ashcroft v. Ashcroft, 71 L. J. P. 125; [1902] P. 270; 87 L. T. 229; 51 W. R. 292—C.A.

So in a case where the wife was found guilty of adultery, THE COURT, being satisfied that she was in delicate health and quite unable to support herself and earn her own living, and that she was entirely without means and had no friends or relations who would support her, ordered the petitioner to secure her by deed the sum of 1*l.* a week for life—*dum sola et casta vixerit*—although the petitioner had been guilty of no misconduct and opposed the making of the order. *Id.*

Alimony—Examination of Witness—Means of Husband—Refusal to Attend—Conduct-money.

—Where after a decree absolute for dissolution of marriage upon the wife's petition an order is made for the husband to attend before the Registrar to be examined as to his means for the purposes of the assessment of permanent alimony for the wife, conduct-money is payable to the husband, and in default thereof an order of committal cannot be made against him for not attending. *Townend v. Townend*, 21 T. L. R. 657—Gorell Barnes, P. Reversed, 93 L. T. 680; 22 T. L. R. 50—C.A.; but not to be taken as a precedent, 40 L. J. N.C. 788, 853; [1905] W. N. 158, 178; 22 T. L. R. 128.

Arrears of Alimony—Action in King's Bench Division—Order of Probate and Divorce Division—Final Judgment.—An action for arrears of alimony will not lie in the King's Bench Division on an order for payment of alimony made in the Probate and Divorce Division, because that order is not a final and conclusive order, but still remains subject to the control of and to variation by the latter Division. *Bailey v. Bailey* (53 L. J. Q.B. 583; 13 Q.B. D. 855) applied. *Robins v. Robins*, 76 L. J. K.B. 649; [1907] 2 K.B. 13; 96 L. T. 787; 23 T. L. R. 428—Joyce, J.

Alimony Pendente Lite—Separation Deed—Maintenance and Education of Children.—On the wife's petition for an allowance by way of alimony *pendente lite* and for the maintenance and education of the children of the marriage, the husband was ordered to give particulars of his income notwithstanding an agreement for separation under which the husband had agreed to pay an annual sum to the wife. *Barry v. Barry*, 70 L. J. P. 17; [1901] P. 87; 84 L. T. 33; 49 W. R. 370—C.A. And see *Childers v. Childers* (*otherwise Burford*), 68 L. J. P. 90—Jeune, P.

(i) *Custody of Children.*

Paternity of Child.—Where it is desired by a respondent to question the paternity of a child or children the custody of whom is claimed on a petition, the question of such paternity must be specifically raised in the answer, so that the other side may have due notice to be prepared to meet it; and unless the party opposing the prayer for custody so pleads, such party will not in future be allowed at the hearing to question the paternity of such child or children. *Gordon v. Gordon and Bell*, 72 L. J. P. 34; [1903] P. 92; 88 L. T. 573—Jeune, P.

Presumption of Legitimacy—Effect of Wife's Adultery.—The adultery of the wife, although

throwing the greatest doubt upon the paternity of the child, is not conclusive. It must be shewn that the husband could not have had access which might result in his paternity; otherwise the presumption of sexual intercourse between husband and wife, and consequently of legitimacy of the child, must prevail. *Gordon v. Gordon and Granville Gordon*, 72 L. J. P. 33; [1903] P. 141; 89 L. T. 73—Jeune, P.

Disobedience of Order for Custody—Orders for Attachment or Committal Ex parte.—The respondent having removed the child from the jurisdiction, notwithstanding an order that it should be given up to the petitioner forthwith, a writ of attachment issued against the respondent and an order for her committal was made on the application of the petitioner *ex parte*. *Favard v. Favard* (75 L. T. 664) followed. *Ib.*

Child Begotten before Marriage—Husband not the Father.—The petitioner obtained a decree for a divorce from his wife, and applied for the custody of two children, both of whom were born during the marriage. The elder child was begotten before the marriage, and the petitioner was not the father of it. The respondent contended that the eldest child was illegitimate, and the petitioner was not entitled to its custody. The Court gave the petitioner the custody of both children. *M. v. M.*, 22 T. L. R. 325—Bargrave Deane, J.

Wife's Petition—Judicial Separation—Husband's Desertion and Adultery.—Upon a wife's petition for judicial separation on the grounds of her husband's desertion and adultery, the Court will require very strong evidence of the aggravated character of the conduct of the husband before making an order, under section 7 of the Guardianship of Infants Act, 1886, that he is a person unfit to have the custody of his children. *Skinner v. Skinner* (57 L. J. P. 104; 13 P. D. 90) distinguished. *Woolnoth v. Woolnoth*, 86 L. T. 598—Jeune, P.

Interim Order upon Decree.—The Court has power under section 6 of the Matrimonial Causes Act, 1884, to make an interim order as to custody of the children of the marriage, and to save expense will make such an order at the time of the pronouncing of a decree of restitution of conjugal rights. *Paine v. Paine*, 50 W. R. 382—Jeune, P.

Irish Divorce Bill—Infant—Practice.—In an Irish divorce bill, although no separate action has been instituted in Ireland to obtain the custody of infant children after a decree for separation *a mensa et thoro* has been pronounced, the House of Lords will sanction a clause giving the custody of the children to the innocent party. *Mrs. Addison's Case*, [1801] (Macq. H.L. p. 598) followed. *Hart's Divorce Bill*, [1898] A.C. 305—H.L. (Ir.)

(k) Variation of Settlements.

Petitioner Guilty of Matrimonial Misconduct—Respondent's Property—Retrospective Effect of Order.—In exercising the power of varying settlements conferred by section 5 of the Matrimonial Causes Act, 1859, the Court must have regard not only to the rights and liabilities of the parties *inter se*, but also to the

interests of society and public morality, and relief will not be given to a person guilty of matrimonial misconduct unless such misconduct can be palliated. The sum to be awarded to an injured husband by variation of settlements should be measured by what is necessary to give him means according to the scale to which he may have accommodated his mode of life, and this measure ought not to be disregarded for the purpose of preventing the co-respondent obtaining a pecuniary profit from his adultery. There is no general rule that a co-respondent is not to be allowed to get any profit from his adultery; but the Court must exercise its discretion so as to promote virtue and discourage vice, and the fact that the guilty respondent and co-respondent have married may turn the scale in favour of a liberal allowance to the petitioner, or against the respondent, but it will not justify the depriving the respondent of everything beyond the bare necessities of life in the condition in which she has been brought up. *Constantinidi v. Constantinidi and Lance*, 74 L. J. P. 122; [1905] P. 253; 93 L. T. 651; 54 W. R. 121; 21 T. L. R. 651—C.A.

There is no power for the Court in the exercise of its jurisdiction to make an order having a retrospective effect so as to recoup to a husband income of a fund settled by him which has been received by the wife after she had deserted him. *Ib.*

A decree *nisi* for the dissolution of marriage was made on the petition of the husband, which was based on the ground that the wife had left him, and gone to America and obtained a divorce there, and subsequently married the co-respondent there and cohabited with him, neither the divorce nor the marriage in America being such that it could be recognised by the law of England. It was alleged and admitted at the trial that the petitioner had committed adultery before the presentation of the petition, and afterwards, and close up to the time of the respondent putting in her answer. The petitioner did not go into the witness-box and offer any explanation as to his adultery, or submit himself to cross-examination. The decree was afterwards made absolute. There were no children of the marriage. The respondent had brought into settlement property yielding an income of about 2,200*l.* Under the settlement the respondent took the first life interest, and there was a trust, in default of issue of the marriage taking a vested interest, to pay the income of the trust fund to any husband surviving the respondent during his life. The respondent was also entitled to a protected life interest in certain funds under her father's will subject to her mother's life interest. The petitioner had brought into settlement property yielding an income of about 400*l.* The respondent took the first life interest in this fund under the settlement. The petitioner had from other sources an income of about 250*l.* a year. The petitioner applied for variation of the settlements:—*Held*, that the respondent's interest in the petitioner's settlement ought to be extinguished; but that, having regard to the conduct of the petitioner, the Court ought not under the discretionary power vested in it by section 5 of the Matrimonial Causes Act, 1859,

to vary the respondent's settlement in his favour. *Ib.*

The law laid down in *Chetwynd v. Chetwynd* (35 L. J. P. 21, 24; L. R. 1 P. & D. 39, 44, 45) and *March v. March* (36 L. J. P. 65, 67; L. R. 1 P. & D. 440, 442, 447) applied. *Ib.*

The guiding principle to be found running through the cases decided under the provisions of section 5 of the Matrimonial Causes Act, 1859, is that where the breaking up of the family life has been caused by the conduct of the respondent, the Court, exercising its powers under the above section, ought to place the petitioner and the children in a position, as nearly as circumstances will permit, the same as if the family life had not been broken up. *Hartopp v. Hartopp*, 68 L. J. P. 33; [1899] P. 65; 80 L. T. 297—Gorell Barnes, J.

Therefore where trust funds are settled upon parents successively, or upon one of them for life, with remainder to the children, the Court, while it might extinguish the whole or a part of the guilty parent's life interest and his or her powers of appointment among the children, would not interfere to deprive the children of any interests to which they would have been entitled under the settlement had the marriage continued in force. *Ib.*

Where a wife whose marriage was dissolved on the ground of her adultery had a power of appointment over settled funds in favour of her husband, but if she failed to exercise such he had no interest in the said fund, which went to the children, and the wife had also power to appoint to the extent of one-third of the property in favour of any children of any second marriage she might make.—THE COURT ordered the settlement to be varied by extinguishing all the wife's powers of appointment, and gave the husband half the income as long as she lived, and further secured to him a portion of it after her death. *Ib.*

Post-nuptial Settlement—Assignment of Leasehold Property and Furniture by Husband to Wife.]—An assignment, made after marriage, of leasehold property and furniture by a husband in favour of his wife absolutely is not a post-nuptial settlement within the meaning of section 5 of the Matrimonial Causes Act, 1859. *Hubbard (otherwise Rogers) v. Hubbard*, 70 L. J. P. 34; [1901] P. 157; 84 L. T. 441—C.A.

Property Vested in Children.]—The Court has power under section 5 of the Matrimonial Causes Act, 1859, to make orders dealing with the property settled for the benefit of the petitioner, even though it may affect the property which under the settlement has vested in the children of the marriage. *Blood v. Blood*, 50 W. R. 138; 65 J. P. 823—Gorell Barnes, J.

Petition by Guilty Party—Jurisdiction of Court to Entertain.]—*Seemle*, there may be circumstances under which the Court would consider a petition for variation of settlements filed under section 5 of the Matrimonial Causes Act, 1859, by the guilty party to a suit for dissolution of marriage. *Wootton Isaacson v. Wootton Isaacson*, 71 L. J. P. 80; [1902] P. 146; 87 L. T. 147—Gorell Barnes, J.

Guilty Husband—Extinguishment of Respondent's Interest—Power to Wife to Appoint Part

of Corpus of Settled Fund on Second Marriage—Reversionary Interest of Children of First Marriage Detrimentially Affected—Discretion.]

—Under section 5 of the Matrimonial Causes Act, 1859, the Court has power to vary a marriage settlement "either for the benefit of the children of the marriage or of their respective parents." In exercising its discretion under this section the Court ought to consider what the effect of the whole order it is about to make will be, and not merely the effect of any particular part. Therefore, although it has always been the practice to consider first what is the interest of the children and to see that nothing is done to their disadvantage, there may be cases in which the Court will make an order depriving infant children of part of their interest under a settlement. *Whitton v. Whitton*, 71 L. J. P. 10; [1901] P. 348; 85 L. T. 646—Jeune, P.

So where a marriage was dissolved on the wife's petition, and the petitioner subsequently asked the Court to vary her settlement by (amongst other things) extinguishing all the respondent's interests as though he were dead, the Court made an order extinguishing all the respondent's interests, and also giving the petitioner power to appoint part of the fund if she should marry again for the benefit of a second husband and the children of a second marriage, a power given her by the settlement in case she survived her husband, but not otherwise; the reason for making such order being that the wife, by obtaining the extinguishment of the husband's interests, had benefited the children of the marriage by the acceleration of their interests, and was entitled to a *quid pro quo*. *Ib.*

— Interest as Next-of-kin of Deceased Son—Extinguishment of Interest—"Property settled."]

—By marriage settlement property was settled upon trust for the wife for life, remainder to the husband, remainder to the children of the marriage. There was only one child, who died after having acquired a vested interest in the fund, and his father became entitled to his interest as his sole next-of-kin. The wife obtained a decree dissolving the marriage:—*Held*, that the father's interest as next-of-kin of his deceased son was "property settled" within section 5 of the Matrimonial Causes Act, 1859, and that the Court had power under that section to extinguish not only the father's life interest, but also his interest as next-of-kin of the son. *Blood v. Blood*, 71 L. J. P. 97; [1902] P. 190; 86 L. T. 641; 50 W. R. 547—C.A.

Settlement on Wife with Restraint on Anticipation—Dissolution of Marriage—Re-marriage of Wife.]—On their marriage both husband and wife brought property into settlement. The wife's property was settled on her for life, with a restraint on anticipation. The wife obtained a decree dissolving her marriage, and re-married. She then presented a petition for variation of the marriage settlement. The Registrar recommended that the property brought into settlement by husband and wife should be given back to them freed from all trusts:—*Held*, that the report ought to be confirmed, and the restraint on anticipation did not, even after the petitioner's re-marriage, affect the power of the Court to make the suggested variation. *Merton v. Merton*, 83 L. T. 223—Gorell Barnes, J.

No issue of Marriage—Reconveyance of Trust Funds brought into Settlement by Innocent Wife—Interests of Unborn Persons Affected.]—In varying a settlement under the powers conferred by section 5 of the Matrimonial Causes Act, 1859, where there is no issue of the marriage, an order can be made for the reconveyance to an innocent wife of funds brought by her into settlement, where the only other living persons interested consent, although the result may be to deprive other persons, yet unborn, of their possible interests under the settlement. *Morrissey v. Morrissey*, 74 L. J. P. 11; [1905] P. 90; 92 L. T. 476—Jeune, P.

Settled Property wholly brought in by Husband—Extinction of Husband's Life Interest.]—After a divorce on the wife's petition the Court extinguished the husband's life interest in the property included in the marriage settlement, the income of which amounted to 45*l.* a year, and the whole of which had been brought into settlement by him. There was one child of the marriage, who had not attained a vested interest:—*Held*, that this was a proper exercise of the discretion of the Court in the interests of the wife and child. *Kaye v. Kaye*, 86 L. T. 638; 50 W. R. 499—C.A.

Guilty Wife—Life Interest of—Provision for Daughters out of Life Interest—Extinguishment.]—Under a marriage settlement the wife's interest in what was known as the Roden Settlement was 1,000*l.*, out of a sum of 2,800*l.*, the remaining 1,800*l.* to go to the husband; if he predeceased the wife she was to take the whole sum; there were trusts for the benefit of the children of the marriage, the wife having a power of appointment among them. In another fund (called the Broughton Settlement) of 4,900*l.* a year, one half was to go to the wife and the other half to the husband, the whole to the survivor for life, and then for the benefit of the children, with power to the wife to appoint in favour of any future husband and children. The marriage having been dissolved on the petition of the husband, the latter petitioned for a variation of the marriage settlements:—*Held*, that out of the income that would have been payable to the wife there should be paid during the joint lives of the petitioner and the respondent the sum of 200*l.* to each of the daughters of the marriage to be increased to 500*l.* after the death of the petitioner and during the life of the respondent, and further that the respondent's second life interest in the moiety of the income of the trust funds subject to the Broughton Settlement payable to the petitioner during his life should be extinguished so long as either by virtue of an exercise of the power of appointment in the settlement contained or, in default of appointment, any child or issue of the marriage of the petitioner and respondent should be interested in the capital of the trust funds. *Beauchamp v. Beauchamp*, 20 T. L. R. 273—C.A.

Application to Extinguish Interest in Settled Fund and Vest it Absolutely in Innocent Party—Ultimate Trust in Favour of Living Persons.]—A husband settled certain property on his marriage, giving himself the first life interest subject to a clause for forfeiture if he should do any one of certain things. The wife took the second life interest during widowhood. On failure of issue of the marriage, there was

an ultimate trust in favour of the next-of-kin of the husband. This ultimate trust, however, did not take effect till after the death of the wife, as, even if she married a second time, she was entitled to the benefits of the settlement if she became a widow. Subsequently the husband became liable for certain moneys as trustee, and, having obtained a divorce from his wife, gave an undertaking, which was embodied in an order in an action in the Chancery Division, to take proceedings at once for a variation of settlements, so as, if possible, to get the settled property in him absolutely. He further undertook, in any event, to charge his interest in the settled property for a certain amount. This undertaking operated as a forfeiture. After he had obtained his divorce he married again, and his next-of-kin at the time of his making the application to the Court were his second wife, his mother, a nephew, and a niece:—THE COURT refused to order a reconveyance of the settled property to the petitioner absolutely, there being living persons interested in the settlements whose interests would be injuriously affected by such a course, but extinguished the interests of the guilty wife in the settlement, creating a resulting trust in favour of the husband, which was not subject to the forfeiture clause, and was therefore unaffected by the undertaking he had given in the Chancery action. *Meredyth v. Meredyth* (64 L. J. P. 54; [1895] P. 92) and *Wynne v. Wynne* (78 L. T. 54) distinguished. *Walpole v. Walpole* (No. 2), 70 L. J. P. 49; [1901] P. 196; 84 L. T. 727—Jeune, P.

Allowance for Husband—Incumbrances on Wife's Income—Wife's Reversionary Life Interest—Allowance to Child of Marriage—Continuance of, after Attaining Majority.]—In determining the settlement to be made out of the income of a person who is ordered to make a settlement under the Divorce Act, 1857, it must be ascertained what the person ordered to settle receives after keeping down all charges on the income. In ordering a settlement to be made under section 45 of the Divorce Act, 1857, the Court has jurisdiction to take into account any property to which a guilty wife is entitled in reversion, and it is proper so to do, having regard to the principle established by *March v. March* (L. R. 1 P. & D. 440) and *Noel v. Noel* (10 P. D. 179), notwithstanding the decision of Butt, J., in *Harrison v. Harrison* (12 P. D. 130). Although in principle it is not desirable to make a child, even of a wife who has misconducted herself, independent of his parent, by ordering him allowance for maintenance and education, under section 45 of the Divorce Act, 1857, to continue after he has attained his majority, yet, under special circumstances, it is proper that the provision should not be made to cease on the happening of that event. *Savary v. Savary*, 79 L. T. 607—C.A.

Policy Payable at Fixed Date to Husband if Alive; if Not, to Wife—"Property in reversion."]

—The money secured to a wife under a policy of insurance, and to be paid to her under the terms thereof if she is living at the time of her husband's death, may be "property in reversion," although the policy itself may not be a marriage settlement, and the Court has power to compel her, if she is the guilty party in divorce proceedings, to settle her interest under the policy in favour of her husband and

children. *Stedall v. Stedall*, 86 L. T. 124; 50 W. R. 320—Jeune, P.

Annuity to Wife Lost—Compensation to Children.—The fact that by reason of dissolution of a marriage in consequence of a wife's misconduct, an annuity provided by the husband will not be payable to the wife, and will be lost to the family, is a detriment to the children, and a ground for compensating them out of the wife's property brought into settlement. *Newall v. Newall*, 78 L. T. 203—Jeune, P.

Re-settlement.—Where under a marriage settlement a wife has power to re-settle settled property in the event of surviving her husband and marrying again, and, having been divorced, has married the co-respondent during her husband's lifetime, the Court may make an order preventing any re-settlement on any husband married, or children born, during the husband's lifetime. *Day v. Day*, 78 L. T. 358—Jeune, P.

Payment to Father for Child's Maintenance—Payment to Child after Twenty-one.—The Court will not make payment to a father, for maintenance of a child, conditional on the latter residing with the father and being under his control, on the ground that after sixteen the child may wish to reside with the divorced wife. Payment to a child of an annual sum after attaining majority, to which he is not entitled under the settlement, will not be refused on the ground that he may receive larger benefits from the wife. *Ib.*

Power of Appointment to Second Wife of Petitioner and Her Issue—Interest of Child of Dissolved Marriage Affected.—Where a marriage settlement gives an innocent party to it the power, if survivor, of appointing a portion of his or her settled fund in favour of a second spouse and the children of a second marriage, the Court in varying such a settlement under the powers of the Matrimonial Causes Act, 1859, will, although issue of the first marriage exists, permit the immediate exercise of such a power in the lifetime of the guilty party to an extent in the opinion of the Court not, having due regard to all the facts, detrimental to such existing issue. *Hodgson Roberts v. Hodgson Roberts*, 75 L. J. P. 48; [1906] P. 142; 94 L. T. 621; 22 T. L. R. 395—Gorell Barnes, P.

Ultimate Limitation to Next-of-Kin—No Issue of Marriage—Reconveyance to Wife.—Where under a marriage settlement there is a limitation of the wife's settled property in the event of failure of issue upon such trusts as she should by will or codicil appoint, and in default of appointment to her absolutely if she survive the husband, but if she die in his lifetime upon trust for her next-of-kin, the Court may, if she obtain a decree *nisi* without issue born, order the settled property to be reconveyed to her freed from the trusts of the settlement. *Wynne v. Wynne* (No. 2), 78 L. T. 796—Jeune, P.

Annual Sum.—Where the respondent resisted all attempts at intercourse for a period of six months, the Court annulled the marriage and varied the marriage settlement, ordering the respondent to pay an annual sum to the petitioner. *E. v. E.*, 87 L. T. 149; 50 W. R. 607—Jeune, P.

Legitimacy of Child Born in Wedlock—Petition to Decide Question.—In the course of an undefended suit for dissolution of marriage presented by the husband, it appeared that the respondent had made a written statement in the form of a letter to the petitioner as to the paternity of the only child, with the object of retaining its custody. Upon petition for variation of the marriage settlement, it was urged on behalf of the trustees of the settlement that the respondent's statement was inadmissible, and that so important a matter as that of the legitimacy of the child ought not to be dealt with upon motion. The Court thereupon adjourned the motion as to variation, and directed the official solicitor to present, on behalf of the child, a petition for declaration of legitimacy. *Douglas v. Douglas*, 78 L. T. 88—Jeune, P.

Trial of Issue.—In order that the Court may properly exercise its powers to vary a settlement under section 5 of the Matrimonial Causes Act, 1859, and section 3 of the Matrimonial Causes Act, 1878, it is necessary to ascertain what legitimate children (if any) of the parties to the settlement are living at the time of filing the petition to vary. For this purpose the trial of an issue will, if necessary, be directed, the proceedings to vary being meanwhile stayed. *Evans v. Evans* (No. 1), 78 L. J. P. 87; [1904] P. 274; 91 L. T. 356; 20 T. L. R. 516—Gorell Barnes, J.

In spite of the fact that the result of the trial of the issue may be to disturb the existing presumption in favour of the legitimacy of a child, the Probate Division will not, by refusing to deal with the matter, compel the parties to resort to the Chancery Division for an order directing the application of the trust funds. *Ib.*

The cases of *Chaplin, In re* (36 L. J. P. & M. 49; L. R. 1 P. & D. 328), *Pryor v. Pryor* (56 L. J. P. 77; 12 P. D. 165), and *Douglas v. Douglas* (78 L. T. 88), discussed. *Ib.*

Trust for Wife "if she shall survive her now intended coverture"—Termination of Coverture by Divorce—Effect of Trust.—By a marriage settlement the wife's father covenanted that his executors should within twelve months of his death, if the wife were then living, pay to the trustees 10,000*l.* on trust (in default of issue, which happened) for the wife absolutely "if she shall survive her now intended coverture, but if she shall die during her now intended coverture," then in trust for the father absolutely. The husband obtained an absolute decree for dissolution of the marriage, and the wife survived her father:—*Held*, that the wife had survived the coverture within the meaning of the settlement, and was therefore entitled to receive the 10,000*l.* from the trustees when paid to them. *Crawford, In re; Cooke v. Gibson*, 74 L. J. Ch. 22; [1905] 1 Ch. 11; 91 L. T. 683; 53 W. R. 107—Kekewich, J.

Semble, that, an order of the Divorce Court having dealt with the settled property, as if the husband were dead, the husband must be considered as dead for the purpose of construing the settlement, and the coverture might be considered as terminated in this manner also. *Ib.*

Quare, whether under the Matrimonial Causes Acts, 1857, 1859, and 1878, the Divorce Court has power to interfere with the interests, rights, and liabilities of persons not parties to the suit—for example—a wife's father covenanting to settle a fund. *Ib.*

Petition to Vary Settlement—Respondent an Undischarged Bankrupt and His Address Unknown—Notice to Official Receiver in Bankruptcy—Service on Respondent Dispensed with.—The Court dispensed with service on the respondent in a suit for dissolution of marriage of a petition to vary settlements when the respondent was an undischarged bankrupt and his address unknown and notice had been given to the trustee in bankruptcy of the respondent. *Gordon v. Gordon*, 74 L. J. P. 39; [1905] P. 96; 92 L. T. 476—Gorell Barnes, P.

Variation of Settlements—Time for Filing Answer to Petition.—Where the husband obtained a decree *nisi* for dissolution of the marriage, and before the decree was made absolute filed a petition for variation of the settlements made on the marriage, under section 5 of the Matrimonial Causes Act, 1857, THE COURT ordered the wife to file an answer to the petition within one month after the decree *nisi* was made absolute, and discharged the order of GORELL BARNES, J., directing her to file her answer before the decree *nisi* was made absolute. *Constantinidi v. Constantinidi* (No. 2), 73 L. J. P. 91; [1904] P. 306; 91 L. T. 273; 20 T. L. R. 573—C.A.

(1) *Summary Jurisdiction (Married Women) Act, 1895, under.*

Jurisdiction of Justices—Desertion—Petition for Divorce in High Court.—Where proceedings are pending in the Divorce Division of the High Court between husband and wife, Justices ought not to entertain any application by the wife against her husband under the Summary Jurisdiction (Married Women) Act, 1895. In October, 1906, a husband filed a petition for divorce, and an order was made for a weekly payment of alimony to the wife *pendente lite*. The weekly payments were continued down to January 4, 1907. On February 19, 1907, an order was made that the husband should pay to the wife her taxed costs, and should deposit 20*l.* as security, and the usual order was made staying the suit until the order was complied with. On April 15, 1907, a summons was issued by Justices on the application of the wife under section 4 of the Summary Jurisdiction (Married Women) Act, 1895, for an order under the Act, upon the ground that her husband had deserted her, and the Justices made an order for separation and maintenance, reciting in their order that the husband had abandoned his divorce suit:—*Held*, that, as the divorce suit was still pending, there could not be desertion, and the Justices had no jurisdiction to make the order. *Craeton v. Craeton*, 71 J. P. 399; 23 T. L. R. 527—D.

Application of Act—Indictment for Intent to Murder—Conviction for Common Assault.—Where a person was indicted for attempting to shoot his wife with intent to murder her, but acquitted on that charge and convicted of a common assault, a separation order under the

Summary Jurisdiction Act, 1895, s. 4, was refused, the Judge stating that the section did not apply to the case. *Reg. v. Corrigan*, 62 J. P. 522—Wright, J.

Adultery and Desertion of Husband—Effect of Order Previously Obtained by Wife on the Ground of Desertion under the Summary Jurisdiction (Married Women) Act, 1895, s. 5, sub-s. (a).—The provisions of section 5, subsection (a) of the Summary Jurisdiction (Married Women) Act, 1895, that an order of the Court of summary jurisdiction made under the Act, that the applicant is to be no longer bound to cohabit with her husband, is while in force to have the effect in all respects of a decree of judicial separation, are to be read subject to this qualification, that no order made under the Summary Jurisdiction Act can oust the jurisdiction of the Matrimonial Division of the High Court of Justice. *Smith v. Smith*, 74 L. J. P. 113; [1905] P. 249; 93 L. T. 457—Bargrave Deane, J.

An order of the Court of Summary jurisdiction proceeding on the ground of desertion, which, under the Summary Jurisdiction Act, need not continue for two years, is not to be taken into consideration by the High Court, in subsequent proceedings before it, in determining whether a state of things has in fact arisen since the date of the order of the Court of summary jurisdiction constituting desertion for two years under the Matrimonial Causes Act, 1857. *Ib.*

Petition by Wife on Ground of Adultery Coupled with Desertion—Effect of Non-cohabitation Provision Inserted in Previous Order on Application by Petitioner under Summary Jurisdiction (Married Women) Act, 1895.—Desertion as contemplated by the Matrimonial Causes Act, 1857, must be persistent for two years, and cannot be relied on by a spouse who has so acted as to prevent the time from running. *Dodd v. Dodd*, 75 L. J. P. 49; [1906] P. 189; 94 L. T. 709; 54 W. R. 541; 70 J. P. 163; 22 T. L. R. 484—Gorell Barnes, P.

The insertion in orders of Justices, made under the Summary Jurisdiction (Married Women) Act, 1895, of the non-cohabitation provision is unnecessary in cases of desertion or neglect to maintain. If inserted it puts an end to any desertion on the part of the husband that may have commenced within the meaning of the Matrimonial Causes Act, 1857. *Smith v. Smith* (74 L. J. P. 113; [1905] P. 249) not followed. *Ib.*

"Persistent cruelty."—*Seem* that a number of acts of cruelty committed on one day may amount to persistent cruelty. *Broad v. Broad*, 78 L. T. 687—D.

Desertion.—A husband and wife married in 1890 and cohabited together (in common service) till 1892, when they parted by mutual agreement, to find work, until such time as they should be able to save money for the purpose of getting together a home. The husband obtained work and made his wife an allowance up to November, 1898. He visited her occasionally up to some time in 1897. In 1899 he wrote, "I am not going to have any more to do with

wife went to P., and took out a similar summons there against B.:—*Held*, that the magistrates were justified in deciding that the facts constituted desertion by B.:—*Held*, also, that desertion being a continuing offence, and the wife having been driven to P. by B.'s acts, the magistrates at P. had jurisdiction to make an order against B. The order of the magistrates contained no finding that B. had been guilty of desertion:—*Held*, that, though the order was irregular, the Court had power to make a fresh order under Order LIX. rules 4a and 7, and that a fresh order ought to be made in the terms of the order appealed against. *Brown v. Brown* (No. 1), 79 L. T. 102; 62 J. P. 711—D.

Summons for Desertion under the Summary Jurisdiction (Married Women) Act, 1895.]—Apart from any special provision in the Act, a return by a wife to cohabitation pending the adjournment of a summons for desertion under the Summary Jurisdiction (Married Women) Act, and before an order is made on the summons, puts an end to the cause of complaint, and no order can subsequently be made upon the summons. *Williams v. Williams*, 73 L. J. P. 31; [1904] P. 145; 90 L. T. 174; 68 J. P. 188; 20 T. L. R. 213—D.

Order of Justices Granting Separation Order—Subsequent Adultery of Husband.]—A wife obtained an order from Justices, under section 5, sub-section (a) of the Summary Jurisdiction (Married Women) Act, 1895, that she was no longer bound to cohabit with her husband on account of his desertion. More than two years after the desertion and the order she filed a petition for divorce, the husband having committed adultery since the order. The Court pronounced a decree *nisi* for divorce upon the ground of the adultery and desertion for two years. *Levy v. Levy*, 21 T. L. R. 157—Jeune, P.

Wilful Neglect to Maintain Wife.]—In 1887 the parties separated, and they continued to live apart till February or March, 1900, when the husband called at his wife's house and cohabited with her for a few days. In May following the wife went to the husband's house and asked for admission, but he refused to admit her:—*Held*, upon this evidence, that the Justices were justified in finding that the husband's conduct had caused the wife to leave and live apart from him within the meaning of section 4 of the Summary Jurisdiction Act, 1895. *Snape v. Snape*, 64 J. P. 793—D.

Wilful Neglect and Misconduct by Husband—Limit of Time for Taking Proceedings.]—A husband and wife married in 1882, and cohabited till July, 1887, when they executed a "memorandum of agreement" for a separation, bearing a sixpenny stamp. The next day the wife went to America, where she remained till August, 1899, when she returned to this country and presented herself at her husband's house, who shut the door in her face. The wife took out a summons against her husband under the Summary Jurisdiction (Married Women) Act, 1895, a proceeding which must be taken within six months of the commission of the offence (*Ellis v. Ellis*, 65 L. J. P. 124; [1896] P. 251). At the hearing the Justices refused to hear any evidence as to the agreement, beyond the bare

statement of the wife that the solicitor who drew it said it was not worth the paper it was written on, and that it was never intended to be acted upon. The ground of their refusal to do so was not clearly stated, but it appeared—partly, at all events—to be based on the ground that it was insufficiently stamped. They granted the wife a separation order, and ordered the husband to pay ten shillings a week for her maintenance:—*Held*, on appeal, that the case depended on the terms of the agreement. If the parties intended to separate in July, 1887, then there was no offence within the Act, at all events within six months of the summons, as decided to be necessary in *Ellis v. Ellis*, *supra*. Case remitted to the Justices to hear further evidence as to the agreement. *Medway v. Medway*, 69 L. J. P. 56; [1900] P. 141; 82 L. T. 627; 48 W. R. 622; 64 J. P. 120—D.

"Habitual drunkard"—What is.]—In proceedings for a separation order by a wife against her husband on the ground that he was an "habitual drunkard" within the meaning of section 3 of the Habitual Drunkards Act, 1879, evidence was given that he was "constantly drinking," "very rarely sober," and that he assaulted his wife and threatened other people:—*Held*, that the Justices were right in holding that the husband was an "habitual drunkard" within the meaning of the section. *Robson v. Robson*, 68 J. P. 416—D.

Effect of Separation Order.]—The provisions of section 5, sub-section (a) of the Summary Jurisdiction (Married Women) Act, 1895, that an order of the Court of summary jurisdiction made under the Act, that the applicant is to be no longer bound to cohabit with her husband, is while in force to have the effect in all respects of a decree of judicial separation, are to be read subject to this qualification, that no order made under the Summary Jurisdiction Act can oust the jurisdiction of the Matrimonial Division of the High Court of Justice. *Smith v. Smith*, 74 L. J. P. 113; [1905] P. 249; 93 L. T. 457; 54 W. R. 220—Bargrave Deane, J.

An order of the Court of summary jurisdiction proceeding on the ground of desertion, which, under the Summary Jurisdiction Act, need not continue for two years, is not to be taken into consideration by the High Court, in subsequent proceedings before it, in determining whether a state of things has in fact arisen since the date of the order of the Court of summary jurisdiction constituting desertion for two years under the Matrimonial Causes Act, 1857. *Ib.*

Maintenance—Order for—Voluntary Allowance Made to Wife by Person Other than Husband—Amount of Allowance.]—In making an order for maintenance under the Summary Jurisdiction (Married Women) Act, 1895, it is the duty of the Justices, in computing the amount of such allowance, to enquire into the joint means of both husband and wife, and for the purposes of such enquiry they ought to take into account a voluntary allowance paid to the wife by a person other than her husband. *Nott v. Nott*, 70 L. J. P. 94; [1901] P. 241; 84 L. T. 573; 65 J. P. 378—D.

— Amount—Form of Order.]—*Per JEUNE, P.:*

In making an order for maintenance under the Summary Jurisdiction (Married Women) Act, 1895, Justices should follow the principles on which the Divorce Court acts when awarding alimony, and award one-third of the joint incomes. The maintenance order should on its face recite the conviction against the husband. *Wilcox v. Wilcox*, 66 J. P. 166—D.

— **Wife's Children by Former Marriage—Liability of Husband to Maintain.**—Where magistrates have made an order for a judicial separation under the Summary Jurisdiction (Married Women) Act, 1895, in fixing the amount of maintenance to be paid by the husband to the wife, they are entitled to take into consideration the existence of any infant children of the wife by a former marriage that she may have to support, a husband being, at all events by the poor law, liable for the maintenance of his step-children as well as for the issue of his own marriage. *Hill v. Hill*, 71 L. J. P. 81; [1902] P. 140; 86 L. T. 597; 50 W. R. 400; 66 J. P. 344—D.

— **Practice.**—Although there is no hard-and-fast rule as to the amount of allowance to be made to a wife under section 5 of the Summary Jurisdiction (Married Women) Act, 1895, magistrates would do well to follow the practice of the Probate, Divorce, and Admiralty Division of the High Court of Justice in suits for judicial separation, which is (where there are no children) to allow the wife one-third of the joint income. *Cobb v. Cobb* (No. 2), 69 L. J. P. 125; [1900] P. 294; 83 L. T. 716—D.

Evidence of Means.—In an application by a wife under the Summary Jurisdiction (Married Women) Act, 1895, the Justices found that she had been deserted, and made an order on the husband to pay her 1*l.* a week. The husband had no means of his own, but a relative of his had undertaken to provide the 1*l.*, and it was upon this that the Justices acted in making the order:—*Held*, that they were entitled to make the order, as the offer of 1*l.* was some evidence of means; but that if the husband afterwards found he could not pay the allowance he could apply to have the amount reduced. *Walton v. Walton* (No. 2), 64 J. P. 264—D.

Custody of Child given to Wife—Enforcement of Order.—Where a separation order has been granted to a wife, and the custody of the child of the marriage is given to her till such child should attain the age of sixteen, and the husband refuses to deliver up the child, the order may be enforced by attachment. *Brown v. Brown* (No. 2), 62 J. P. 568—Phillimore, J.

Summons out of Time—Previous Summons Withdrawn—Revival—Jurisdiction of Justices.—Where a summons under the Summary Jurisdiction (Married Women) Act, 1895, is withdrawn at the hearing the complaint on which it is founded comes to an end and the Justices have no jurisdiction to allow a fresh summons to be issued founded on the same matter of complaint. *Pickavance v. Pickavance*, 70 L. J. P. 14; [1901] P. 60; 84 L. T. 62—D.

Depositions—Practice.—When an application for relief is made by a married woman to Justices, by virtue of the provisions of the

Summary Jurisdiction (Married Women) Act, 1895, it is essential that careful notes of the evidence or depositions and of the magistrates' reasons for arriving at their decision should be taken by the magistrates' clerk, and in case of appeal correct copies of the same should be furnished to the Judges of the Divisional Court. *Robinson v. Robinson*, 67 L. J. P. 77; [1898] P. 153; 78 L. T. 392—D.

Appeals, Practice on.—It is the duty of Justices on determining applications under the Summary Jurisdiction (Married Women) Act, 1895, to state the reasons for their decision, and of their clerks to furnish on application by the parties an adequate note of the evidence taken on the hearing by the Justices, in order that the Divisional Court of the Probate, Divorce, and Admiralty Division, the appellate tribunal constituted by section 11 of the Act, may be enabled to deal adequately and properly with appeals. The proper practice in this respect, as laid down in *Cobb v. Cobb* (69 L. J. P. 52; [1900] P. 145), re-stated and affirmed. *Barker v. Barker*, 74 L. J. P. 74; 69 J. P. 82, 192; 21 T. L. R. 253—D.

— **Adultery of Wife—Wilful Neglect Conducing to Adultery—Liability of Husband—Appeal—Special Case.**—A husband against whom an order for weekly payments has been made under section 5 of the Summary Jurisdiction (Married Women) Act, 1895, is entitled to have the order discharged on proof of subsequent adultery of his wife, notwithstanding that he may by his conduct have conducted thereto. *Ruther v. Ruther*, 72 L. J. K. B. 826; [1903] 2 K. B. 270; 52 W. R. 154; 67 J. P. 359—D.

From a committal under a warrant made on an information or complaint that the weekly payments are in arrear, by virtue of section 9 of the Summary Jurisdiction (Married Women) Act, 1895, and section 4 of the Bastardy Laws Amendment Act, 1872, an appeal lies by way of Special Case to the King's Bench Division. *Manders v. Manders* (66 L. J. Q. B. 296; [1897] 1 Q. B. 474) distinguished. *Ib.*

— **"Fresh evidence."**—In 1887 the appellant's husband (Heald) deserted her and went to New Zealand. In 1891 Heald's mother informed the appellant that Heald had died in New Zealand. In this belief, and describing herself as a widow, the appellant married on October 19, 1895, the respondent Groves. Early in 1906 the respondent was convicted of an assault on the appellant, and in March, 1906, he deserted her; whereupon she, on March 21, 1906, obtained a separation order under the Summary Jurisdiction (Married Women) Act, 1895. At this date the respondent had written to New Zealand for a certificate of Heald's death, but had not received same. On May 30, 1906, the respondent applied to the magistrate to discharge the order of March 21, 1906, on the ground that on October 19, 1895, Heald was still alive, and that he died on June 6, 1896. The hearing was adjourned till July 11, on which date there was produced for the first time a certificate which purported to certify the fact of the death of Heald. The magistrate upon this evidence discharged the order of March 21, 1906:—*Held*, that the magistrate was right. *Groves v. Groves*, 71 J. P. 167—D.

— Fresh evidence will not, as a general rule, be received by a Divisional Court hearing appeals from the orders of Justices made under the Summary Jurisdiction Act, 1895. The note taken by the Justices' clerk will be accepted as a *prima facie* complete statement of what took place; if such note is incomplete it may be supplemented by an affidavit as to what took place in the Court below, but not as to other facts. *Snappe v. Snappe*, 62 J. P. 153—D.

— Time for—"Fresh evidence."—More than six months after a separation order was made by a magistrate, on the application of a wife under the Summary Jurisdiction (Married Women) Act, 1895, the husband discovered that his wife had committed adultery a few days before the order was made. He thereupon took out a summons under section 7 of the Act to discharge the order. The magistrate having held that he had no jurisdiction.—*Held*, that the limit of six months prescribed by section 11 of the Summary Jurisdiction Act, 1848, did not apply, and the application therefore was not out of time; and further that an application under section 7 to alter, vary, or discharge an order was on the same footing as regards fresh evidence as an application for a new trial of an action, and that there was "fresh evidence" within the meaning of section 7 to justify the order being discharged. *Weightman v. Weightman*, 94 L. T. 620; 70 J. P. 120; 22 T. L. R. 362—D.

— "Fresh evidence"—Case Remitted.]—On June 15, 1889, a married woman obtained an order for separation and maintenance against her husband under the Summary Jurisdiction (Married Women) Act, 1895, s. 4. At the time of the hearing the husband was seriously ill, and, although he knew he had an answer to the charge, his brain and faculties were so far paralysed that he could neither indicate the lines of his defence nor give the names of his witnesses. As he was supposed to be actually dying, his solicitor allowed the order to go without opposition, and declined an adjournment. Subsequently the husband so far recovered as to be able to give the names of his witnesses, and the matter having been again brought before them on a fresh summons, the Justices, after hearing the evidence, discharged their order of June 15, on the ground that "fresh evidence" had been brought before them within the meaning of section 7 of the Summary Jurisdiction (Married Women) Act, 1895. Against this decision the wife appealed:—*Held*, that "fresh evidence" within the meaning of section 7 meant evidence which had not come to the knowledge of the party wishing to call it at the time of the hearing, or evidence which he could not then have called, but not evidence which could have been called and was not; and that (although the ultimate result may have been right) the magistrates were wrong in re-hearing the matter on that ground. THE COURT, having regard to the physical condition of the respondent on June 15, remitted the case to the magistrates to be re-heard *ab initio*. *Johnson v. Johnson*, 69 L. J. P. 13; [1900] P. 19; 81 L. T. 791; 64 J. P. 72—D.

— Supplying Notes of Evidence.]—It is the duty of the clerk to the Justices, in every case in which an appeal is brought from their deci-

sion to the Probate, Divorce, and Admiralty Division, to furnish copies of the notes on the application of either party. Such notes should include not merely the evidence, but the decision of the Justices, and their ground for arriving at such decision. *Cobb v. Cobb* (No. 1), 69 L. J. P. 52; [1900] P. 145; 82 L. T. 626; 64 J. P. 200—D.

— Number of Copies to be Supplied.]—In cases brought before the Court on appeal from magistrates under the Summary Jurisdiction (Married Women) Act, 1895, two copies of the notes of evidence should be sent for the use of the Court. *Walton v. Walton* (No. 1), 69 L. J. P. 54; [1900] P. 147; 82 L. T. 627; 48 W. R. 622—D.

Costs of Appeal.]—A husband who successfully appeals from an order of Justices must pay the wife's costs of the appeal if he fails to raise before the Justices a valid objection to their jurisdiction to hear the summons. *Pickavance v. Pickavance*, *supra*.

— Wife's Costs.]—The wife was allowed her costs of an appeal from Justices on a summons under the Summary Jurisdiction (Married Women) Act, 1895. *Hurttable v. Hurttable*, 68 L. J. P. 83—D.

Where a wife has obtained a decision in her favour under the Summary Jurisdiction (Married Women) Act, 1895, she is entitled to her costs of an appeal to the Divisional Court, even though the appeal is successful. *Medway v. Medway*, 69 L. J. P. 56; [1900] P. 141—D. And see Costs, *infra*.

(m) Costs.

Wife's Costs—Security—Charges without Prospect of Success.]—To entitle an unsuccessful wife to secured costs it is essential that they should be the costs arising from the making of substantial allegations and reasonably incurred. Costs of allegations which have no prospect of success are incurred at the risk of the party making them, and not that of the party giving security. *Ash v. Ash* (62 L. J. P. 97; [1893] P. 222) followed. *Kay v. Kay*, 73 L. J. P. 108; [1904] P. 382; 91 L. T. 360; 20 T. L. R. 521—Gorell Barnes, J.

— Wife Respondent Guilty of Adultery—Separate Estate under Deed of Separation.]—The source of the separate estate of a married woman is immaterial in considering her liability for costs in a divorce suit. An allowance by a husband to his wife secured by covenant in a deed of separation may be sufficient separate estate to ground an order condemning her in costs. *Clark v. Clark*, 76 L. J. P. 16; [1906] P. 331; 95 L. T. 550—Gorell Barnes, P.

— Security by Husband—Existing Separation Order.]—The discretion of the Divorce Court to see that a wife is put in funds to sue her husband or defend herself before it, and for that purpose to order the husband to give security for her costs, is not affected by the operation of section 26 of the Matrimonial Causes Act, 1857, or section 5 (a) of the Summary Jurisdiction (Married Women) Act, 1895. *Wingfield & Blew, In re* (73 L. J. Ch. 797;

[1904] 2 Ch. 665), discussed and distinguished. *Sheppard v. Sheppard*, 74 L. J. P. 102; [1905] P. 185; 93 L. T. 443; 53 W. R. 608; 21 T. L. R. 526—Gorell Barnes, P.

— **Insufficient Defence—Facts Known to Solicitor.**—Where a wife had made a confession in the presence of several persons, and there was some evidence that the fact of such confession had come to the knowledge of her solicitor, the Court ordered—first, that the money paid into Court to secure the wife's costs should be paid out to the petitioner, unless the wife's solicitor should within fourteen days satisfy the Court he had reason to believe the wife had a *bona fide* defence; and secondly, that the wife's costs should in any event be taxed against the co-respondent, and, if recovered, paid to the wife's solicitor, unless he had already received the amount from the petitioner. *Townson v. Townson*, 67 L. J. P. 68; 78 L. T. 54—Jeune, P.

— **Bona Fide Defence.**—Security for the costs of the wife's defence to a suit for dissolution of marriage is only ordered upon the basis that the wife has a *bona fide* defence. In order that the solicitor for the wife, who is unsuccessful in the suit, should obtain an order for the wife's costs, there must have been reasonable grounds for defending. It is not enough that the solicitor thought that the husband would not be able to establish his case. *Kershaw v. Kershaw*, 23 T. L. R. 296—Gorell Barnes, P.

— **Application by Solicitor who had Acted for Wife to Tax Costs against Respondent—No Previous Application for Security.**—A wife filed a petition for judicial separation, and the case was in due course set down for trial. Subsequently she wrote to her solicitors saying that she had returned to her husband. On May 29 her solicitors wrote to her expressing a wish to withdraw from the case, and they did not afterwards act for her. Up to that date they took no steps, under the prevailing practice of the Divorce Division, to obtain security for the wife's costs from the husband. On July 8 they carried their costs into the Registry for taxation against the husband. On a summons adjourned into Court for further argument, THE COURT held, that, as the solicitors had not applied for security in the ordinary way, they must be left to their remedy at common law; that the application was not in accord with the practice of the Court; that it was out of time; that it was not made by the wife's solicitors, but merely by a firm that had at one time acted for her; that the Court had no jurisdiction to deal with it; and that it must be dismissed with costs against the applicants personally. *Nairne v. Nairne*, 71 L. J. P. 87; 85 L. T. 649; 65 J. P. 777—Gorell Barnes, J.

— **Wife Petitioner—Compromise—Payment of Taxed Costs to Solicitor.**—A petition for divorce was presented by a wife, and an application instituted for the usual order for the taxation of her costs. Before the hearing of the application a settlement was made by the petitioner without the knowledge of her solicitor, and she returned to cohabitation with her husband. THE COURT, on the application of the petitioner's solicitor, made an order for the

taxation of her costs and for payment of the amount of same to the solicitor. *Ballance v. Ballance*, [1899] 2 Ir. R. 128—Andrews, J.

— **Wife's Defence—Counter-charges—Reasonable Ground for.**—Upon a husband's petition for dissolution of marriage, the wife's answer alleged charges of cruelty and condonation on the part of the husband. A decree *nisi* having been pronounced, an application was made for the usual order for the wife's costs. The Judge thereupon read the proofs of the wife's witnesses, and said that they disclosed no adequate reason for bringing the counter-charges, and ordered a sum of money, which had been paid into Court by the husband for the wife's defence, to be paid out to him. *Marks v. Marks*, 21 T. L. R. 209—Gorell Barnes, J.

— **No Security for—Disagreement of Jury—Wife's Costs of Abortive Trial.**—Where a wife, upon a husband's petition for a dissolution of marriage, had made no application that her husband should give security for her costs, the Court will not allow her any costs in the case of an abortive trial. *Waudby v. Waudby*, 84 L. T. 571; 49 W. R. 672; 65 J. P. 344—Jeune, P. Affirmed, 84 L. T. 829—C.A.

If she succeeds on a second trial she will, unless special reasons are shewn to prevent it, be entitled to her full costs of both trials. *Ib.*

Wife's Petition for Judicial Separation—Costs of Solicitors Acting for Petitioner—Application for Security for Costs after Solicitors have Ceased to Act for Petitioner.—If solicitors acting for the wife in a petition for judicial separation do not follow the ordinary practice and get security for costs, they cannot after abandoning the suit apply for security, as they are then no longer acting for the wife. In such circumstances they can only take action at common law. *Nairne v. Nairne*, 65 J. P. 777—Gorell Barnes, J.

Agreement to Pay Taxed Costs of Wife—Validity—Cross-petitions Dismissed.—Where the cross-petitions of husband and wife were both dismissed the Court refused to give any effect to an agreement which had been drawn up before the trial by which the husband agreed to pay the wife a certain sum yearly as alimony and to pay her taxed costs, the agreement appearing to the Court to have been made in contemplation of a decree being pronounced. The usual orders were made—namely, the wife's petition dismissed and the husband's being dismissed with costs. *Weekes v. Weekes*, 21 T. L. R. 227—Gorell Barnes, J.

Petition for Divorce by Husband—Petition for Separation by Wife—Consolidation—Order for Payment of Costs—Final or Interlocutory—Co-respondent.—A suit for judicial separation was brought by the wife, and a suit for divorce was brought by the husband, to which A was made a co-respondent. These suits were consolidated by an order of the Court, and at the trial the wife's suit was withdrawn and a decree *nisi* (which was afterwards made absolute) was pronounced in the husband's suit with costs against the co-respondent. On taxation of the costs the question was raised whether

the husband's costs of the wife's suit ought to be taxed against the co-respondent, and the Registrar referred the question to the Judge, who decided that they ought, holding that by virtue of the consolidation order the two suits became one, and that he therefore had jurisdiction to order the co-respondent to pay the husband's costs of the wife's suit under the Matrimonial Causes Act, 1857, s. 34. The co-respondent appealed from this decision without obtaining leave to appeal:—*Held*, that the appeal lay without leave, the order not being an interlocutory order within the Judicature Act, 1894, s. 1 (1) (b). *Held* also, that the order consolidating the two suits was not a consolidation within the strict meaning of the term so as to make the two suits one proceeding, and that the Court had no jurisdiction either under the Matrimonial Causes Act, 1857, s. 34, or under the Judicature Act, 1890, s. 5, to order the co-respondent to pay any part of the costs of the wife's suit to which he was not a party. *Forbes-Smith v. Forbes-Smith*, 70 L. J. P. 61; [1901] P. 258; 84 L. T. 789; 50 W. R. 6—C.A.

Co-respondent — Liability of — Co-respondent Appearing, but not Answering.—Where a co-respondent alleged that he did not know at the time he first committed adultery with the respondent that she was a married woman, but admitted that he became acquainted with the fact within a fortnight from that time,—THE COURT declined to construe that admission too literally, and, holding that practically he knew the fact from the first, condemned him in costs. *Bilby v. Bilby*, 71 L. J. P. 81; [1902] P. 8; 86 L. T. 123—Jeune, P.

— **Husband's Right to Costs against.**—The question of condemning the co-respondent in costs is entirely in the discretion of the Court. If a co-respondent who has misconducted himself with a woman in ignorance of the fact that she was a married woman continues to live in adultery with her after being informed of the fact, he will not necessarily be condemned in costs. *Robinson v. Robinson and Wilson*, 78 L. T. 391—Gorell Barnes, J.

— **Security for Costs—Bankrupt Petitioner—Claim for Damages from Co-respondent.**—A petitioner who is an undischarged bankrupt may claim damages from the co-respondent without being compelled to give security for the co-respondent's costs. *Smith v. Smith and Palle* (7 P. D. 227) overruled. *Blackett v. Blackett*, 71 L. J. P. 69; [1902] P. 170; 86 L. T. 669; 50 W. R. 516—C.A.

Motion for New Trial—Security for Costs.—The practice laid down in *Heckscher v. Crosley* (60 L. J. Q. B. 75; [1891] 1 Q. B. 224), that no security for costs is required to be given by a party moving in the Court of Appeal for a new trial, after trial of an action with a jury, under the Supreme Court of Judicature Act, 1890, applies to a motion for a new trial of a petition for a divorce. *Rickaby v. Rickaby and Swift*, 70 L. J. P. 24; [1901] P. 134; 84 L. T. 182—C.A.

Queen's Proctor's Intervention—Pauper Litigant.—The cost of the Queen's Proctor's intervention are entirely in the discretion of the Judge, and an unsuccessful pauper litigant

is therefore liable to an order condemning him in the full costs of the intervention. *White v. White*, 67 L. J. P. 63; [1898] P. 124—Jeune, P.

Order to Pay or Secure Wife's Costs—Attachment—Release—Condition.—See ATTACHMENT.

Two Trials.—See *Waudby v. Waudby*, 71 L. J. P. 43; [1902] P. 85—Gorell Barnes, P.

(n) Practice.

Rules of Divorce Court are not Exhaustive.—The rules of the Divorce Court must not be taken as exhaustive, and where they fail to meet any particular case the Court may follow the Rules of the Supreme Court, notwithstanding the provision of Order LXVIII. rule 1, that they shall not affect the procedure or practice in proceedings for divorce and other matrimonial causes, except where expressly provided. *Giles v. Giles*, 69 L. J. P. 26; [1900] P. 17; 81 L. T. 823; 48 W. R. 288—Gorell Barnes, J.

Petitioner Suing in Forma Pauperis—Respondent of Unsound Mind.—Where a wife petitioner was suing *in forma pauperis* for a divorce, on the ground of her husband's adultery and cruelty, and the respondent was of unsound mind and confined as a pauper lunatic in an asylum,—THE COURT, in the absence of any express provision in rule 196 of the Divorce Court Rules applicable to the particular case, *held*, that the practice laid down for the other Divisions of the High Court by Order XIII. rule 1, ought to be followed, and adjourned the case in order that the petitioner might apply that the official solicitor or some other suitable person might be appointed as guardian *ad litem* to such respondent. *Ib.*

Substituted Service of Petition.—Though the fact that the respondent's whereabouts cannot be discovered may be due to the petitioner's delay in bringing his petition, substituted service of the petition and citation may be allowed. *Jenson v. Jenson*, 78 L. T. 764—Jeune, P.

An affidavit by the petitioner of his ignorance of the address of the parties to be served should be filed with application for substituted service. *Martin v. Martin* (No. 1), 78 L. T. 170—Gorell Barnes, J.

— **Affidavit in Support.**—Although it is a fixed rule of practice to require an affidavit by the petitioner in support of every application for substituted service of a petition at the commencement of a matrimonial suit, this rule does not necessarily apply to petitions for permanent maintenance and alimony. *Schraml v. Schraml*, 68 L. J. P. 47; 80 L. T. 328—Jeune, P.

Co-respondent, Dispensing with—Substituted Service—Amendment of Petition—Further Affidavit in Support Dispensed with.—A husband petitioned for a dissolution of his marriage with his wife on the ground of her adultery with a man unknown. No evidence could be obtained as to the adulterer, except that the wife had stayed with a man in an hotel in London, where

their names were entered in the books as "Mr. and Mrs. E. L. G." The wife, whilst admitting her adultery, would give no information as to the adulterer, beyond that "he would marry her when the divorce was pronounced." THE COURT refused to dispense with making a co-respondent, but ordered the petition to be amended by charging adultery with "E. L. G." in the ordinary way, the co-respondent to be served by advertisement; and—the petitioner being in Western Australia—any further affidavit in support of the petition to be dispensed with. *Nicolas v. Nicolas*, 68 L. J. P. 66; 80 L. T. 422—Jeune, P.

— **Discretion of Court.**—In order to justify the Court in making an order giving permission to a husband petitioner to proceed without making a co-respondent of a person who has been accused by name of committing adultery with his wife, it is not sufficient that he believes on the evidence then before him that such person is innocent of the charge. If, however, the Court believes that no evidence can be obtained against such person, it may exercise its discretion under section 28 of the Matrimonial Causes Act, 1857, and permit the petitioner to proceed without making him a co-respondent. But as one of the objects of section 28 was that any one against whom adultery is alleged might have an opportunity to appear and defend his character, the Court ought, if possible, to have some evidence that the person accused does not desire to be made a co-respondent. *Jones v. Jones* (65 L. J. P. 101; [1896] P. 165) and *Saunders v. Saunders* (66 L. J. P. 57; [1897] P. 89) commented on and explained. *Edwards v. Edwards*, 67 L. J. P. 1—Jeune, P.

— **Unknown Adulterer—Named by Wife—No other Source of Information—Enquiries ordered to be made from the Wife.**—A wife, in answer to enquiries by her husband touching the paternity of a child with which she was pregnant, and of which he could not be the father, gave the name of a man, and made certain statements which she said were within the petitioner's knowledge, but of which he declared he knew nothing; neither did he know of the existence of such a man. After petition filed, and upon motion by the husband (petitioner) for leave to proceed without citing any person as co-respondent, THE COURT directed the petitioner's solicitor to write to the respondent with a view of having a personal interview with and obtaining an explanation from her, and refused to make an order in the petitioner's favour until this had been done and the result made known to the Court. *Grose v. Grose*, 78 L. T. 89—Jeune, P.

— **Respondent and Co-respondent Residing Abroad—Service of Petition and Citation out of Jurisdiction—Refusal of Letters of Request.**—A respondent and co-respondent residing at Lisbon, the citation and petition were sent to a Portuguese advocate, who reported that the matter must be carried through diplomatic channels, when the Crown attorney would decide whether the proceedings were legal according to Portuguese law or not. THE Foreign Office, on being applied to, requested that application should be made to them by the senior Registrar, who stated that the proper course was for the President to issue letters of request to the Foreign Office.

THE COURT, being thereupon moved for an order for substituted service, or, in the alternative, for letters of request, adjourned the motion in order that the application for letters of request might be made direct to the President in the first instance. Subsequently, the President having refused to issue letters of request, THE COURT made an order for substituted service by registered letters on the respondent, co-respondent, and certain relatives residing at Lisbon, intimating, however, at the same time, that the addresses of the respondent and co-respondent must be verified by affidavit, and that at the hearing the Court would have to be satisfied that the service had been duly effected. *Wray v. Wray and D'Almeida*, 70 L. J. P. 32; [1901] P. 132; 84 L. T. 64—Gorell Barnes, J.

— **Co-respondent Resident Abroad—Substituted Service of Proceedings.**—The co-respondent in a suit for dissolution of marriage was resident in a sanatorium in the Canton of Neuchâtel in Switzerland. The principal of such sanatorium refused to serve him with the citation and petition, or to allow him to be served with them. The Procureur-General of Neuchâtel stated that service must be effected through a diplomatic source, but the Foreign Office refused to act in the matter except under an order of the Court. It was shewn on affidavit that the mother and uncle of the co-respondent resided in Switzerland, and that the petitioner was acquainted with their addresses. THE COURT, after observing that the usual practice was to serve through the foreign tribunal, made an order for the service of the citation and petition on the co-respondent by registered letters addressed to his mother and uncle. *Trübner v. Trübner and Cristiani* (59 L. J. P. 56; 15 P. D. 24). *Stumpel v. Stumpel and Zepfel*, 70 L. J. P. 6—Jeune, P.

— **Wife's Petition for Dissolution—Adultery Charged with Person Named in Petition—Intervention by Person so Charged—Intervener's Costs.**—A wife, in a petition for dissolution of marriage, charged her husband with adultery with B. and other women unknown, also with cruelty and desertion. Shortly before the hearing the wife's counsel applied that the case might stand out of the paper for a few days, whereupon the husband's counsel stated that he was not in a position to contest either the adultery or the desertion, but still proposed to contest the charges of cruelty. B. then applied for and obtained leave to intervene, and at the hearing succeeded in completely negating the charges made against her:—*Held*, that the intervener ought to be put in the best possible position to obtain the costs which she had properly incurred in defending herself, and the Court thereupon made an order against both the petitioner and respondent to pay the costs of her successful intervention. *Wade v. Wade*, 72 L. J. P. 1; [1903] P. 16; 87 L. T. 751; 51 W. R. 464—Gorell Barnes, J.

— **Countercharge by Husband.**—Where a husband in answer to his wife's petition for a dissolution of their marriage countercharged her with having committed adultery, but did not claim any specific relief, and his answer did not even contain the usual formal prayer for "such further or other relief as to the Court may seem fit," on an application by the party

charged with adultery with the wife for leave to intervene, THE COURT held that, though the application was in itself a reasonable one, it had no power to grant it. *Wheeler v. Wheeler and Rhodes* (58 L. J. P. 65; 14 P. D. 154) distinguished. *Harrop v. Harrop*, 68 L. J. P. 58; [1899] P. 61; 80 L. T. 171—Gorell Barnes, J.

Intervention by Third Party—Answer Alleging Adultery of Petitioner with Third Party, but Claiming no Relief.—If a respondent to a petition for dissolution of marriage simply asks by his answer that the petition should be dismissed, and does not ask for any further relief, the answer will be treated as an ordinary defence, and a third party will not be allowed to intervene, though charges may be made against him by the answer; but if the answer does ask for further relief, it will be treated like a cross-petition, and the intervention of a third party will be allowed. *Harrop v. Harrop* (68 L. J. P. 58; [1899] P. 61) approved. *Lowe v. Lowe*, 68 L. J. P. 60; [1899] P. 204; 80 L. T. 575; 47 W. R. 553—C.A.

Intervention by Member of Public.—Where a member of the public intervenes under section 7 of the Matrimonial Causes Act, 1860, to shew cause why a decree *nisi* for a divorce should not be made absolute, the same rule as to costs applies as in a case where the King's Proctor intervenes, and the intervener who succeeds will not, as a general rule, be allowed costs as between solicitor and client. *Woodhead v. Woodhead*, 23 T. L. R. 334—Gorell Barnes, P.

Mode of Trial—Act on Petition—Discretion of Court.—The Court has a discretion under section 36 of the Divorce Act, 1857, as to the mode of trial of an act on petition. In spite of Divorce Rule 61, which probably did not contemplate issues of fact as likely to arise on the trial of an act on petition, and although on an act on petition questions of law are generally combined with the issues of fact, and inconvenience may result from a trial of such questions with a jury, the Court will not refuse a jury if one of the parties wish for it, although a jury is not the proper tribunal for the purpose according to the old practice. *Louvenfeld v. Louvenfeld*, 72 L. J. P. 57; [1903] P. 177; 89 L. T. 146—C.A.

Right to begin—Wife's Petition for Restitution—Cross-petition by Husband for Dissolution—Consolidated Suit.—A wife petitioned for restitution of conjugal rights, and her husband in his answer charged her with adultery, and afterwards filed a cross-petition praying for a dissolution of his marriage with her on the ground of her adultery with the co-respondent. The suits, having been consolidated, came on for hearing together:—*Held*, that the burden of proof lay on the husband, and that his counsel must begin. *Smith v. Smith and Charlesworth*, 69 L. J. P. 44; [1900] P. 66 Jeune, J.

Trial in Camera—Jurisdiction of Court.—The inherent jurisdiction of the Probate, Divorce, and Admiralty Division to try cases *in camera* is not confined to that branch of its jurisdiction which it inherits from the Ecclesiastical Courts. Evidence tendered in a suit for dissolution may also be heard *in camera* when its nature is such that justice cannot be

done if it be heard in open Court. *C. v. C.* (38 L. J. P. 37; L. R. 1 P. & D. 640) not followed. *Druce v. Druce*, 72 L. J. P. 51; [1903] P. 144; 88 L. T. 573—Jeune, P.

Decree Nisi—New Trial Granted on Application of Co-respondent—Effect on Decree Nisi as against Respondent.—In a suit for divorce by a husband the respondent did not appear, but the co-respondent defended. A decree *nisi* was pronounced. The co-respondent appealed, and the Court of Appeal made the following order: "Upon hearing counsel for the co-respondent it is ordered that the verdict and judgment be set aside, and that a new trial be held":—*Held*, that this order annulled the decree *nisi*. *Worsley v. Worsley*, 20 T. L. R. 171—Jeune, P.

Practice—Time for Decree Absolute Allowed to run from Date of Hearing, where Decree Nisi has been Reserved.—When judgment has been reserved the decree *nisi*, if pronounced, will not be antedated, but the Court may allow the time for decree absolute to run from the date of the hearing. *Houghton v. Houghton*, 72 L. J. P. 31; [1903] P. 150.

Practice—Condonation after Decree Nisi—Rescission of Decree Nisi—Effect on Verdict for Damages—Liability of Co-respondent for Costs.—Decree absolute is the substantial decree in the suit, and condonation by a husband of the adultery of his wife after he has obtained a decree *nisi* dissolving his marriage on the ground of such adultery prevents the decree *nisi* being made absolute and entails its rescission. The decree *nisi* will in such a case be rescinded for all purposes, and any damages for which a verdict has been given fall with the decree *nisi*. *Hymen v. Hymen*, 73 L. J. P. 106; [1904] P. 403; 91 L. T. 361; 20 T. L. R. 696—Jeune, P.

Semble, in any other view the damages would at all events after such condonation require re-assessment. *Ib.*

Condonation by the husband, the petitioner, after decree *nisi* is no reason for relieving the co-respondent of any liability for costs. *Long v. Long* (60 L. J. P. 27; 15 P. D. 218) doubted. *Ib.*

Decree Absolute—Time for Application—Amendment of Claim for Relief—Decree of Judicial Separation.—A petitioner is entitled to a reasonable time for determining whether he or she will proceed to make absolute a decree *nisi* for dissolution of marriage. *Parsons v. Parsons*, 76 L. J. P. 159; [1907] P. 331; 23 T. L. R. 749—Bucknill, J.

Semble, the respondent is not entitled to have the petition dismissed in the absence of an application to make the decree absolute immediately on the expiration of the period of six months from decree *nisi*. A petitioner is entitled, where he or she has obtained a decree *nisi* on a petition for dissolution of marriage, not claiming further or other relief, to amend his or her claim by applying for rescission of the decree *nisi* and a decree of judicial separation. *Ib.*

Counterclaim for Restitution of Conjugal

Rights — Cross-petition — Practice.]—A wife petitioned for a judicial separation on the ground of the respondent's cruelty. The respondent, in his answer, denied the cruelty, and claimed a decree of restitution of conjugal rights:—*Held*, that the respondent's proper course would have been to file a cross-petition, and that the relief prayed for could not be granted on a mere counterclaim in the answer not verified by affidavit. *Wingfield v. Wingfield*, 78 L. T. 568—Gorell Barnes, J.

Order Settled by Conveyancing Counsel and Signed by Registrar—Power of Court to Rectify Mistake in Order pending Appeal to Court of Appeal.]—The Court has power to rectify a mistake or omission in an order, even though an appeal against such order is pending in the Court of Appeal at the time of such application to rectify, and in spite also of the fact that the application to rectify is made by the party who is appealing against the order as drawn up. *E. v. E. (otherwise T.)* 72 L. J. P. 44; [1903] P. 88; 88 L. T. 570—Jeune, P.

Dissolution—Dismissal of Petition by Consent —Application in Chambers.]—An application to dismiss a petition for dissolution by consent ought now to be made by summons in chambers and not by motion in open Court. *Slater v. Slater and Bolderson*, 69 L. J. P. 48—Gorell Barnes, J.

Re-hearing Suit—Application.]—An application for the re-hearing of a suit for dissolution of marriage cannot be made except to a Divisional Court. *Watson v. Watson*, 89 L. T. 78—Jeune, P.

New Trial Ordered by Court of Appeal—Competency of Appeal to the House of Lords.]—An appeal without leave lies to the House of Lords from an order of the Court of Appeal for a new trial of a suit in which a decree *nisi* has been granted by the Divorce Court on the verdict of a jury. *Butchart v. Butchart and Hill*, 70 L. J. P. 29; [1901] A.C. 266; 84 L. T. 209—H.L. (E.)

Appeal—Notes of Proceedings in Court Below —Duty of Justices' Clerks.]—It is the duty of Justices' clerks to take a full note of the proceedings in the Court below in any case arising out of the Summary Jurisdiction (Married Women) Act, 1895, and of the Justices to state the reasons for arriving at their decision. The Court will decline to hear any appeal under the Act when it is not supplied with such notes and reasons. If an imperfect note is taken, such note cannot be supplemented or amplified by affidavit evidence. *Cobb v. Cobb* (69 L. J. P. 52; [1900] P. 145) and *Barker v. Barker* (74 L. J. P. 74) approved and followed. *Wenham v. Wenham*, 95 L. T. 548—D.

5. NULLITY SUITS.

Marriage Contracted Abroad—English Domicil —Jurisdiction of English Court in Nullity Suit.]—An English Court has jurisdiction to entertain an action for nullity of a marriage contracted abroad between persons who are domiciled in England. *Bater v. Bater*, 21 T. L. R. 517—Gorell Barnes, J.

Domicil—Residence—Practice of Ecclesiastical Courts.]—In suits for nullity residence and not domicil is the test of jurisdiction. So the Court pronounced a decree of nullity on the ground of bigamy in a case where the domicil of the respondent was Irish and the ceremony of marriage between the parties had been gone through in the Isle of Man. *Niboyet v. Niboyet* (48 L. J. P. 1; 4 P. D. 1) commented on and followed. *Roberts (otherwise Brennan) v. Brennan*, 71 L. J. P. 74; [1902] P. 143; 86 L. T. 599; 50 W. R. 414—Jeune, P.

Impotence — Practice — Pleading — Evidence — Want of Sincerity.]—Want of sincerity as an answer to a suit for nullity on the ground of impotence must be specifically pleaded. *S. (otherwise G.) v. S.*, 76 L. J. P. 118; [1907] P. 224; 28 T. L. R. 460—Bargrave Deane, J.

Materiality of Adultery of Petitioner—Admissibility of Evidence.]—*Semble*, adultery on the part of a petitioner for nullity on the ground of impotence may be pleaded, and if established in evidence is material matter on the question of sincerity, although the petitioner is not bound to answer questions tending to establish it. *M. (otherwise D.) v. D.* (10 P. D. 175) not followed. *Ib.*

Identity—Evidence of Practice.]—In an undefended suit for nullity on the ground of impotence, although the identity of both parties is proved in the Registry at the time of the medical examination, the identity of the party not appearing must be proved again in open Court. *H. (otherwise G.) v. G.*, 69 L. J. P. 120—Gorell Barnes, J.

Bigamous Marriage—Alimony Pendente Lite after Decree Nisi.]—The principle on which decrees of nullity of marriage have been ordered to be decrees *nisi* in the first instance is that the Queen's Proctor may have an opportunity of intervening wherever there is any doubt as to the facts of the case. Where, however, the status of the parties is definitely settled, as where it has been proved beyond question that the marriage which it is sought to set aside was bigamous, there is no reason why the Court should not at once exercise its discretion and relieve a petitioner from the obligation to pay alimony *pendente lite* between decree *nisi* and decree absolute. *Childers v. Childers (otherwise Burford)*, 68 L. J. P. 90—Jeune, P.

—Declaration of Nullity of Marriage—Provision for Wife.]—Where a petition is brought for a declaration that a marriage ceremony is null and void on the ground that the respondent had a husband living at the time of the ceremony, the Court cannot ordinarily make it a term of granting a decree that the petitioner shall make provision for the respondent. *Bateman v. Bateman (otherwise Harrison)*, 78 L. T. 472—Gorell Barnes, J.

—Petitioner's Right to Declaration.]—A petitioner is entitled *ex debito justitiae* to a declaration of nullity of marriage when the respondent's husband was alive at the time of the second marriage, and the Court has no discretion as to withholding relief. *Ib.*

Practical Impossibility of Consummation—In

ference of Incapacity on Part of Woman.]—In a suit for nullity at the instance of the husband on the ground of the wife's impotency, it was proved that the marriage had been solemnised seven months before the action was brought; that the parties lived together for three and a-half months after the date of the marriage, and then separated; that the marriage never was consummated; that there was no structural incapacity on the part of the wife, and that the husband was able and anxious to consummate, had ample opportunities, and, short of physical force, adopted all ordinary expedients to induce the wife to admit connection. No reason was suggested for a wilful refusal on the part of the wife, and it was found that the whole probabilities pointed to an opposite conclusion:—*Held*, that the Court was entitled to draw the inference that there was a practical incapacity on the part of the wife, and a decree of nullity was granted. *A. B. v. C. B.*, 8 F. 603—Ct. of Sess.

Non-consummation—No Cohabitation—Refusal of Female Respondent to Submit to Inspection—Positive Evidence of Incapacity.]—Incapacity found as a fact on positive evidence arising on the general facts of the case after non-consummation, and refusal of a female respondent to submit to medical inspection in spite of absence of cohabitation. The authorities on mere inference of incapacity apart from positive evidence commented on. *W. v. W.*, 74 L. J. P. 112; [1905] P. 231; 93 L. T. 456—Gorell Barnes, P.

—Refusal of Wife—Petition—Delay.]—The parties were married in 1887, and the wife refused to consummate the marriage. The husband, three months afterwards, in the honest belief, and being so advised, that he could not obtain relief from the Court as the marriage had taken place so recently, executed a separation deed. In 1905 he consulted other solicitors, and filed a petition for nullity of marriage. Upon evidence, the Court pronounced a decree *nisi*. *M. v. M.*, 22 T. J. R. 719—Bargrave Deane, J.

—Inference from Conduct of Respondent.]—The fact of the physical incapacity of either a husband or wife to consummate a marriage may be inferred from his or her conduct during their married life. Therefore, where a husband during the time he lived with his wife obstinately refused to consummate the marriage, and, after she had filed a petition for nullity on the ground of his impotence, refused to allow himself to be examined by the medical inspectors appointed by the Court, and the inspectors certified that the wife was fully developed and a *virgo intacta*, THE COURT held that it was justified in assuming that there was physical impediment to consummation on the part of the respondent, and pronounced a decree of nullity. *B. (otherwise H.) v. B.*, 70 L. J. P. 4; [1901] P. 39—Gorell Barnes, J.

—Presumption of Incapacity of Wife—Refusal by Wife to Consummate Marriage—Delay in Taking Proceedings.]—The Court pronounced a decree of nullity of marriage on the husband's petition, the wife having refused to consummate the marriage and not having submitted herself for medical examination, the

Court drawing therefrom the inference of incapacity, notwithstanding the petition was not presented until seventeen years had elapsed after the date of the marriage. *S. v. B.*, 21 T. L. R. 219—Gorell Barnes, J.

Intervention of King's Proctor—Application by Petitioner to Withdraw Petition and Rescind Decree.]—A wife petitioner obtained a decree *nisi* for nullity, on the ground of her husband's impotence, *in camera*. Subsequently the King's Proctor intervened. Previous to such intervention the petitioner had herself instructed her solicitor to take steps to get her petition dismissed and the decree *nisi* rescinded. On a motion being made in open Court to this effect, THE PRESIDENT, having considered the matter in chambers, allowed the decree *nisi* to be rescinded and the petition dismissed on the petitioner's own motion, and—the King's Proctor consenting—without condemning her in his costs. *A. v. A.*, 70 L. J. P. 90; [1901] P. 284; 85 L. T. 171—Jeune, P.

Variation of Settlement—"Property settled."]—The power of enquiring into and varying settlements after a decree of nullity vested in the Court by the provisions of section 5 of the Matrimonial Causes Act, 1859, as extended by section 3 of the Matrimonial Causes Act, 1878, applies equally to all cases of nullity, and the jurisdiction of the Court is not affected by the fact that the decree has been pronounced on the ground of the respondent's impotence. *Dormer (otherwise Ward) v. Ward*, 69 L. J. P. 144; [1901] P. 20; 83 L. T. 556; 49 W. R. 149—C.A.

By an ante-nuptial settlement the respondent covenanted to pay the trustees during the joint lives of himself and his intended wife (the petitioner) a yearly sum of 200*l.* by certain quarterly payments, the said sum to be paid by the trustees to the petitioner without power of anticipation. The respondent also appointed to the use of the petitioner, if the intended marriage took place and she survived him, a yearly rentcharge of 1,300*l.* so long as his mother should be living, and after her death a further rentcharge of 1,600*l.* charged upon certain hereditaments, subject to a jointure rentcharge of 1,200*l.* created in favour of his mother under another indenture; and, as beneficial owner, he appointed the hereditaments to the use of the trustees for the term of 1,000 years, to commence from his death, to secure the payments of the rentcharges. He also appointed certain other hereditaments to the use of the trustees for the term of 1,200 years, to commence from the solemnisation of the intended marriage, upon trust to raise a sum of 20,000*l.*; and the deed, after making provision as to the payment of the interest on that sum to the respondent or his assigns, and as to the disposition of the *corpus* of the fund after his decease, provided further that no part of the 20,000*l.* was to be raised during the life of the respondent without his consent in writing. The mother of the respondent was dead, and his consent in writing had not been obtained. The petitioner obtained a decree of nullity upon the ground of the respondent's impotence, and subsequently applied under section 5 of the Matrimonial Causes Act, 1859, as extended by section 3 of the Matrimonial Causes Act, 1878, for an order of the Court varying the settle-

ment:—*Held*, that the subject-matter of the settlement above referred to was "property settled" within the meaning of section 5 of the Act of 1859. *Held* also, that the only right which the petitioner had was to apply to the Court under section 5 to make an order in respect of the yearly sum of 200*l.* for her benefit, and that such order as to the Court should seem fit ought to be made. *Held* also, with regard to the jointure rentcharges and the power to raise 20,000*l.*, that inasmuch as the jointure and term could not commence until after the death of the respondent, and as no part of the 20,000*l.* could be raised during the lifetime of the respondent without his consent in writing, neither of which conditions had been fulfilled, the Court ought not to make any order under section 5 in respect thereof. *Ib.*

— **Interests of Both Parties Extinguished—**

Costs.—Where a decree of nullity was pronounced on the ground of the husband's impotence, and both husband and wife had brought money into settlement,—THE COURT, on a petition for variation of settlements, ordered that the wife's fund should be re-settled on her, on the same terms as those contained in the settlement, save that the husband be considered as dead; the husband's fund to be released from the settlement and reconveyed to him; the trustees to pay their own and the wife's costs out of the husband's fund, and pay the balance over to him. *Attwood v. Attwood*, 71 L. J. P. 129; [1903] P. 7; 87 L. T. 750—Gorell Barnes, J.

— **Marriage by Force, Fraud, and Duress—**

Conspiracy of Respondent and Petitioner's Mother.—Petitioner was induced by her own mother, acting in concert with the respondent, to go through the ceremony of marriage with the respondent. At the time of the marriage the mother, who was shewn to have exercised an abnormal amount of control over her daughter, persuaded her that the ceremony she had gone through was merely a ceremony of betrothal:—*Held*, that the petitioner acted under the duress of her mother, and was not a consenting party to the marriage, and was therefore entitled to a decree of nullity. *Clarke v. Clarke*, 65 L. J. P. 18; [1896] P. 1—Gorell Barnes, J.

Wife Pregnant by Third Person at Date of Marriage.—See *Moss v. Moss*, 66 L. J. P. 154; [1897] P. 263—Jeune, P.

Settlement—Covenant to Pay if Marriage "Solemnised."—See SETTLEMENT.

G. RESTITUTION OF CONJUGAL RIGHTS.

Written Demand for Resumption of Cohabitation.—The preliminary letter, which must be sent by the petitioner to the respondent demanding a resumption of cohabitation before a suit for restitution of conjugal rights can be entertained, must be of a friendly character, and not a hostile demand. It is not to be expected that a letter written under such circumstances should be of an affectionate nature, and, provided the request is clear, the Court will not enquire too closely into the peremptory character of the precise words which are used. *Elliott v. Elliott*, 85 L. T. 648—Jeune, P.

Deed of Separation—Covenant not to Sue for Restitution—Breaches of Covenants in Deed by Respondent—Undefended Suit for Restitution.—The existence of a deed of separation containing a covenant not to sue for restitution of conjugal rights is not to be disregarded by the Court because the respondent, in a suit for that purpose does not appear in it to set up the deed. *Kennedy v. Kennedy*, 76 L. J. P. 34; [1907] P. 49; 96 L. T. 476; 23 T. L. R. 139—Gorell Barnes, P.

It is the province of the Court to consider the deed and examine the question what breaches (if any) of the covenants in the deed have been committed by the respondent. If the Court finds that the breaches are substantial, and that the deed has been, so to speak, repudiated by the respondent, the Court will not allow the deed, which is *prima facie* an answer to the suit, to tie its hand if it finds that the deed is in the circumstances of the case useless to the party petitioning for restitution. *Ib.*

— **Time for Consideration of the Deed by the Court where a Suit for Restitution is followed by one of Divorce.**—

The proper time for the consideration by the Court of the effect of such a deed is on the hearing of the suit for restitution, and not, when that follows, on the hearing of the subsequent suit by the same petitioner for divorce on the ground in part of disobedience by the respondent to the decree for restitution. *Tress v. Tress* (56 L. J. P. 93; 12 P. D. 128) commented on. *Ib.*

— **Effect of, when not Specially Plead.**—

Semble, if an agreement for separation has previously been entered into between the parties to a suit for restitution of conjugal rights, but such agreement has not been pleaded by the respondent in bar to the petition, it is not the duty of the Court to raise the point how far the petitioner's rights to a decree for restitution are affected by such agreement—*Tress v. Tress* (56 L. J. P. 93; 12 P. D. 128) followed. Nevertheless, if such decree is made the basis of subsequent proceedings, it is open to the Court to go into the whole matter. *Hardie v. Hardie*, 70 L. J. P. 29; 84 L. T. 64—Gorell Barnes, J.

— **Covenant not to Sue—Plea.**—A husband separated from his wife under a deed by which each covenanted not to take legal proceedings to compel the other to cohabit with him or her. The wife subsequently brought a suit for restitution of conjugal rights, to which the husband did not file any answer, and did not appear:—*Held*, that in the absence of a plea founded on the covenant in the deed, the Court would grant a decree of restitution. *Aleig v. Aleig*, 22 T. L. R. 716—Bargrave Deane, J.

— **Breach of Covenant—What Amounts to—Wife's Costs.**—It is not every breach of covenant in a deed of separation which will prevent the party committing it from setting up the deed in answer to a suit for restitution of conjugal rights. To have this effect a breach must be substantial, serious, and deliberate. *Kunski v. Kunski*, 68 L. J. P. 18—Jeune, P.

In a case where the only breach consisted in the fact that the husband was four days late in paying a weekly allowance payable to his wife

under a deed of separation, THE COURT held that the deed was a complete answer to the wife's petition for conjugal rights, and refused to make the usual order for the wife's costs. *Ib.*

•*Besant v. Wood* (12 Ch. D. 605) considered. *Ib.*

Petitioner an Habitual Drunkard—“Just Cause” for Refusal.—A wife petitioned for a decree of restitution of conjugal rights, and her husband pleaded in reply that she had been addicted to drink for a long period, had become dangerous to herself and others, and had on one occasion been in a condition bordering on delirium tremens. Upon the evidence it was held that the husband had “just cause” for withdrawing from cohabitation, though such evidence was not enough to entitle him to a decree of judicial separation. *Beer v. Beer*, 94 L. T. 704; 54 W. R. 564; 22 T. L. R. 338—Gorell Barnes, P.

Limit of Time in which to Comply with Decree to Return to Cohabitation.—If a respondent is served with a decree for restitution of conjugal rights abroad, he should be allowed sufficient time to return to this country and comply with the order, if he desires to do so; and if the petitioner takes further proceedings in consequence of the respondent's non-compliance with such decree, the petitioner must satisfy the Court that the respondent has been given sufficient time to comply with it. *Bateman v. Bateman*, 70 L. J. P. 29; [1901] P. 136; 84 L. T. 331—Gorell Barnes, J.

Return of Wife to Cohabitation—Suit Pending—Application of Solicitor as to Costs of Suit—Reserved List.—If the parties return to cohabitation whilst a matrimonial suit is pending, the petition will not necessarily be struck out of the list for want of prosecution whilst the costs of the petitioner's solicitor are unpaid. The proper course is for the case to be put into the reserved list. *Warwick v. Warwick*, 85 L. T. 173—Jeune, P.

Service of Decree out of the Jurisdiction.—A decree for restitution of conjugal rights made against a respondent who is domiciled in England may be served on him out of the jurisdiction. *Dicks v. Dicks*, 68 L. J. P. 118; [1899] P. 275; 81 L. T. 462; 48 W. R. 302—Gorell Barnes, J.

Where a respondent in a suit for restitution of conjugal rights is a domiciled Englishman he may be served with any proceeding in such suit anywhere outside the jurisdiction of the Court. *Dicks v. Dicks* (68 L. J. P. 118; [1899] P. 275) followed. *Hardie v. Hardie*. *Bateman v. Bateman*, 70 L. J. P. 29; [1901] P. 136; 84 L. T. 64, 331—Gorell Barnes, J.

Wife's Costs—Unreasonable Suit.—In a suit for restitution of conjugal rights the Court will decline to make the usual order for wife's costs where the grounds of the litigation are altogether unreasonable. *Beer v. Beer*, 94 L. T. 704; 54 W. R. 564; 22 T. L. R. 367—Gorell Barnes, P.

7. SEPARATION DEEDS.

Separation Deed or Post-nuptial Settlement.—The question whether a deed is a separation

deed or a post-nuptial settlement depends on the intention of the parties to be gathered from the terms of the deed. *Rowell v. Rowell*, 69 L. J. Q.B. 55; [1900] 1 Q.B. 9; 81 L. T. 429—C.A.

Re-cohabitation—“Live separate.”—Mere casual acts of marital intercourse are not conclusive evidence that the parties to the deed have ceased to live separate. *Ib.*

Valuable Consideration—Living Apart.—Where husband and wife live apart pursuant to a separation deed, such deed is for valuable consideration. *Weston, In re*; *Davies v. Tagart*, 69 L. J. Ch. 555; [1900] 2 Ch. 164; 82 L. T. 591; 48 W. R. 467—Stirling, J.

Construction—Son to Remain under “tutelage or care” of Wife—Allowance to Wife for the Son's Maintenance—Education of Son at Christ's Hospital—Liability of Husband to Continue the Allowance.—By a covenant in a separation deed the husband agreed to pay the wife a weekly sum for her sole and separate use, and also a further weekly sum so long as their son should remain under the age of twenty-one and should reside with or under the tutelage or care of the wife, for and towards the support, maintenance, board, lodging, clothing, and education of the son; and the wife covenanted that out of this further sum, and without any further assistance from the husband, she would support, maintain, board, lodge, clothe, and educate the son in a suitable manner, and would indemnify the husband from all liability on account thereof. Afterwards the son obtained admission to Christ's Hospital, where he was maintained and educated at very small expense to his mother. Under an originating summons an order was made by consent that the son should spend half his holidays with his father and half with his mother:—*Held*, that the husband was not relieved under those circumstances from continuing to pay to the wife the weekly sum covenanted by him to be paid so long as their son should remain under the age of twenty-one, and should reside with or under the tutelage and care of the wife. *Rowell v. Rowell*, 89 L. T. 288—C.A.

Annuity to Wife—Deduction of Income Tax.—Where a separation has taken place between a husband and wife, and in a deed carrying out the award of an arbitrator settling the allowance to be made to the wife the husband has covenanted to pay to trustees an annuity during the life of the wife by way of alimony or maintenance, he will be entitled to deduct the income-tax from such annuity. *Warren v. Warren* (72 L. T. 628; 43 W. R. 490) followed. *Barry's Trusts, In re*; *Barry v. Smart*, 75 L. J. Ch. 676; [1906] 2 Ch. 358; 95 L. T. 165; 54 W. R. 621—C.A.

No Chastity Clause—Action to Set Aside Deed—Adultery.—Action to set aside a separation deed by which the husband covenanted to pay an annuity to his wife, but which contained no provision limiting the annuity during chastity, dismissed on the grounds that the allegation on which the action was based, that the husband was induced to execute the deed by fraudulent representations that his wife was a virtuous woman, was not proved, and that in the absence of a clause limiting the annuity

during chastity the wife's subsequent adultery did not deprive her of the annuity granted by the deed. *Wasteney v. Wasteney*, 69 L. J. P.C. 83; [1900] A.C. 446—P.C.

— **Breach of Covenant to Pay—Subsequent Cohabitation—Accord and Satisfaction.**—Where a husband and wife are living apart under a deed of separation and the husband has made default in payment of instalments due to the wife under the deed, a resumption of cohabitation subsequent to such default does not of itself amount to accord and satisfaction of the cause of action which has already accrued to the wife in respect of the arrears of the instalments. *Macan v. Macan*, 70 L. J. K.B. 90—Bigham, J.

— **Bequest by Will—Satisfaction.**—By a separation deed S. covenanted that he, his executors and administrators, would pay to his wife an annuity during the term of her natural life the weekly sum of 15s. By his will S. bequeathed to his wife a weekly sum of 12s. and the life use of a house and furniture:—*Held*, first, that the annuity under the deed was payable to the wife for her life, and not merely during the joint lives of the husband and wife; and secondly, that the legacy of 12s. could not operate as a satisfaction of the testator's liability under the separation deed of greater amount, and that the bequest of the life use of house and furniture could not be treated as a satisfaction, not being a gift of the same nature as the debt. *Coates v. Coates*, [1898] 1 Ir. R. 258—V.C.

— **Covenant to Pay "for her life if she shall so long continue to live separate and apart"—Cessation of Annuity on Death of Husband.**—In a separation deed a husband covenanted to pay to his wife for her sole and separate use during her life if she should "so long continue to live separate and apart," 150l. for her maintenance, clothing, and other necessities. The husband having died, the wife re-married:—*Held*, on the construction of the deed, that the annuity ceased to be payable on the death of the husband. *Charlesworth v. Holt* (43 L. J. Ex. 25; L. R. 9 Ex. 38) distinguished. *Gilling, In re*; *Procter v. Watkins*, 74 L. J. Ch. 835; 92 L. T. 533; 53 W. R. 427—Kekewich, J.

— **Personal Covenant by Husband to Pay Annuity for Wife's Separate Use—Power, on Notice Given, to Withdraw Annuity—Wife's Waiver of Notice.**—By a deed of separation a husband covenanted to pay an annuity to a trustee for his wife for her separate use without power of anticipation. It was provided that at the end of twelve months the husband might give notice to the trustee of his intention to reduce the annuity, and in the event of there being no agreement made within one month after such notice between the parties as to the amount of the annuity, the arrangement was to be at an end and void. Towards the end of the year the husband's solicitors wrote to the wife's solicitors asking whether the latter would accept notice of reduction. The wife through her solicitors waived notice to the trustee of the deed. No arrangement, however, was reached. Payments were made from time to time by the husband, short of the allowance provided by the

deeds. Some years later the trustee brought an action against the husband to recover moneys alleged to be due under the covenant:—*Held*, that, though restraint on anticipation is as binding under a mere personal covenant as it would be on the income of a settled fund, the notice to the trustee was a mere formality which the wife was at liberty to waive; that the waiver was not an attempt to anticipate; and that the deed had ceased to be operative, as the wife, not having taken the steps pointed out by the deed, had induced the husband to alter his position, and could not equitably claim payment under the deed. *Macnaghten v. Paterson*, 76 L. J. P.C. 94; [1907] A.C. 483; 97 L. T. 442; 23 T. L. R. 727—P.C.

— **Covenant against Molestation—Proceedings Abroad for Divorce.**—A covenant in a separation deed between husband and wife not to molest is not broken unless there is both an annoyance and an intention to annoy. Where therefore a husband covenants in a separation deed not to molest his wife, the fact that he subsequently goes to a foreign country for the purpose of instituting, and does there institute, proceedings for divorce does not of itself amount to molestation in the absence of an intention to annoy the wife. *Hunt v. Hunt*, 67 L. J. Q.B. 18; [1897] 2 Q.B. 547; 77 L. T. 421—C.A.

— **Covenant not to take Proceedings for Misconduct Previous to Date of Deed—Subsequent Adultery by Husband—Deed not Pledged in Answer to Wife's Petition—Revival.**—A husband was guilty of cruelty towards his wife, in consequence of which they separated in 1897. A deed of separation was executed whereby they covenanted, among other things, that neither of them should take any proceedings for divorce or judicial separation against the other "in respect of any misconduct which has heretofore taken place." There was a further provision that if they became reconciled, or if the marriage should be afterwards dissolved or a judicial separation granted "by reason of any misconduct on the part of either occurring after the date" of the deed, the covenant should be void. The respondent committed adultery subsequently to the date of the deed, and did not set up the deed in answer to his wife's petition:—*Held*, that, inasmuch as the respondent had not pleaded the deed, the case was distinguishable from *Rose v. Rose* (52 L. J. P. 25; 8 P. D. 98), and that the respondent's previous cruelty was revived by his subsequent adultery. The Court granted the wife a decree nisi for a dissolution of her marriage. *Dowling v. Dowling*, 68 L. J. P. 8; [1898] P. 228; 47 W. R. 272—Gorell Barnes, J.

— **Trusts for Wife and Children—Reconciliation.**—Articles of agreement between a husband and wife, made in contemplation of a separation between them, and by which funds were vested in a trustee upon trust for the wife and children, will not be rendered void by a subsequent reconciliation and resumption of cohabitation, but will be held to be a subsisting voluntary settlement. *Bindley v. Mulloney* (L. R. 7 Eq. 343) distinguished. *Ruffles v. Alston* (44 L. J. Ch. 308; L. R. 19 Eq. 539) followed. *Spark's Trusts, In re*; *Massey v. Spark*, 73 L. J. Ch. 259; [1904] 1 Ch. 451; 90 L. T. 54; 52 W. R. 426—Kekewich, J. Appeal compromised, 73 L. J.

Ch. 576; [1904] 2 Ch. 121; 91 L. T. 237; 53 W. R. 41—C.A.

Re-cohabitation — “Live separate.”] — The question whether a deed is a separation deed or a post-nuptial settlement depends on the intention of the parties to be gathered from the terms of the deed. *Rowell v. Rowell*, 69 L. J. Q.B. 55; [1900] 1 Q.B. 9; 81 L. T. 429—C.A.

Mere casual acts of marital intercourse are not conclusive evidence that the parties to the deed have ceased to live separate. *Ib.*

Separation Deed as Bar to Suit for Restitution of Conjugal Rights.]—See col. 975.

8. ENTICING WIFE AWAY FROM HUSBAND.

Persuasion—Advice Given at Request of Wife—Advice Volunteered.]—In an action by a husband for enticing away his wife the questions the jury have to consider are whether the defendant persuaded, induced, or incited her to leave, or procured her leaving, and whether in consequence thereof she did leave. If the wife merely asked the defendant for advice, and the defendant merely approved of her leaving, the defendant will not be liable if such advice was given in good faith; it might be different if the advice was volunteered. *Smith v. Kaye*, 20 T. L. R. 261—Wright, J.

9. WIFE'S PROPERTY AND LIABILITIES.

(a) Generally.

Domicil—Marriage according to French Law of Community of Goods—Subsequent English Domicil—Movable Property.]—Where a domiciled Frenchman and Frenchwoman have married in France without entering into any marriage contract, and therefore according to the French law of community of goods, and have afterwards acquired an English domicil, their respective rights as to movable property will be governed by the law of the English domicil, and not by that of the matrimonial domicil. *Lashley v. Hog* (Robertson's Sc. App. Cas. 4; 4 Paton's Sc. App. 581) explained and followed. *De Nicols, In re*; *De Nicols v. Curlier*, 67 L. J. Ch. 419; [1898] 2 Ch. 60; 78 L. T. 541; 46 W. R. 532—C.A.

Dower—Marriage Settlement—Annuity out of Leaseholds to Intended Wife “for the purpose of making a provision for her.”]—By a settlement executed by a widower on the occasion of his second marriage leaseholds were conveyed by him to trustees on trust to pay to the intended wife, after his death, an annuity of 500*l.* The settlement recited an agreement that the lands were to be conveyed to the trustees upon the trusts (amongst others) for the purpose of making a provision for the intended wife by securing to her a life annuity of 500*l.*:—*Held*, that the settlement was no bar to the widow's claim to dower or thirds. *Vizod v. London* (W. Kelynge, 17) explained. *Lemon v. Mark*, [1899] 1 Ir. R. 416—C.A.

— **Estate pur Autre Vie and Estate in Fee**—

Contingent Remainder Interposed—Merger.]—Where an estate *pur autre vie* is granted to a person with an ultimate remainder to him in fee, the fact that a contingent remainder (which failed) is interposed will not prevent the estate *pur autre vie* merging in or uniting with the estate in fee in remainder; and the grantee has such an estate as entitles his widow to dower out of the lands. *Michell, In re*; *Moore v. Moore* (61 L. J. Ch. 326; [1892] 2 Ch. 87), considered. *Cordal's Case* (Cro. Eliz. 316) questioned. *Ib.*

— **Widow's Charge under Intestates Estates Act—Lex Domicilii—Lex Loci as Applied to Sale of Lands in Victoria.**]—A domiciled Irishman died in Ireland intestate without issue, leaving a widow surviving. His property in Ireland consisted of freeholds, chattels real, furniture, stock, and cash. He was also possessed of lands in Victoria, granted to him in fee by the Crown, which lands by the law of the colony were regarded and devolved as personal estate. The only creditors were in Ireland. Administration was taken out in Ireland by the widow, and in Victoria by a person appointed for the purpose, who sold the lands, and remitted the net proceeds to the widow. By the Victorian Intestates Estates Act, 1896, a widow is entitled, on the death of her husband intestate and without issue, if his estate is over the value of 1,000*l.*, to a charge of 1,000*l.* upon it, and the residue is divisible between the widow and the next-of-kin:—*Held*, that the widow was entitled under the Victorian Act to 1,000*l.* out of the proceeds of sale of the Victorian lands; secondly, that the balance was to be taken as personal estate, and added to the Irish personalty, and that the debts were to be paid out of this blended fund; thirdly, that the widow was entitled to 500*l.* out of the remainder of this blended fund, and out of the Irish real estate, to be apportioned as directed by the Intestates Estates Act, 1890; fourthly, that of the residue of the personalty the widow was entitled to one moiety, and the next-of-kin to the other moiety; fifthly, that the widow was entitled to dower out of the residue of the realty, which, subject thereto, went to the heir-at-law. *Rea, In re*; *Rea v. Rea*, [1902] 1 Ir. R. 451—M.R.

Estate by Curtesy—Wife Never in Actual Seisin.]—R. H., who held lands under a fee-farm grant, granted them by deed to his daughters M. and L. as tenants in common in fee, but continued himself in possession. M. married P. and a son was born of the marriage. An ejectment was brought by M. and L. against R. H. and others to recover the lands, and by consent judgment was entered, with a stay of execution during the lifetime of R. H., and he remained in possession until his death. M. died intestate during the lifetime of R. H., without ever having been in possession. R. H. having died, P., claiming as tenant by the curtesy, applied to be added as a plaintiff in the ejectment proceedings:—*Held*, that, notwithstanding the consent judgment for possession, with stay of execution, there was no sufficient actual seisin in M. to entitle P. to an estate by the curtesy. *Parks v. Hegan*, [1903] 2 Ir. R. 643—K.B. D.

Where, under a devise to testator's daughter, who dies intestate in his lifetime, she is deemed to have become absolutely entitled

under section 33 of the Wills Act, 1837, her husband takes an estate by the curtesy. *Derbyshire, In re*; *Webb v. Derbyshire*, 75 L. J. Ch. 95—Buckley, J.

Mortgage to Wife—Sale of Estate—Concurrence of Husband.—A married woman, who has become the mortgagee of real property after the passing of the Married Women's Property Act, 1882, and to whom the money advanced belongs as her separate estate, is in no sense a trustee for the mortgagor until the principal, interest, and costs under the mortgage have been satisfied. Therefore, upon a sale of the property by the mortgagor with the concurrence of the mortgagee, it is not necessary that her husband should also concur in the conveyance in order to give the purchaser a good title, or that the deed should be acknowledged by her under the Fines and Recoveries Act. *Harkness and Allsopp's Contract, In re* (65 L. J. Ch. 726; [1896] 2 Ch. 358), distinguished. *Brooke and Fremelin's Contract, In re*, 67 L. J. Ch. 272; [1898] 1 Ch. 647; 78 L. T. 416; 46 W. R. 442—Kekewich, J.

Will of Wife—Assent of Husband—Chose in Action—Title of Husband—General Probate of Will of Married Woman.—Under the old law as it stood before the Married Women's Property Act, 1882, the assent by a husband to his wife's will might be given after her death. It was not necessary that it should be given in her lifetime. *Elliott v. North*, 70 L. J. Ch. 217; [1901] 1 Ch. 424; 49 W. R. 247—Buckley, J.

A woman married in 1863 under a settlement made upon her marriage had a power of appointment over certain funds. In 1871 her son by a previous marriage died intestate without issue, and thereupon the married woman became entitled to a reversionary interest in certain personal estate expectant on the determination of the life interest of the son's widow, who was still living. In 1874 the married woman died, having by her will appointed the defendants executors and trustees thereof, and having in exercise of the power reserved to her by the settlement appointed the residue of the settlement funds and all other personal estate which at the time of her decease she had power to appoint or dispose of by will to be equally divided between the defendants. The will did not expressly refer to the reversionary interest. The husband signed a consent to letters of administration with the will annexed being granted to the defendants. The executors of his will brought an action against the defendants to determine whether the plaintiffs or the defendants were entitled to the reversionary interest:—*Held*, that although the husband had consented to the wife's will the reversionary interest did not pass under it to the defendants, and that the effect of the grant of general administration to them was merely to constitute them trustees for the husband and his personal representatives of the reversionary interest. *Squib v. Wyn* (1 P. Wms. 878) followed. *Id.*

Purchase of Property in Name of Husband out of Separate Money of Wife—Resulting Trust—Presumption—Capital and Income of Wife.—*Per ROMER, L.J., and COZENS-HARDY, L.J.*—In considering the question whether, when pro-

perty is bought in the name of a husband with money of his wife, there is a resulting trust in her favour, there is no difference in the presumption that arises according as to whether the money was capital or income of the wife. The only question in each case is whether a gift was intended, and there is no difference in principle whether it is of capital or income, but only one of degree. *Alexander v. Barnhill* (21 L. R. Ir. 511, 515) explained. *Mercier v. Mercier*, 72 L. J. Ch. 511; [1903] 2 Ch. 98; 88 L. T. 516; 51 W. R. 611—C.A.

The defendant married in 1883, and her husband died in 1901. After the marriage she and her husband kept a joint banking account, which consisted practically of her money, though both of them had power to draw upon it. All capital sums and income of the defendant were paid to that account. In 1891 they purchased a piece of land and built a house on it, and lived together in the house till the husband died. The conveyance of the land was taken in the name of the husband, but the money spent on the land and house came from the joint account:—*Held*, on the evidence, that the money was money of the wife, and she did not intend to make a gift to her husband. *Id.*

Advancement—Transfer of Mortgage—Joint Account—No Evidence as to how Money Provided.—In the case of a transfer of mortgage to a husband and his wife after the Married Women's Property Act, 1882, the money was stated to have been advanced by them on a joint account, but there was no evidence as to how it was found:—*Held*, that, even assuming that the husband advanced part out of his money and the wife part out of hers, the case was the same as if the whole of the money were an advance by the husband, and the wife surviving him, her estate was entitled to the money paid off. *Scott, In re*; *Palmer v. Vickers*, 97 L. T. 537—Kekewich, J.

Separate Property of Wife—Advance to Husband by Wife's Trustees of Wife's Money—Constructive Payment of Interest—Bond for Principal and Interest at Specified Date—Bar by Lapse of Time—Implied Trust.—Where money held upon trust for the separate use of a married woman is lent by the trustees to her husband at interest on his bond, and the husband and wife continue to live together in amity, but the husband does not pay any interest on the debt, the wife will be presumed, according to the principle of *Caton v. Rideout* (1 Mac. & G. 599), to have given the arrears of interest to the husband so that the debt will not become statute-barred during her life. It is not necessary, while the parties are living together, that the husband should go through the form of handing the interest to the trustees to keep the debt alive. The principle of *Amos v. Smith* (31 L. J. Ex. 423; 1 H. & C. 238) applied. *Dixon, In re*; *Heynes v. Dixon*, 69 L. J. Ch. 609; [1900] 2 Ch. 561; 83 L. T. 129; 48 W. R. 665—C.A.

If the advance to the husband was to his knowledge a breach of trust, he would be in the position of a trustee as regards raising the defence of the Statute of Limitations; and (*per* LORD ALVERSTONE, M.R., and COLLINS, L.J.) if the husband received the advance with full

knowledge of the trusts, he would be in the same position, although the advance was not a breach of trust. *Spickernell v. Hotham* (Kay, 669) applied by COLLINS, L.J. *Ib.*

Under a marriage settlement money belonging to the wife was authorised to be invested on personal security bearing interest, the interest to be paid to the wife for her separate use for life, and after her death to her husband for life. The money was advanced by the trustees to the husband on his bond. The wife lived for twenty-four years after the date of the bond, and the husband survived her for twenty years. They lived together in amity. During the whole forty-four years no interest on the bond was paid by the husband, and after his death the bond was found amongst his papers, but it appeared that on one occasion shortly after the wife's death he had referred to the bond as not having been paid:—*Held*, that there was no presumption of payment of the bond by the husband; and that the debt thereby secured was not barred by the Statute of Limitations, and could be recovered with interest from the date of the husband's death. *Ib.*

— **Loan to Husband for Purpose of His Business**—“Other estate.”—In section 3 of the Married Women's Property Act, 1882, the words “other estate” are not to be read as meaning only property *ejusdem generis* with that indicated by the preceding words “any money.” *Donaldson, In re*, [1902] 2 Ir. R. 310—C.A.

A married woman lent to her husband for the purpose of his business as hotel-keeper certain furniture to which she was entitled as her separate property. On the husband's bankruptcy his assignees claimed the furniture as his assets:—*Held*, that the furniture was to be treated as assets of the husband. *Ib.*

— **Right of Wife to Retain as Executrix Money Lent to Husband for Purposes of Business**—**Husband's Estate Insolvent.**—Section 3 of the Married Women's Property Act, 1882, which deals with loans by a wife to her husband, does not apply to the subject of retainer by a woman as executrix of her husband. Consequently, the right of a woman who is executrix of her late husband to retain out of assets of his estate come to her hands the amount of a loan made by her out of her separate estate to her husband for the purpose of his business is not taken away by the joint operation of that section and section 10 of the Judicature Act, 1875, in cases where the estate is insolvent. *Leng, In re*; *Tarn v. Emmerson* (64 L. J. Ch. 468, 471, 472; [1895] 1 Ch. 652, 657, 660), and *May, In re*; *Crawford v. May* (60 L. J. Ch. 34; 45 Ch. D. 499), followed. *Ambler, In re*; *Woodhead v. Ambler*, 74 L. J. Ch. 367; [1905] 1 Ch. 697; 92 L. T. 716; 53 W. R. 584; 21 T. L. R. 376—C.A.

— **Realty—Succession to Intestate—Conversion—Date of Accrual of Title.**—A woman, married without settlement in 1875, became, in 1877, entitled in succession to an intestate to reversionary real estate which was converted into personality by a sale in 1901. She died in 1905, the tenant for life in 1906, and the woman's husband later in that year. Her children claimed the property under her will,

which was made without her husband's consent:—*Held*, that the woman's title accrued in 1877, section 8 of the Married Women's Property Act, 1870, then giving her (subject to the life estate) the rents and profits for her separate use, but no power to dispose of the corpus; that the sale, which converted the property, gave her no new property nor any fresh title; and that the property was not her separate property and did not pass by her will, but by that of her husband. *Bacon, In re*; *Turner, In re*; *Toovey v. Turner*, 76 L. J. Ch. 213; [1907] 1 Ch. 475; 96 L. T. 690—Swinfen Eady, J.

Bond by Husband to Wife's Trustees—Receipt of Wife's Income by Husband—Constructive Payment of Interest—Bond for Principal and Interest at Specified Date—Penalty—Bar by Lapse of Time.—Under a marriage settlement money belonging to the wife was authorised to be invested on personal security, and the interest directed to be paid to the wife for her separate use for life, and after her death to her husband for life. The money was advanced by the trustees to the husband on his bond. The wife lived twenty-four years after the date of the bond, and the husband survived her for twenty years. They lived together in amity. For the whole forty-four years no interest on the bond was paid by the husband, and after his death the bond was found amongst his papers:—*Held*, that there was no presumption of payment of the bond by the husband, that the debt secured by the bond was not barred by the Statute of Limitations, and that the capital sum was recoverable from the husband's executors, together with interest from the date of his death. *Dixon, In re*; *Heynes v. Dixon*, 68 L. J. Ch. 689; [1899] 2 Ch. 561; 48 W. R. 71—Byrne, J.

Joint Banking Account—Overdraft—Security Given by Wife.—On December 4, 1902, a marriage took place. The husband at that time had an account at a bank in S. This account was on December 17, 1902, transferred to the joint names of himself and his wife, and drawn on by both husband and wife. On May 18, 1903, when the husband was absent, the wife deposited with the bank the deeds of a house belonging to her, and charged them for the debt then or thereafter to become due to the bank from her either solely or jointly with any other person, and agreed to execute a legal mortgage containing a covenant for payment and a power of sale and other proper clauses. The wife died on August 27, 1904, leaving furniture worth 300*l.* to the husband absolutely, and the house she had mortgaged to the bank, worth about 1,400*l.*, to her husband for life, with remainder to her next-of-kin. The overdraft on May 18, 1903, was 107*l.*, and at the date of her death it was 414*l.* The wife had paid in about 100*l.* into the account:—*Held*, that the true inference was that the husband and wife agreed to provide jointly for current household expenses, and that each of them ought to pay one moiety of the overdraft. *Shaw, In re*; *Shaw v. Jones*, 94 L. T. 93—Swinfen Eady, J.

Protection Order—Whereabouts of Husband not Known—Notice and Citation Dispensed with.—Where a married woman who had been

deserted by her husband applied by summons in chambers for a protection order under the provisions of the Matrimonial Causes Act, 1858, ss. 6 and 7 (principally for the purpose of enabling her to obtain payment of a legacy in Scotland, which by Scotch law could not be paid to her without her husband's consent), but she did not know her husband's whereabouts, the order was made, and the necessity of citing the husband or giving him any notice of the application either personally or otherwise was dispensed with. *Morris, In re*, 71 L. J. P. 56; [1902] P. 104; 86 L. T. 596—Jeune, P.

Married Woman Carrying on Farming Independently of Husband—"Trade."—A married woman carrying on a farm separately from her husband is not carrying on a "trade" within the meaning of section 1, sub-section 5 of the Married Women's Property Act, 1882. *Long, In re*, [1905] 2 Ir. R. 343—C.A. And see *BANKRUPTCY*, col. 75.

Question between Husband and Wife as to Property—Order Restraining Husband from Interfering with Wife's Business.—Order made under section 17 of the Married Women's Property Act, 1882, declaring a married woman entitled to a licensed public-house as her separate property, and restraining her husband from interfering with the business carried on by her there, but no order made preventing the husband from entering the house. *Gaynor v. Gaynor*, [1901] 1 Ir. R. 217—M.R.

Detinue by Wife against her Husband.—A married woman can, by virtue of section 12 of the Married Women's Property Act, 1882, maintain an action of detinue against her husband in respect of her separate property. *Larner v. Larner*, 74 L. J. K.B. 797; [1905] 2 K.B. 539; 93 L. T. 537; 54 W. R. 62; 21 T. L. R. 637—D.

Life Policy for Benefit of Wife—Petition for Appointment of Trustees—Title of Petition.—A petition under section 10 of the Married Women's Property Act, 1870, should be entitled in the matter of that Act only, and not in the matter of the Married Women's Property Act, 1882, or the Trustee Act, 1893. *Adam's Policy Trusts, In re* (52 L. J. Ch. 642; 23 Ch. D. 525), as explained in *Turnbull, In re*; *Turnbull v. Turnbull* (66 L. J. Ch. 719; [1897] 2 Ch. 415), followed. *Kuyper's Policy Trusts, In re*, 68 L. J. Ch. 10; [1899] 1 Ch. 38; 79 L. T. 486; 47 W. R. 238—North, J.

Married Woman Administratrix—Attachment—Jurisdiction—Disobedience of Order to Pay Money into Court.—A personal order may be made against a married woman to pay into Court a sum of money in her hands in her office of administratrix of a deceased person, and for disobedience of that order she may be attached. *Turnbull, In re*; *Turnbull v. Nicholas*, 69 L. J. Ch. 187; [1900] 1 Ch. 180—Stirling, J.

Semble, that if the money be no longer in her hands, but has been lost by breach of trust or *devastavit*, the order cannot be made in this form, but must be a proprietary order, as in *Scott v. Morley* (57 L. J. Q.B. 43; 20 Q.B. D. 120). *Ib.*

(b) *Restraint on Anticipation.*

Admission by Deed—Estoppel.—The doctrine of estoppel cannot be so used as to enable a married woman to deprive herself of income settled to her separate use with a restraint on anticipation. *Bateman (Lady) v. Faber*, 67 L. J. Ch. 130; [1898] 1 Ch. 144; 77 L. T. 576; 46 W. R. 215—C.A.

A married woman was entitled under a settlement to certain rents and profits for her life for her separate use, with a restraint on anticipation, but subject to a proviso that in the event of her succeeding to an income of a particular amount her life interest should cease. She subsequently executed a deed-poll, under an alleged misapprehension of fact that she had succeeded to the income in question, admitting that her life interest had determined and releasing all claims to the rents and profits. Relying upon this deed-poll, a mortgagee of her husband entered into certain arrangements whereby his position was altered to the benefit of the husband:—*Held*, that the married woman, notwithstanding her admission by the deed-poll, was not estopped from still claiming the rents and profits under the settlement, on the ground that she had not in fact succeeded to the income in question. *Ib.*

Policy of Insurance Effected by Wife on Life of Husband—Condition indorsed Restraining Assignment.—A married woman effected, in 1885, an insurance on her husband's life for a period of ten years, and under the policy, described in margin as "wife's policy—endowment," the amount insured was made payable to her for her sole use, if she and her husband both survived that period (which event happened). The policy was made on condition that certain provisions and requirements annexed to it were to be taken as part of the contract. One of these was: "This policy is not assignable":—*Held*, that there was a restraint upon anticipation, and that an attempted charge upon the policy during the currency of the ten years was void. *Lavender's Policy, In re*, [1898] 1 Ir. R. 175—C.A.

Annuity to Married Woman—Death of Annuitant before Purchase of Annuity—Administration—Will—Insufficiency of Estate.—Where in the distribution of the estate of a testator, which is insufficient to pay the legacies and annuities in full, the Court has directed a sum of money to be laid out in the purchase of a Government annuity to satisfy a proportionate amount of an annuity given by the testator to a married woman restrained from anticipation, and she dies before the annuity is purchased, the capital sum appropriated to the annuity will belong to her estate, and be payable to her personal representative. *Ross, In re*; *Ashlon v. Ross*, 69 L. J. Ch. 192; [1900] 1 Ch. 162; 81 L. T. 578; 48 W. R. 264—North, J.

Restraint on Anticipation at Time of Entering into Contract—Determination of Coverture—Income Received.—Income of property vested in trustees for the separate use of a married woman subject to a restraint against anticipation, though paid into her hands after the determination of the coverture, is not, since the

Married Women's Property Act, 1893, available to satisfy an obligation arising out of a contract entered into by her during coverture. *Per* A. L. SMITH, L.J.; VAUGHAN WILLIAMS, L.J., doubting. *Barnett v. Howard*, 69 L. J. Q.B. 935; [1900] 2 Q.B. 784; 83 L. T. 301—C.A.

Judgment—Equitable Execution.]—A judgment creditor who, in an action commenced after the death of her husband, has obtained judgment against a woman married since the Married Women's Property Act, 1882, upon a contract made by her during the coverture, is not entitled since the Married Women's Property Act, 1893, to have a receiver appointed, by way of equitable execution, of the income of property which at the date of the contract was settled upon the woman for her separate use without power of anticipation. *Barnett v. Howard* (69 L. J. Q.B. 955; [1900] 2 Q.B. 784) considered and followed. *Brown v. Dimpleby*, 73 L. J. K.B. 35; [1904] 1 K.B. 28; 89 L. T. 424; 52 W. R. 53—C.A.

Income Due after Judgment.]—A judgment against a married woman possessed of separate property which she is restrained from anticipating cannot be enforced in respect of income accruing due after the date of the judgment. *Whiteley v. Edwards* (65 L. J. Q.B. 457; [1896] 2 Q.B. 48) approved. *Bolitho v. Gidley*, 74 L. J. K.B. 430; [1905] A. C. 98; 92 L. T. 369; 53 W. R. 498—H.L. (E.)

Wife's Antenuptial Debt—Form of Judgment against Wife — Separate Property — Restraint against Anticipation.]—In an action against a married woman to recover a debt contracted by her before her marriage in 1902 a judgment was entered against her adjudging the sum due to be payable out of her separate property, whether subject to any restriction against anticipation or not. Subsequently to the judgment a deed of separation was executed by which her husband covenanted to pay her a monthly sum for her separate use, subject to a restraint against anticipation:—*Held*, that on the true construction of section 19 of the Married Women's Property Act, 1882, the money payable under the deed was not available to satisfy the antenuptial debt, and that the judgment must be amended by striking out the words "whether subject to any restriction against anticipation or not." *Axford v. Reid* (58 L. J. Q.B. 230; 22 Q.B. D. 548) commented on. *Robinson v. Lynes* (63 L. J. Q.B. 759; [1894] 2 Q.B. 577) explained. *Birmingham Excelsior Money Society v. Haywood*, 73 L. J. K.B. 28; [1904] 1 K.B. 35; 52 W. R. 84—C.A.

Claim to Goods taken in Execution — "Proceeding instituted" — Liability for Costs.]—A claim by a married woman to goods taken in execution is a "proceeding instituted" by her within the meaning of section 2 of the Married Women's Property Act, 1893, and an order may be made under that section for payment of the costs of the execution creditor out of her separate property which is subject to a restraint on anticipation. *Nunn v. Tyson*, 70 L. J. K.B. 854; [1901] 2 K.B. 487; 85 L. T. 123; 50 W. R. 16—D.

Married Woman Trading Separately from Husband—Bankruptcy of Married Woman—Death

of Husband—Title of Trustee in Bankruptcy to Life Estate.]—In 1859 certain real estate was vested in a trustee upon trust during the life of W. to pay her the rents and profits for her sole and separate use independently of any husband with whom she might intermarry, his debts, control, or engagements, but without power to her whilst covert or sole to charge or anticipate the same. W. married in 1868. In 1891 she was carrying on business as a schoolmistress apart from her husband, and in June, 1891, she was adjudicated a bankrupt. In February, 1899, her husband died, she being then still an undischarged bankrupt:—*Held*, that the entire life estate of W. was her separate estate at the date of the bankruptcy within the meaning of section 1, sub-section 5 of the Married Women's Property Act, 1882, and that the restraint upon anticipation which was saved by section 19 of the Act attached only to a portion of that life interest—namely, during the joint lives of herself and her husband—that the residue of the life interest from the death of her husband belonged to the trustee in bankruptcy, and must be applied in satisfaction of W.'s debts. Observations of KAY, L.J., in *Pelton Brothers v. Harrison* (60 L. J. Q.B. 742; [1891] 2 Q.B. 422, 425), commented upon. *Wheeler's Settlement, In re; Briggs v. Ryan*, 68 L. J. Ch. 663; [1899] 2 Ch. 717; 81 L. T. 172; 48 W. R. 10; 6 Manson, 372—Cozens-Hardy, J.

Assignment of Fund by Wife—Payment Out of Court—Affidavit of no Settlement.]—Where a fund has been assigned by a wife, and both husband and wife refuse to make an affidavit of no settlement, the fund may be ordered to be paid out on an affidavit of no settlement made by some person likely to be well informed. *Rowland v. Oakley* (14 Jur. 845) followed. *Timothy v. Crown*, 82 L. T. 142—Cozens-Hardy, J.

Removal of Restraint by Court—Life Interest of Wife—Mortgage to Pay Debts of Husband—Joint Expenses—Right of Wife to Indemnity.]—The question whether a married woman who charges her property with money for the purpose of paying her husband's debts is entitled to have her property indemnified by him against the charge is a matter of inference to be drawn from the circumstances of each particular case; and where it appears that the debts, though legally the debts of the husband, were contracted to pay the expenses of the extravagant mode of living of both the wife and the husband, no inference of a right to indemnity will be drawn in her favour. *Paget v. Paget*, 67 L. J. Ch. 266; [1898] 1 Ch. 470—78 L. T. 306; 46 W. R. 472—C.A.

This doctrine applies in a case where the charge is made by the order of the Court on property of the wife subject to a restraint on anticipation, under section 39 of the Conveyancing Act, 1881; and the silence of such an order as to the wife's right to indemnity is not necessarily fatal to her right, though it is one of the circumstances to be taken into consideration. *Ib.*

Costs—Proceedings Instituted by Married Woman—Order against Property Subject to Restraint on Anticipation.]—Costs of the respon-

dent on an unsuccessful appeal by a married woman, the plaintiff in the action, ordered to be paid out of property of hers, subject to a restraint on anticipation, under section 2 of the Married Women's Property Act, 1893. *Ib.*

— **Benefit of Woman—Increase of Income—Money in Court—Change of Investments—Payment out to Trustees of Settlement.**—A married woman was under a will, in the events which had happened, absolutely entitled to a fund in Court, subject only to a restraint on anticipation during the life of her husband. The fund was standing to a separate account. By the settlement made on her marriage she covenanted to settle after-acquired property. Under the settlement she was restrained from anticipation, and her husband took a life interest in the settled funds after her death. There were no children. The settlement allowed a wider range of investment than the Court allowed for the investment of money under its control. The lady wished to increase her income, and also wished that the fund in Court should pass to the trustees of her settlement under her covenant. She applied to the Court for removal of the restraint on anticipation imposed by the will, and for payment of the fund out of Court to her trustees:—*Held*, that no case of such predominant benefit to the lady had been made out as to warrant the Court in removing the restraint on anticipation, and the application must be refused. *Blundell's Trusts, In re*, 70 L. J. Ch. 522; [1901] 2 Ch. 221; 84 L. T. 706—C.A.

Power of Appointment—Married Woman Married before 1881—Restraint on Anticipation of Life Interest—Release of Power.—A married woman married before the Conveyancing and Law of Property Act, 1881, may under section 52 of that Act by deed unacknowledged release a power of appointment over personal property in which she has a life interest subject to a restraint on anticipation. *Chisholm's Settlement, In re*; *Hemphill's Settlement, In re*; *Hemphill v. Hemphill*, 70 L. J. Ch. 533; [1901] 2 Ch. 82—*Stirling, J.*

Restraint on Anticipation—Remoteness—Validity of Bequests.—*See WILL.*

(c) *Contracts by Married Women.*

Wife "contracting otherwise than as agent."—By section 1 of the Married Women's Property Act, 1893, "every contract hereafter entered into by a married woman otherwise than as agent" is to bind her separate estate, whether or not she has such estate at the time of the contract:—*Held*, by the COURT OF APPEAL, that where in fact a married woman contracts by her husband's authority, it is immaterial whether or not the other party to the contract is aware that the wife is acting as her husband's agent. Two of their Lordships being in favour of affirming and two of reversing the decision of the Court below, the appeal was, in accordance with the rule laid down in *Eastern Steamship Co. v. Smith* (unreported), dismissed, but without costs. *Paquin v. Beauclerk*, 75 L. J. K.B. 395; [1906] A.C. 148; 94 L. T. 350; 54 W. R. 521; 22 T. L. R. 395—H.L. (E.) *See next case.*

The defendant, who was a married woman, living with her husband, ordered from the plaintiffs, with her husband's authority, articles of dress for herself, suitable to her position in society. She had no separate property. The Court came to the conclusion upon the facts that the contract for the purchase of the articles by the defendant was *prima facie* a contract by her as a married woman acting as agent for her husband. In an action against the defendant to recover the price of the articles supplied to her,—*Held*, that the defendant was not liable on the contract, section 1, sub-section a of the Married Women's Property Act, 1893, only applying to a contract entered into by a married woman "otherwise than as agent." The meaning of the words "otherwise than as agent" in the above section discussed. *Paquin, Lim. v. Holden*, 21 T. L. R. 361—C.A.

Contract by Wife During Coverture—Action Thereon after Death of Husband against Widow—Form of Judgment.—In an action against a widow upon a contract made by her during coverture before the Married Women's Property Act, 1893, but after the Married Women's Property Act, 1882, the plaintiff is not entitled to sign judgment against the defendant in the ordinary form as if she were a *feme sole*, but is entitled to sign judgment against her in the form settled in *Scott v. Morley* (57 L. J. Q.B. 43; 20 Q.B. D. 120), if at the date of the contract the defendant was possessed of separate estate not subject to restraint against anticipation. *Holtby v. Hodgson* (59 L. J. Q.B. 46; 24 Q.B. D. 103) explained. *Softlaw v. Welch*, 63 L. J. Q.B. 940; [1899] 2 Q.B. 419; 81 L. T. 64; 47 W. R. 626—C.A.

Advances to Married Woman—No Separate Property—Acknowledgment of Debt—Contract to Pay.—An acknowledgment given by a married woman in 1894 of advances previously made to her by a testator, and in respect of which she could not have been sued, she having no separate property at the time the advances were made, will not render her liable under section 1 of the Married Women's Property Act, 1893, although the acknowledgment be such as would take the debt out of the Statute of Limitations. For the purposes of the Act there must be a contract entered into by the married woman for the first time after the date of the Act, and supported by a fresh consideration to pay the debt. And if, under the circumstances, there is no debt, there is no right in the executor to retain the advances to the married woman out of any part of the testator's estate to which she may be entitled. *Wheeler, In re*; *Hankinson v. Hayter*, 73 L. J. Ch. 576; [1904] 2 Ch. 66; 91 L. T. 227; 52 W. R. 586—*Warrington, J.*

Contract Prior to 1883—Power of Appointment—Creditor's Right to Prove against Appointed Funds.—The operation of section 4 of the Married Women's Property Act, 1882, is not limited to debts and liabilities contracted by a married woman since the Act came into force; and a fund appointed by her under a general power of appointment is liable for debts and obligations which she was capable of contracting as a *feme sole* before as well as after the Act came into force. *Roper, In re*; *Roper v.*

Doncaster (58 L. J. Ch. 215; 39 Ch. D. 482), distinguished by *LINDLEY, M.R. Hughes, In re; Brandon v. Hughes*, 67 L. J. Ch. 279; [1898] 1 Ch. 529; 73 L. T. 432; 46 W. R. 502—C.A.

A married woman, having previously obtained a protection order under the Matrimonial Causes Act, 1857, by deed made in 1880, covenanted to pay certain moneys. In 1894 a settlement was made under which she acquired a general testamentary power of appointment over certain trust funds. She made her will in 1895, executing the power, and died in 1896:—*Held*, that, by virtue of sections 21 and 26 of the Matrimonial Causes Act, 1857, the married woman had power to contract as a *feme sole* free from the restrictions imposed on married women, and that the funds appointed under her general testamentary power of appointment were assets for the payment of the debt so contracted. *Hill v. Cooper* (62 L. J. Q.B. 423; [1893] 2 Q.B. 85) distinguished. *Ib.*

Wife's Antenuptial Debt—Form of Judgment against Wife—Separate Property—Restraint against Anticipation.—In an action against a married woman to recover a debt contracted by her before her marriage in 1902 a judgment was entered against her adjudging the sum due to be payable out of her separate property, whether subject to any restriction against anticipation or not. Subsequently to the judgment a deed of separation was executed by which her husband covenanted to pay her a monthly sum for her separate use, subject to restraint against anticipation:—*Held*, that on the true construction of section 19 of the Married Women's Property Act, 1882, the money payable under the deed was not available to satisfy the antenuptial debt, and that the judgment must be amended by striking out the words "whether subject to any restriction against anticipation or not." *Axford v. Reid* (58 L. J. Q.B. 230; 22 Q.B. D. 548) commented on. *Robinson v. Lynes* (63 L. J. Q.B. 759; [1894] 2 Q.B. 577) explained. *Birmingham Excelsior Money Society v. Haywood*, 73 L. J. K.B. 28; [1904] 1 K.B. 85; 89 L. T. 656; 52 W. R. 84; 20 T. L. R. 47—C.A.

Restraint on Anticipation at Time of Entering into Contract—Determination of Coverture—Judgment—Equitable Execution.—A judgment creditor who, in an action commenced after the death of her husband, has obtained judgment against a woman married since the Married Women's Property Act, 1882, upon a contract made by her during the coverture, is not entitled since the Married Women's Property Act, 1893, to have a receiver appointed, by way of equitable execution, of the income of property which at the date of the contract was settled upon the woman for her separate use without power of anticipation. *Barnett v. Howard* (69 L. J. Q.B. 955; [1900] 2 Q.B. 784) considered and followed. *Brown v. Dimpleby*, 73 L. J. K.B. 35; [1904] 1 K.B. 23; 89 L. T. 424; 52 W. R. 53—C.A.

Mortgage to Married Woman—Power to Convey as Feme Sole—Trustee—Trusts Kept off Title.—A freehold house was conveyed to C by A and B (a *feme sole*) in exercise of a trust for sale. The following day the house was mortgaged by C to A and B in order to secure

a certain loan which was stated to be made by A and B on a joint account. B subsequently married, and afterwards joined, without her husband and without acknowledgment of her execution, in a transfer of the mortgage to D. It having been objected by a subsequent purchaser that this transfer was defective,—*Held*, that the statement in the mortgage deed that the mortgage money was advanced on a joint account was not sufficient, even in connection with the fact that the mortgage was in immediate and suggestive sequence to the exercise of a trust for sale, and that the parties to the two transactions were the same, to affect a subsequent purchaser with notice of any trust. *Held*, accordingly, that B, as a mortgagee, was entitled to join in the transfer as a *feme sole* by virtue of the Married Women's Property Act, 1882. *Brooke and Fremlin's Contract, In re* (67 L. J. Ch. 272; [1898] 1 Ch. 647), followed. *West and Hardy's Contract, In re*, 73 L. J. Ch. 91; [1904] 1 Ch. 145; 89 L. T. 579; 52 W. R. 188—Farwell, J.

—Reconveyance—Trustee—Mortgagee—Concurrence of Husband—Separate Acknowledgment.—Under section 16 of the Trustee Act, 1893, a married woman who, as sole surviving trustee, is mortgagee of a mortgage executed before the Married Women's Property Act, 1883, is competent to reconvey the property without the concurrence of her husband or a deed of separate acknowledgment. *Howgate and Osborn's Contract, In re*, 71 L. J. Ch. 279; [1902] 1 Ch. 451; 86 L. T. 180—Kekewich, J.

Guarantee by Wife of Husband's Debt—No Independent Advice.—*See FRAUD AND MISREPRESENTATION*, col. 876.

Deed of Married Woman—Setting Aside—No Independent Advice.—*See DEED*.

(d) Life Insurance Policy.

Married Women's Property Act—Construction—"Wife and children"—Second Marriage.—In 1891 a settlor effected a policy of assurance on his life "for the benefit of his wife and children," pursuant to section 11 of the Married Women's Property Act, 1882. At that date he had a wife and five children living. Upon the death of his first wife in 1894 he married again, and subsequently died intestate, leaving a widow and one child by the second marriage, and the five children of the first marriage:—*Held*, that the widow and the child of the second marriage were entitled to share the policy-moneys with the children of the first marriage, all taking as joint tenants. *Browne's Policy, In re; Browne v. Browne*, 72 L. J. Ch. 85; [1903] 1 Ch. 188; 87 L. T. 588; 51 W. R. 364—Kekewich, J.

Married Man—Power to Appoint to Widow—Appointment to After-taken Wife.—A policy of assurance taken out by a married man under section 10 of the Married Women's Property Act, 1870, enures for the benefit of an after-taken wife. She is within the statute, and he can exercise in her favour a power in the policy to appoint to his "widow." *Browne's Policy, In re; Browne v. Browne* (72 L. J. Ch. 85; [1903] 1 Ch. 188), followed. *Parker's Policies, In re; Parker v. Parker*, 75 L. J. Ch. 297;

[1906] 1 Ch. 526; 94 L. T. 477; 54 W. R. 329; 22 T. L. R. 259—Swinfen Eady, J.

Assuming the after-taken wife were not within the statute, the provision in her favour would be the introduction of a stranger into the trust. The policy would in that case cease to be under the Act, and would be simply an arrangement with the insurance office that the moneys should be paid to the objects of the power as the assured should appoint. *Ib.*

For Benefit of Wife and Children—Second Marriage—"Wife."—A policy of assurance effected under the Married Women's Property Act, 1870, by a married man "for the benefit of his wife or if she be dead between his children in equal proportions," does not include an after-taken wife, but does include all the children of the assured, whether born before or after the issue of the policy, including children of a second marriage. *Griffiths' Policy, In re*, 72 L. J. Ch. 330; [1903] 1 Ch. 739; 88 L. T. 537—Joyce, J.

Effected by Wife in Favour of Husband—Husband Predeceasing Wife.—A wife effected a policy on her own life in favour of her husband under the Married Women's Property Act, 1882, for 1,000*l.* By the terms of the policy the insurance company promised to pay 1,000*l.* to the husband or his executors, administrators, or assigns on the death of the wife. The husband paid the premiums on the policy and predeceased the wife:—*Held*, that the trust created by the policy and the Act in favour of the husband was not dependent on his surviving his wife, and that the policy belonged to his executor and not to his wife. *Prescott v. Prescott*, [1906] 1 Ir. R. 155—M.R.

(c) *Married Woman—Liability for Costs.*

"Proceeding instituted"—Probate Action—Intervention—Property Subject to Restraint on Anticipation.—When a married woman obtains leave on her own application to intervene in a probate action as a plaintiff, and she does so, and delivers a pleading in which she adopts the pleadings of the plaintiff, she institutes a proceeding within the meaning of section 2 of the Married Women's Property Act, 1893, and the Court has jurisdiction under that section to order the costs of the opposite party to be paid out of property to which she is entitled subject to a restraint on anticipation. The principles laid down in *Hood-Barrs v. Cathcart* (63 L. J. Ch. 793; [1894] 3 Ch. 376) applied. *Crickitt v. Crickitt*, 71 L. J. P. 65; [1902] P. 177; 86 L. T. 635—C.A.

—Separate Estate—Restraint on Anticipation.—An application in a divorce suit by the respondent wife after a final decree for dissolution of the marriage to vary previous orders in the suit for the custody of the child of the marriage and to have the custody given to herself is not a "proceeding instituted" by her within the Married Women's Property Act, 1893, s. 2 and the costs cannot be ordered to be paid out of her property subject to a restraint on anticipation. *Gordon v. Gordon*, 73 L. J. P. 41; [1904] P. 163; 90 L. T. 597; 52 W. R. 889; 20 T. L. R. 272—C.A.

Order for Payment of Costs—Receiver.—Where an order is made against a married woman for payment of costs out of her separate estate, the party obtaining the order is *prima facie* entitled, under section 2 of the Married Women's Property Act, 1893, to enforce payment by obtaining the appointment of a receiver of her property which is subject to a restraint on anticipation, and the onus is upon her to shew why the appointment should not be made. *Pawley v. Pawley*, 74 L. J. Ch. 344; [1905] 1 Ch. 593; 92 L. T. 457; 53 W. R. 375—Buckley, J.

Application for New Trial by Married Woman Plaintiff—Costs.—Upon the dismissal of an application for a new trial made by a married woman, who is plaintiff in an action, the Court has jurisdiction under section 2 of the Married Women's Property Act, 1893, to order that the defendant's costs of the application be paid out of the property of the plaintiff which is subject to a restraint on anticipation. *Dresel v. Ellis*, 74 L. J. K.B. 401; [1905] 1 K.B. 574; 92 L. T. 816; 53 W. R. 353—C.A.

Unsuccessful Appeal—Restraint on Anticipation.—The defendant's costs of an unsuccessful action by a married woman and her husband in which she was the plaintiff really interested ordered to be paid out of her separate estate subject to a restraint on anticipation. *Huntly (Marchioness) v. Gaskell (No. 1)*, 75 L. J. Ch. 66; [1905] 2 Ch. 656; 93 L. T. 785; 54 W. R. 164—C.A.

Appeal by Married Woman—Costs.—An appeal by a married woman will, if it fails, be dismissed with costs in the usual way. *Perrins v. Bellamy*, 68 L. J. Ch. 397—C.A.

Appointment of Receiver.—See PRACTICE.

10. HUSBAND'S LIABILITIES.

Goods Supplied to Wife—Husband and Wife Sued Jointly—Judgment against Wife—Election.—Where husband and wife are sued jointly for goods supplied to the wife and judgment is obtained against the wife, and the evidence shews that there was no joint liability, but that the wife acted as her husband's agent, the creditor having elected to pursue a joint remedy and having recovered judgment against the agent, cannot proceed against the husband as principal. *Morel v. Westmorland (Earl)*, 73 L. J. K.B. 93; [1904] A.C. 11; 89 L. T. 702; 52 W. R. 353; 20 T. L. R. 33—H.L. (E.). See *infra*.

It is a good defence by the husband, in an action against husband and wife for the price of household necessities supplied upon the order of the wife at the residence where they cohabited, that the plaintiff by entering judgment against the wife under Order XIV. has elected to look to her alone as the contracting party. *Morel v. Westmorland (Earl)*, 72 L. J. K.B. 66; [1903] 1 K.B. 64; 87 L. T. 635; 51 W. R. 290—C.A.

Authority of Wife to Pledge Husband's Credit.—Cohabitation of a husband and wife, each having property, and the fact that household necessities are, upon the orders of the wife,

supplied to and consumed at the common home, afford no evidence of a joint liability on the part of the husband and wife for the price of such necessaries. *Ib.*

Such facts *prima facie* give rise to a presumption that the wife has actual authority to pledge the credit of her husband for the household necessities, but the presumption is one not of law, but of fact only, and may be rebutted, as by proving that the husband has provided a sufficient allowance for household necessities, and has forbidden the wife to incur household expenses beyond such allowance. *Ib.*

Wife's Tort—Husband's Liability.]—A husband is subject to the same liability for his wife's torts committed during coverture as he was previously to the Married Women's Property Act, 1882. He will be exempt from liability only in cases where the tort is directly connected with her contract and parcel of the same transaction, and is also the means of "effecting" (in the sense of "obtaining") the contract. *Fairhurst v. Liverpool Adelphi Loan Association* (23 L. J. Ex. 163; 9 Ex. 422) and *Wright v. Leonard* (30 L. J. C.P. 365; 11 C. B. (N.S.) 258) followed. *Seroka v. Kattenburg* (55 L. J. Q.B. 375; 17 Q.B. D. 177) approved. *Earle v. Kingscote*, 69 L. J. Ch. 725; [1900] 2 Ch. 585; 83 L. T. 377; 49 W. R. 3—C.A.

— Action against Husband and Wife—Payment into Court by Husband—Denial of Liability by Wife—Striking out Wife's Defence.]—A husband and wife who are sued jointly in respect of a tort committed by the wife cannot set up separate defences. Where, therefore, in such an action the husband paid money into Court in satisfaction of the plaintiff's claim, a defence by the wife denying liability was ordered to be struck out. *Beaumont v. Kaye*, 73 L. J. K.B. 213; [1904] 1 K.B. 292; 90 L. T. 51; 52 W. R. 241; 20 T. L. R. 183—C.A.

11. OTHER MATTERS.

Act of Bankruptcy by Married Woman.]—See BANKRUPTCY, col. 75.

Administration to Wife.]—See WILL.

Assets for Payment of Wife's Debts—Appointment by Married Woman—Intention to Pay Husband's Debts.]—See POWER.

Attachment against Married Woman.]—See DEBTORS ACT, col. 679.

Claim against Husband's Estate—Surety.]—See BANKRUPTCY, col. 138.

Criminal Responsibility of Wife.]—See CRIMINAL LAW.

Indictment of Wife for Larceny of Husband's Goods.]—See CRIMINAL LAW.

Loan by Married Woman to Husband—Bankruptcy.]—See BANKRUPTCY, col. 138.

Receipt of Money Stolen by Wife from Husband—Indictment.]—See CRIMINAL LAW.

Restraint of Marriage—Bequest—Validity.]—See WILL.

Restraint on Anticipation—Compensation.]—See ELECTION.

Wife's Rights—Widow of Intestate Husband—Real and Personal Estate—Contingent Interests—Valuation.]—See EXECUTOR.

Will of Married Woman.]—See WILL.

— Assent of Husband—Probate.]—See WILL.

HYPOTHECATION.

See SHIPPING.

IDENTITY.

See EVIDENCE.

ILLEGALITY.

See CONTRACT.

IMPRISONMENT (ACTION FOR FALSE).

See MALICIOUS PROCEEDING.

INCOME TAX.

See REVENUE.

INDEMNITY.

Agent, of, by Principal.]—See PRINCIPAL AND AGENT.

Club—Right of Trustees to be Indemnified by Members.]—See CLUB.

Contract of—Stamping.]—See REVENUE.

Costs, Against.]—See COSTS.

Forged Transfer of Stock.]—See *Sheffield Corporation v. Barclay*, ante, COMPANY, col. 398.

Leases, on Assignment of.]—See LANDLORD AND TENANT.

Offer of—Duty to Accept as Discharge of Contract.]—See *The Blairmore*, 67 L. J. P.C. 96.

Third Party.]—See PRACTICE (THIRD PARTY); VENDOR AND PURCHASER.

INDIA.

1. STATUTES.

61 & 62 Vict. c. 13 is the *East India Loan Act*, 1898.

1 Edw. 7 c. 25 is the *East India Loan (Great Indian Peninsular Railway Debentures) Act* 1901.

3 Edw. 7 c. 11 is the *Contracts (India Office) Act*, 1903.

5 Edw. 7 c. 19 is the *East India Loans (Railways) Act*, 1905.

6 Edw. 7 c. 9 is the *Indian Railways Act Amendment Act*, 1906.

7 Edw. 7 c. 35 is the *Council of India Act*, 1907.

2. APPEALS.

Practice—Reception of Additional Evidence by Court of Appeal—Irregularity in Procedure.—The Code of Civil Procedure permits an application for the review of a judgment on the ground of the discovery of fresh evidence since the trial, and by section 623 allows the remedy to "any person considering himself aggrieved . . . from the discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within his knowledge, or could not be produced by him at the time when the decree was passed . . . or for other sufficient reason." There is no appeal from the refusal of an application to review. By section 568: "If the appellate court requires any document to be produced, or any witness to be examined to enable it to pronounce judgment, or for any other substantial reason, the appellate court may allow such evidence to be produced, or document to be received, or witness to be examined." The appellant brought an action against the respondent company for personal injuries, and obtained a verdict for a sum which included damages for loss of employment in consequence of the injuries which he had sustained. The defendants applied for a review of the judgment on the ground that since the trial they had obtained information that the plaintiff had not lost his employment in consequence of the accident, but their application was refused. They then appealed to the Court of Appeal on the whole case, and that Court ordered further evidence to be taken on the question of the alleged loss of employment:—*Held*, that the Court of Appeal had no jurisdiction to admit of such additional evidence. The Judges of the Court of Appeal, with the consent of the parties, visited the scene of the accident, and allowed the appeal, not on the evidence given at the trial, but on their own inspection of the locality. *Held*, that such procedure was irregular, and that the judgment based on it must be reversed. *Kessowji Issur v. Great Indian Peninsula Railway*, 96 L. T. 859—P.C.

Right of to the King in Council—Appellate Orders of the Governor of Bombay in Council—Decrees of Courts of Political Agents in Kathiawar—British Political Tribunals in a Foreign State—Courts Established by the Executive for Political Purposes—Suits to Enforce and Redeem a Mortgage.—The intention of the British Government is and always has been that the jurisdiction exercised in connection with the province of Kathiawar should be political and not judicial in its character; the ultimate appeal being to the Secretary of State for India in Council. Kathiawar is not as a whole within the King's dominions. It has been controlled by the British Indian Government for a very long period in different degrees in its various component States, but has never been treated as British territory or as subject

to the laws in force in the Bombay Presidency or enacted by the British Indian Legislature. Nor has there been any authoritative assertion of territorial sovereignty therein. A system of judicial administration has been established therein, not by legislation, but by orders of the Executive Government, the judicial officers being Assistant Political Agents, with an appeal to Political Agents to deal with cases both political and civil. In the former cases their functions are "diplomatic and controlling," deciding as they "think proper"; in both the intention of the Government is and has been that the jurisdiction exercised should be guided by policy, rather than by strict law:—*Held*, accordingly, in two suits, one classed as civil to enforce a mortgage, and the other classed as political to redeem a mortgage, brought in the Courts of Assistant Political Agents in Kathiawar, that an appeal does not lie from appellate orders therein passed by the Governor of Bombay in Council to his Majesty in Council. *Hemchand Devchand v. Azam Sakarlal Chhotamlal*, [1906] A.C. 212—P.C.

Seizure of Property—Act of State.—See CROWN.

INDICTMENT.

See CRIMINAL LAW.

INDUSTRIAL SOCIETY.

Pauper Lunatic—Maintenance—Lunatic's Investment in Industrial Society—Transfer of Investment to "person whom they shall judge proper to receive the same on his behalf"—"Pay"—"Payment"—Reimbursement of Guardians of Union.—Transfer of the shares, loans, and deposits not exceeding 100l. belonging to an insane member of a society registered under the Industrial and Provident Societies Act, 1893, to the account of his wife in the books of the society is not "payment" by them of the amount thereof "to any person whom they shall judge proper to receive the same on his behalf" within the meaning of section 29 of that Act; and therefore a claim by the guardians of a union, under section 300 of the Lunacy Act, 1890, may be enforced against such property of the lunatic. *Gloucester Union v. Gloucester Industrial Society*, 96 L. T. 168; 71 J. P. 169; 5 L. G. R. 493—C.A.

Debt Due from Member—Recovery of Debt from Past Member.—A debt due to a provident society from a person who has been a member of the society is recoverable in the County Court under section 23; sub-section 1 of the Industrial and Provident Societies Act, 1893, notwithstanding that such person ceased to be a member before the commencement of the action. *Gwendolen Land Society v. Wicks*, 73 L. J. K.B. 815; [1904] 2 K.B. 622; 91 L. T. 440; 53 W. R. 219; 20 T. L. R. 593—D.

Nominee of Member of Industrial Society—Disputed Claim—Arbitration—Failure of Society to Appoint Arbitrator—Sole Arbitrator—Plaint in County Court.—J., a member of an industrial society, nominated his daughter to receive his interest in the society, and died on May 19,

1898, without having revoked the nomination. Both his widow and the daughter claimed the amount standing to his credit in the books of the society. On September 20 the daughter wrote a letter to the society nominating an arbitrator, and asking the society to name an arbitrator to act on their behalf in accordance with one of their rules. The society took no notice of this application, and on October 19 the daughter gave notice that the arbitrator named in her former letter had been appointed by her as sole arbitrator under the Arbitration Act, 1889, s. 6 (b). The society replied that they would refuse to be bound by the decision of an arbitrator so appointed. On November 1 the sole arbitrator gave an *ex parte* award in favour of the daughter. On November 17 a plaint was taken out by the daughter in the County Court under the Industrial and Provident Societies Act, 1893, s. 49, and the Judge enforced the award in favour of the daughter. The society appealed on the ground that the Arbitration Act, 1889, could not apply, as section 6 (b) of that Act was inconsistent with section 49, sub-section 5 of the Provident and Industrial Societies Act, 1893:—*Held*, that it was not necessary to decide whether the Arbitration Act, 1889, was or was not applicable, since the plaint in the County Court, as the forty days mentioned in section 49, sub-section 5 of the Industrial and Provident Societies Act, 1893, had elapsed, might be regarded as an application under that sub-section. *Jessop v. Huddersfield Industrial Society*, 80 L. T. 598—D.

Winding-up—Fraudulent Preference—Debts Due from Members—Member Credited with Shares in His Name—Debited with Sums for Goods Supplied—Set-off.—In the absence of fraud, and whilst an industrial society is still carrying on business, such society is not precluded from the *bona fide* exercise of the right conferred by section 23 of the Industrial and Provident Societies Act, 1893, to set off sums credited to a member in respect of his shares against debts due by him to the society for goods supplied, notwithstanding the circumstance that the society is at the time in difficulties which result in a resolution to wind it up being passed some three months after the last of such transactions. *Gwawr-y-Gweithyr Industrial and Provident Society, In re; Dovey v. Morgan*, 70 L. J. K.B. 614; [1901] 2 K.B. 477; 84 L. T. 824; 49 W. R. 655—D.

INEBRIATES ACT.

62 & 63 Vict. c. 35 is the *Inebriates Act*, 1899.

INFANT.

1. *Statutes*, 1002.
2. *Custody of*, 1002.
3. *Guardianship and Maintenance*, 1004.
4. *Property*, 1007.
5. *Contracts*, 1009.
6. *Employment*, 1010.
7. *Costs*, 1011.

1. STATUTES.

Employments.—3 Edw. 7 c. 45 is the *Employment of Children Act*, 1903.

Youthful Offenders.—1 Edw. 7 c. 20 is the *Youthful Offenders Act*, 1901.

2. CUSTODY OF.

Father Convicted of Theft.—In a petition by a husband against his wife (who was living apart from him) for the custody of their child, a girl of one year and nine months old,—*Held*, that it was not a ground for refusing to give the father the custody of the child that he had a year previously been convicted of theft and sentenced to four months' imprisonment. *A. C. v. B. C.*, 5 F. 108—Ct. of Sess.

Right of Mother—Desertion or Abandonment.—The father of the infant, who was a farm labourer, died in 1890, leaving a widow and three children, of whom H., a girl, was the youngest. The mother, being in poor circumstances, obtained employment as a domestic servant, and placed the children under the care of the Protestant Orphan Society. In October, 1897, the mother was in the service of M., a farmer of a substantial farm, and on October 5, 1897, an agreement in writing was entered into between the mother and M. that M. should adopt the child, and the mother agreed to give the child to him and to have no claim on her. Shortly afterwards the mother was married again to a small farmer. There was no difference of religion between the parties. In the beginning of 1899, the infant being then eleven years of age, the mother demanded her from M., who refused to give her back unless he was paid for her support and maintenance:—*Held*, that the mother had not deserted or abandoned the child within the meaning of section 3 of the Custody of Children Act, 1891, and was entitled to her custody. *O'Hara, In re*, [1900] 2 Ir. R. 282—C.A.

Rights of Mother who after Husband's Death has Changed her Religion.—G., a Protestant, died intestate in 1900. Upon his death his widow, being in poor circumstances, entrusted the three infant daughters of the marriage to a Protestant orphanage. In November, 1901, the widow married a Roman Catholic (whose means consisted only of a small farm of fourteen acres) and became a member of his Church. It was admitted that if handed over to her the three infants would be educated as Roman Catholics:—*Held*, that the mother's application for the transfer to her of the custody of the children must be refused. *Grey, In re*, [1902] 2 Ir. R. 684—K.B. D.

"Abandoning or deserting child"—Conduct of Parent.—*Per the LORD PRESIDENT*: The words "abandoned or deserted the child" in section 1 of the Custody of Children Act, 1891, point to the parent having left the child to its fate; and the words in the same section "has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child" point to some defect in the character of the parent which would render him unfit to bring

up the child. In section 3 of the same Act the words "Where a parent has . . . (b) allowed his child to be brought up by another person at that person's expense" are not to be read as meaning necessarily that the child has been residing continuously in the home of the person who brings it up; they apply to the person who makes the arrangements for the board, lodging, and clothing of the child, although every penny of expense may not have been paid by such person. *Mitchell v. Wright*, 7 F. 568—Ct. of Sess.

Illegitimate Child—Rights of Mother—Interest of Child.—The wishes of the mother of an illegitimate child as to its custody are primarily to be considered. Where, therefore, it was shewn that it would not be detrimental to the interest but for the benefit of such a child that it should be placed in the particular educational institution chosen by the mother, the Court held that her wishes in the matter should prevail over those of persons in whose custody the child had been for some time. *Reid v. New*, 20 T. L. R. 583—C.A.

Parent's Right to Custody of.—It is not a good answer to a mother's claim for the custody of her illegitimate child that the custodian had obtained the custody of the child from the mother under an agreement that the child should be allowed to remain permanently with the custodian as her adopted child. *Kerrigan v. Hall*, 4 F. 10—Ct. of Sess.

Retention of Child—Arrears of Aliment.—A person with whom a child has been boarded by its mother is not entitled to retain the custody of the child in security of arrears of aliment alleged to be due by the mother. *Ib.*

Contract to Relieve Mother for Ever from Liability as to Bringing Up—Action for Breach not Maintainable.—The plaintiff alleged in the statement of claim that she was a single woman and the mother of an illegitimate female child, and that, in consideration that the plaintiff would place and leave the child in the defendants' possession for the period of one month on trial, and would, in the event of the defendants determining to keep the child, still allow her to remain in the defendants' possession after the expiration of the said month, the defendants promised and agreed with the plaintiff to maintain and bring up the child as though she were the defendants' own child and for ever to relieve the plaintiff from all liability and responsibility in connection with the bringing up of the child. It was further alleged that the defendants had, after maintaining the child for some time, refused any longer to do so, whereby the plaintiff had been and would be put to expense in maintaining her:—*Held*, that the statement of claim, being founded upon a contract to transfer to another person obligations with respect to the child of which the plaintiff could not by law divest herself, shewed no reasonable cause of action, and must be struck out and the action dismissed. *Humphrys v. Polak*, 70 L. J. K.B. 752; [1901] 2 K.B. 385; 85 L. T. 103; 49 W. R. 612—C.A.

Petition for Custody Pending Action of Adherence—Guardianship of Infants Act, 1886.—Circumstances in which the Court, on an appli-

cation by a wife under the Guardianship of Infants Act, 1886, made an interim order giving her the custody of her three daughters, all under seven years of age, and an infant son, without ordering enquiry into the facts, and while an action at her instance against her husband of adherence, and, alternatively, for separation and aliment, with conclusions for the custody of the children, was pending in the Outer House. *Reid v. Reid*, 3 F. 330—Ct. of Sess.

After Decree for Divorce.—See HUSBAND AND WIFE.

3. GUARDIANSHIP AND MAINTENANCE.

Mother Sole Surviving Guardian—Re-marriage of Mother—Appointment of Co-Guardian—Grounds for Interference by Court—Second Husband of Different Religion from Father of Infant.—The fact of the re-marriage of the mother of an infant, who is the sole guardian of the infant under the Guardianship of Infants Act, 1886, is not in itself a ground for the Court considering whether it should appoint another guardian under section 2 of the Act to act jointly with her. The only ground for the interference of the Court in such a case is the benefit of the infant, and though the second husband might be such a person as would make it desirable that the infant should be removed from its mother's influence, the mere fact of the second husband being of a different religion from that of the father of the infant is not, when the infant is left alone and is brought up properly, a ground for interference. *X., In re*; *X. v. Y.*, 68 L. J. Ch. 265; [1899] 1 Ch. 526; 80 L. T. 311; 47 W. R. 345—C.A.

The practice of the Court prior to the Act of 1886 in dealing with a mother who was a guardian is not applicable in the case of a mother who is guardian under the Act. *Ib.*

Bequest to Widow, she Maintaining Children—Immoral Home—Apportionment of Income.—Under a trust to pay the income of the testator's estate to his widow during widowhood, "she maintaining, educating, and bringing up" his children under twenty-one years of age, the widow as well as the children takes a beneficial interest. *G., In re*, 68 L. J. Ch. 374; [1899] 1 Ch. 719; 80 L. T. 470; 47 W. R. 491—Kekewich, J.

The widow does not fulfil the implied obligation thrown on her in such a case if she is bringing up the children in the home in which she is living in adultery, and the Court will withdraw them from her custody, will apportion the income between the widow and children, and apply an apportioned part for the proper bringing up of the children elsewhere. *Ib.*

Testamentary Guardian—Settlement Trustees—Settled Land—Right to Receive Rents and Profits.—The testamentary guardian of an infant tenant for life is entitled under section 9 of the 12 Car. 2. c. 24 (Abolition of Tenures Act), to receive during the infancy the rents and profits of real estate devised in strict settlement unless the testator has appointed trustees

qualified, either expressly or otherwise, to exercise the powers of section 42 of the Conveyancing and Law of Property Act, 1881. *Sed quære*, how far this right of the testamentary guardian has been affected by the provisions of the Land Transfer Act, 1897, Part I. *Helyar, In re; Helyar v. Beckett*, 71 L. J. Ch. 209; [1902] 1 Ch. 391; 85 L. T. 627; 50 W. R. 285—Joyce, J.

It is upon the person who is tenant for life, or who has the powers of a tenant for life, whether *sui juris* or an infant, that the Settled Land Act, 1882, confers a power of sale. Section 60 of that Act does not, by authorising the trustees of the settlement to exercise such power on behalf of an infant, thereby constitute them "trustees with power of sale of the settled land" so as to bring them within the purview of section 42 of the Conveyancing and Law of Property Act, 1881, and enable them to exercise the powers given by that section. *Id.*

— **Removal by Order of Court—Change of Religion.**—A testamentary guardian who changes his religion after the testator's death from that of the father of the ward to another may be removed from his office. *F. v. F.*, 71 L. J. Ch. 415; [1902] 1 Ch. 688—Farwell, J.

— **Ward of Court—Religious Education—Welfare of the Infant—Religion of Father—Change of Religious Education.**—By an order of April, 1904, the son and daughter of a Jewish father, then aged respectively ten and eight years, were directed to be brought up in their father's religion, and, both parents being dead, were placed in a Jewish household for this purpose. In March, 1907, the boy wrote to his guardian that he no longer wished to be educated as a Jew. This letter was sent to the Judge, who, after interviews with the boy and further enquiries, came to the conclusion that the welfare of the boy demanded his sanction to a change in his religious education, and he accordingly made an order that both infants should be henceforth brought up in the Christian religion:—*Held*, that it would be morally injurious to the welfare of the boy not to give effect to his wishes, but as there was no evidence to justify any order changing the religious education of the girl, this portion of the order must be varied. *W., In re; W. v. M.*, 77 L. J. Ch. 147; [1907] 2 Ch. 557—C.A.

— **Form of Order.**—In all orders relating to the religious education of a ward of Court the words "until further order" must, from the nature of the case, be deemed to be inserted. *Id.*

— **Maintenance—Settled Estates—Contingent Portions—Existing Portions Term—Settlement by Parent or Person in Loco Parentis.**—The Court will in a proper case allow reasonable maintenance to younger children in respect of portions to which they are contingently entitled under a settlement made by their father or by a person in *loco parentis*, the term to secure the portions having already commenced to run. *Greaves' Settled Estates, In re; Jones v. Greaves*, 69 L. J. Ch. 596; [1900] 2 Ch. 683; 82 L. T. 799—Farwell, J.

— **Construction—"Applied."**—Where land

is vested in trustees upon trust during the lives of children, and the life of the longest survivor to receive and take out of the rents and profits an annuity "to be applied by the said trustees or trustee for the maintenance and education of such children or child as aforesaid," such children take a joint life interest in the land in settlement, the word "applied" not importing a power of selection in the trustees. *Williams v. Papworth*, 69 L. J. P.C. 129; [1900] A.C. 563; 83 L. T. 184—P.C.

— **Settled Land—Tenant in Tail in Possession—Direction to Accumulate Surplus Income—Items of Expenditure—Upkeep of Mansion-House—Subscriptions to Local Charities.**—Where a testator settles his property on persons for life with remainders over, and provides for infants being maintained during minority, he does not, when he mentions a sum for maintenance and directs an accumulation of the surplus income, without negative words, necessarily exclude an intention that the estate should be kept up and infants brought up in the way suitable to the position which he has shewn by his will he intended they should ultimately occupy. *Walker, In re; Walker v. Duncombe*, 70 L. J. Ch. 417; [1901] 1 Ch. 879; 84 L. T. 193; 49 W. R. 394—Farwell, J.

The following items of expenditure were authorised by the Court on the application of the above principle: (a) Internal repairs to mansion-house and appurtenances; (b) Maintenance of gardens and pleasure-grounds of mansion-house; (c) Increased sum for maintenance of infant; (d) Tutor, clothing, pocket-money, travelling and incidental expenses of infant; (e) Subscriptions to local charities. *Id.*

— **Accumulation—Jurisdiction to allow Maintenance to Infant "presumptively entitled"—Ability of Father to Maintain Eldest Son.**—A testator appointed real estates to his daughter for life, and after her death to her first and other sons successively in tail male, and provided that in the event of her marrying without her mother's consent the rents and profits should be accumulated by his trustees during the minority of her eldest son, and empowered them to apply the rents and profits in reduction of charges on the estate. By a subsequent clause in the will he empowered his trustees to apply any part of the annual income to which any object (being a minor) of the trusts already declared should be entitled or presumptively entitled towards the maintenance of such object. The daughter married without her mother's consent, and had two sons infants. An action was brought in the name of the eldest infant to administer the testator's real and personal estate, and the rents and profits of the real estates, which were very large, were applied by the receiver in reduction of charges. The income of the infant's parents was considerable, but not sufficient to suitably maintain and educate him, having regard to the position in life which he would occupy on attaining majority:—*Held*, that the trustees had power, notwithstanding the accumulation clause, to make an allowance by way of maintenance, and that, under the circumstances, it was a proper case for making the allowance asked for. *King-Harman v. Cayley*, [1899] 1 Ir. R. 39—M.R.

Conversion—Partition.]—See PARTITION.

Maintenance — Contingent Legacy.]—See *Boulby, In re*, 73 L. J. Ch. 810; *WILL*.

— Right of Poor-law Guardians to Recover Expenses.]—See POOR LAW.

— Child in Hospital—Liability of Parents and Persons in Loco Parentis.]—See LOCAL GOVERNMENT.

4. PROPERTY.

Will—Settlement of Contingent Residuary Share—Accumulation of Income.]—“Property” in sub-section 2 of section 43 of the Conveyancing and Law of Property Act, 1881, means “income,” not “*corpus*,” and “ultimately becomes entitled” means “in the events which happen becomes entitled.” The sub-section should read: “The trustees shall accumulate all the residue of that income”—namely, income of property held in trust for an infant, referred to in sub-section 1—“in the way of compound interest, by investing the same and the resulting income thereof from time to time . . . and shall hold those accumulations for the benefit of the person who in the events which happen becomes entitled to the income from accumulation of which the accumulations arise.” *Scott, In re; Scott v. Scott*, 71 L. J. Ch. 475; [1902] 1 Ch. 918; 86 L. T. 848; 50 W. R. 454—Buckley, J.

A testator gave his residuary estate in trust, subject to his wife's interest, for his children who should being sons attain twenty-five, or being daughters attain twenty-one or marry, and directed the daughters' shares to be held in trust for them for life and afterwards for their children:—*Held*, that accumulations of income of the daughters' settled shares belonged to them absolutely on their respectively attaining twenty-one. *Ib.*

Management of Land during Minority—Appointment of Trustees—Infant Taking by Descent.]—The provisions of section 42 of the Conveyancing Act, 1881, enabling the Court to appoint trustees on the application of the next friend of an infant who is beneficially entitled to the possession of any land, include the case of an infant taking by descent. *Glover, In re*, [1899] 1 Ir. R. 337—M.R.

— Appointment of Trustees—Infant Absolutely Entitled by Will.]—Section 42, sub-section 1 of the Conveyancing and Law of Property Act, 1881, enabling the Court to appoint trustees on the application of a guardian or next friend of an infant beneficially entitled to the possession of any land, applies to the case of an infant taking absolutely by will. *Bradshaw, In re*, [1904] 1 Ir. R. 18—M.R.

— Infant Taking by Descent.]—The power given to the Court by section 42 of the Conveyancing and Law of Property Act, 1881, to appoint trustees for the management of an infant's land during minority, on the application of his next friend, extends to the case of an infant taking by descent. *Cowley, In re*, 70 L. J. Ch. 88; [1901] 1 Ch. 38; 83 L. T. 729—Cozens-Hardy, J.

Appointment of Trustees—Beneficial Possession of Land—Undivided Share—Contingency.]—Under the will of a testator an infant was, in the events that happened, entitled to receive one undivided share of the income of real estate with remainder in an undivided share of the fee-simple of the land, contingent—first, on surviving his father; and secondly, on attainment of twenty-one or marriage. The trustees of testator's will were directed to pay his share of income to the infant, but had no power of sale of the settled land, or of consenting thereto:—*Held*, that the trustees of the will did not come within the enabling provisions of section 43 of the Conveyancing Act, 1881, and that the Court had power to appoint them trustees for the purposes of section 42 of the Act to enable them in their discretion to apply the share of income, and accumulations thereof, to which the infant was entitled for his benefit. *Tutthill v. Tutthill*, [1902] 1 Ir. R. 429—M.R.

Advancement—Assets in Hands of Administrator—Jurisdiction.]—The plaintiff, as administrator *de bonis non* of the estate of the father of an infant, had in his hands as assets a sum of 2,013*l.*, to one third share of which the infant was entitled. The plaintiff issued an originating summons under Order LV. rule 4, asking for a declaration that he was at liberty to advance 315*l.* out of the infant's share in order to pay an apprenticeship fee for him to a chartered accountant in order to enable him to learn that business:—*Held*, that the Court had power to sanction the proposed advancement and would do so under the circumstances of the case. *Curtis v. Curtis*, [1901] 1 Ir. R. 374—M.R.

Fund in Court — French Subjects — French Guardians—Payment out of Court—Jurisdiction.]—The Court will not order payment out of a fund paid into Court under the Trustee Relief Act to the French guardian of infant French subjects as a matter of right on mere proof of the guardian's title to give a legal discharge on the infants' behalf, but will exercise its discretion and consider whether payment out is properly required for the infants' benefit. *Crichton's Trust, In re* (24 L. T. (o.s.) 267), *Brown's Trust, In re* (12 L. T. 488), *Ferguson's Trust, In re* (22 W. R. 762), and *Hellmann's Will, In re* (L. R. 2 Eq. 363), considered. *Chatard's Settlement Trusts, In re*, 68 L. J. Ch. 350; [1899] 1 Ch. 712; 80 L. T. 645; 47 W. R. 515—Kekewich, J.

Family Arrangement — Conversion of Contingent Rights into Interests in Possession—Approval of Court—Jurisdiction.]—A testator directed a mixed trust fund to be held upon trust for such members of a class as should be living at the death of the last survivor of certain annuitants. When three of the annuitants were still alive, the then members of the class, seven in number, agreed to apply part of the fund in buying out the surviving annuitants and the next-of-kin and heir-at-law of the testator, and to make an immediate division of the residue of the fund amongst themselves in equal shares. This arrangement affected the rights of infants under settlements previously executed by some of the members of the class of their contingent interests in the fund:—*Held*, that the Court had jurisdiction on behalf

of the infants to sanction the arrangement, notwithstanding that it did not partake of the nature of a compromise; and that the arrangement, being in effect a sale of contingent rights for a sum of money down, and wholly beneficial to the infants, was, in the special circumstances of the case, a proper one to receive the approval of the Court. *Peto v. Gardner* (12 L. J. Ch. 371; 2 Y. & C. C.C. 312) not followed. *Wells, In re*; *Boyer v. McLean*, 72 L. J. Ch. 513; [1903] 1 Ch. 848; 88 L. T. 355; 51 W. R. 521—Farwell, J.

Sale of Glebe Land—Consent of Patron.]—See ECCLESIASTICAL LAW.

5. CONTRACTS.

Necessaries—Racing Bicycle.]—A racing bicycle may be a necessary for an infant apprentice earning 21s. a week and living with his parents. *Clyde Cycle Co. v. Hargreaves*, 78 L. T. 296—D.

—Champagne—Jewellery.]—In the case of an infant, who was entitled to an income of between 7l. and 8l. a week during his minority, such things as (a) cartridges; (b) champagne; and (c) jewellery presented to a lady, to whom the infant was engaged without the consent of his guardian, but who did not become his bride, will not be allowed as “necessaries.” *Hewlings v. Graham*, 70 L. J. Ch. 568; 84 L. T. 497—Joyce, J.

Marriage Articles—Female Infant—Covenant to Settle After-acquired Property—Change of Domicil—Time for Repudiation.]—Ante-nuptial articles entered into according to English law by a female infant will be governed by English law, and may be affirmed by her after coming of age, though she is then domiciled in a foreign country, and the affirmance is in accordance with English law only. *Van Grutten v. Digby* (32 L. J. Ch. 179; 31 Beav. 561) followed. *Viditz v. O'Hagan*, 68 L. J. Ch. 553; [1899] 2 Ch. 569; 80 L. T. 794; 47 W. R. 571—Cozens-Hardy, J.

An infant's contract need not be affirmed after the infant comes of age to render it good. It is valid until disaffirmed, and unless repudiated within a reasonable time the infant is absolutely bound by it. *Ib.*

Edwards v. Carter (63 L. J. Ch. 100; [1893] A.C. 360) and *Hodson, In re*; *Williams v. Knight* (63 L. J. Ch. 609; [1894] 2 Ch. 421), followed. The decision of JESSEL, M.R., in *Smith v. Lucas* (18 Ch. D. 531), is inconsistent with the decision of the House of Lords in *Edwards v. Carter* (*supra*). There is no inconsistency between *Cooper v. Cooper* (13 App. Cas. 88) and *Edwards v. Carter* (*supra*). *Ib.*

—Rectification of Subsequent Settlement.]—Where ante-nuptial articles provided for the settlement of the wife's after-acquired property, exclusive of pecuniary legacies, and the settlement executed after marriage in pursuance of the articles omitted to qualify the covenant to settle by excluding such pecuniary legacies, the settlement was rectified so as to correspond with the articles. *Ib.*

Agreement to Settle Action—Plea in Bar—Contract to Benefit.]—The plaintiff, an infant, commenced an action by his next friend for wages and damages for assault, false imprisonment, and malicious prosecution. He voluntarily came to the defendant and offered to take 30s. in respect of all his claims, as he wished to go abroad, which was paid him, and he signed an acknowledgment that all his wages had been paid, and that he had brought the other claims out of vengeance. The next friend continued the action, and the plaintiff came over to give evidence. The defendant pleaded the agreement in bar to the action. The jury found for the defendant as to the wages and malicious prosecution, but for the plaintiff upon the false imprisonment, with 20l. damages. The infant never ratified the agreement:—*Held*, that under the circumstances the infant was not bound by the agreement, so as to make it a bar to the action. *Mattei v. Vautro*, 78 L. T. 682—Kennedy, J.

Building Society—Advance to Infant Member—Purchase of Land—Building on Land—Mortgage of Land and Buildings to Society—Repudiation—Society's Lien.]—Section 38 of the Building Societies Act, 1874, which enables an infant to become a member of a society constituted thereunder, does not enable an infant to borrow money from the society on mortgage of his property—borrowing not being a necessary element of membership—and such a mortgage is void under the Infants' Relief Act, 1874, s. 1. But a building society advancing the purchase-money of land to an infant is entitled to stand in the place of the vendor and enforce the vendor's lien on such land. *Nottingham Permanent Benefit Building Society v. Thurstan*, 72 L. J. Ch. 134; [1903] A.C. 6; 87 L. T. 529; 51 W. R. 273; 67 J. P. 129—H.L. (E.)

Apprenticeship Deed—Stipulation Detrimental to Infant—Validity.]—An apprenticeship deed entered into by an infant apprentice containing a stipulation that the apprentice shall not be instructed or paid wages on days on which the business of the master shall be at a standstill “through accident beyond the control of the master” is not so detrimental to the infant as to be invalid and incapable of being enforced against him. *Green v. Thompson*, 68 L. J. Q.B. 719; [1899] 2 Q.B. 1; 80 L. T. 691; 48 W. R. 31; 63 J. P. 486—D.

6. EMPLOYMENT.

Master's Liability for Negligence—Claim under Workmen's Compensation Act—Workman's Option as to Remedy—Benefit of Infant.]—An infant apprentice sustained personal injuries in consequence of the negligence of his employers in not fencing machinery. A claim under the Workmen's Compensation Act, 1897, was sent into the employers on behalf of the infant, and they paid him compensation in accordance with the Act during his incapacity for work. Subsequently he commenced a common-law action of negligence against them. *Held*, that the infant was not precluded from maintaining the action by the fact that he had exercised the option given to him by section 1, sub-section 2 (b) of the Workmen's Compensation Act, 1897, by claiming

compensation under the Act, there being nothing in the Act forming an exception to the general rule that an infant is not bound by a contract made by him which is not for his benefit. *Stephens v. Dudbridge Ironworks Co.*, 73 L. J. K.B. 739; [1904] 2 K.B. 225; 90 L. T. 838; 52 W. R. 644; 68 J. P. 437; 20 T. L. R. 492—C.A.

7. COSTS.

Costs of Action to Obtain Probate of Will—Infant Defendant—Agreement that Costs shall be Paid out of Estate—Benefit of Infant—Necessaries.—The plaintiff brought an action to obtain probate of a will dated March 4, 1903. The defendants propounded a will of March 3, 1903, under which the substantial beneficiary was an infant, who appeared by a guardian *ad litem*. The jury found for the will of March 3, and probate was granted of that document. While the case was part heard an agreement was entered into by all parties that no matter which will was upheld the costs as between solicitor and client both of the plaintiff and the defendants should be paid out of the estate, whether the Court so ordered or not. The Court refused to sanction this arrangement, being of opinion that it was not for the benefit of the infant defendant. *Prince v. Haworth*, 20 T. L. R. 313—Gorell Barnes, J.

Costs against Infant—Injunction—Passing off Goods—Fraud.—Where a perpetual injunction has been granted to restrain an infant defendant from passing off his goods as those of the plaintiff, the infant can be ordered to pay the costs. *Woolf v. Woolf*, 68 L. J. Ch. 82; [1899] 1 Ch. 343; 79 L. T. 725; 47 W. R. 181—Keke-wich, J.

Compromise of Action—Sanction of Court—Lien for Costs.—See SOLICITOR.

Legitimacy of Child.—See HUSBAND AND WIFE.

INFERIOR COURT.

See COURT.

INFORMATION (CRIMINAL).

See CRIMINAL LAW.

Justices, before.—See JUSTICE OF THE PEACE.

INJUNCTION.

Jurisdiction—Land Outside Jurisdiction—Plaintiffs and Defendants Within Jurisdiction—Breach of Implied Covenant for Quiet Enjoyment.—In July, 1896, the plaintiffs entered into an agreement with the defendants under which the sole and exclusive right to work certain lands situate in the island of Milos and belonging to the defendants was granted to the plaintiffs for a period of five years; the agreement

also contained a provision for a renewal of the period for three further periods of five years each. The right conferred by this agreement was expressed to be granted for the purpose of enabling the plaintiffs to get and work manganese, and they were to pay by quarterly payments certain royalties therefor, and a minimum royalty was fixed. Clause 6 of the agreement provided that in the event of any royalties being in arrear for three months or a breach of any of the provisions of the agreement the defendants might determine the licence and re-enter the premises. On May 17, 1898, a further agreement was made modifying the first agreement and providing for the payment of the royalties half-yearly on April 8 and October 8 in each year. A dispute having arisen between the original grantors of the lands and the defendants, and the former having requested the plaintiffs to pay the royalties to them instead of to the defendants, the plaintiffs on October 7 declined to pay to the defendants the royalties due on October 8, and offered to refer the question to arbitration. On October 12 the defendants took forcible possession of the lands and remained in possession of the same. On October 18 the plaintiffs tendered to the defendants the money due, but the tender was refused. On November 2 the plaintiffs instituted this action, and now moved for an injunction to restrain the defendants from taking or keeping possession of the lands in question and of the machinery and stock of manganese in or about the premises. The registered offices of the plaintiffs and defendants respectively were situate in London:—*Held*, that if there was jurisdiction to grant the injunction sought for, such jurisdiction ought to be exercised with great caution, and that as the defendants were in actual possession of the lands they ought not to be disturbed and that the motion must be refused. *Black Point Syndicate v. Eastern Concessions, Lim.*, 79 L. T. 658—Stirling, J.

Implied Negative Stipulation.—Where a contract, although affirmative in form, is negative in substance, the Court will, notwithstanding the absence of a negative stipulation, imply one, and grant an injunction accordingly, upon the principle of *Lumley v. Wagner* (1 De G. M. & G. 604). *Metropolitan Electric Supply Co. v. Ginder*, 70 L. J. Ch. 862; [1901] 2 Ch. 799; 84 L. T. 818; 49 W. R. 508; 65 J. P. 519—Buckley, J.

News Agency—Cricket Scores—Copying by Rival Agency—Injunction.—An injunction granted, following the form in *Exchange Telegraph Co. v. Central News* (66 L. J. Ch. 672; [1897] 2 Ch. 48), restraining the defendants, their servants and agents, and each and every of them, from surreptitiously obtaining or copying any cricket or other news collected by the plaintiffs for the purpose of transmission to their subscribers, and from transmitting, communicating, or delivering to any person or persons by messenger, telegraph, telephone, or otherwise any cricket or other news so obtained by the defendants. *Exchange Telegraph Co. v. Howard*, 22 T. L. R. 375—Buckley, J.

Light—Prescription—Completion of Building after Notice of Appeal.—If ancient lights are interfered with substantially, and real damage thereby ensues to tenant or owner, the Court

will grant relief by way of mandatory injunction where the obstructing building has been completed after notice of appeal. *Home and Colonial Stores v. Colls*, 71 L. J. Ch. 146; [1902] 1 Ch. 302—C.A. See S.C. in H.L., *ante*, EASEMENT.

Injunction to Restrain Nuisance after Nuisance Abated.—The plaintiffs claimed damages in respect of injury caused to their trees and crops by smoke and effluvia from the defendants' works. They also claimed an injunction to restrain continuance of the nuisance. The nuisance had ceased owing to defendants having stopped work after action brought:—*Held*, that the plaintiffs were entitled to an injunction and an enquiry as to damages. *Chester (Dean) v. Smelting Corporation*, 85 L. T. 67—Farwell, J.

Infringement of Patent—Article made Abroad.—The Court has no jurisdiction to restrain a foreigner abroad as regards transactions carried on by him in his own country. *Badische Anilin- und Soda-Fabrik v. Basle Chemical Works Bindschedler*, 67 L. J. Ch. 141; [1898] A.C. 200; 77 L. T. 573—H.L. (E.)

Covenant not to Engage in any other Business—Negative Stipulation.—A covenant, negative in its terms, prohibiting a servant during the terms of his employment from being concerned in any business other than that of his employer, is not enforceable by way of injunction, at any rate where the prohibition is not restricted to a competing business. *Ehrmann v. Bartholomew*, 67 L. J. Ch. 319; [1898] 1 Ch. 671—Romer, J.

— **Similar or any other Business—Continuance of Employment—Breach of Contract—Reasonable—Injunction.**—A covenant made by a servant on entering into an employment that he will not, "during the engagement," carry on a business similar to his employer's, "or any other business whatever," is legal, although the Court will not enforce it by injunction. But where the engagement is still subsisting and the agreement provides for service for a term of five years, to be followed by an additional term of five years at the option of the master, and only three years of the first term have expired, and the servant has agreed to devote the whole of his time to the master's business during the engagement, the Court will grant an injunction to restrain the servant from breaking the covenant till the trial of the action, limited to the period during the engagement and without the words "or any other business whatever," on the undertaking of the employer not to extend the service to another term of five years. *Robinson v. Heuer*, 67 L. J. Ch. 644; [1898] 2 Ch. 451; 79 L. T. 281—C.A.

Passing Off Action—Default of Pleading—Injunction—Estoppel.—The plaintiff brought an action against the defendants for an injunction to restrain them from passing off goods alleged to be a colourable imitation of those of the plaintiff's manufacture. The defendants made default in pleading, and the injunction was granted in due course. Later it appeared that a similar article to that complained of was being put upon the market by N., for whom the defendants were acting as agents for sale. On a motion for attachment of the defendants for

breach of the injunction no direct evidence was forthcoming, and the case was rested on admissions by the defendants (which the Court held to be insufficient) and on the fact that the defendants, having allowed judgment to go against them by default, were estopped from saying that the goods complained of were not an imitation of those of the plaintiff's manufacture:—*Held*, that in these circumstances an attachment could not issue. *Ripley v. Arthur*, 86 L. T. 735—C.A.

Contempt—Person not Enjoined Knowingly "Aiding and assisting" in Breach—Committal.—A person who knowingly aids and assists in the doing of acts which have been expressly prohibited by injunction (although he is not a party to the litigation nor named in the order granting the injunction) may be committed for contempt of Court. *Lord Wellesley v. Earl of Mornington* (11 Beav. 180, 181) followed. *Seaward v. Paterson*, 66 L. J. Ch. 267; [1897] 1 Ch. 545—C.A.

Statutory Duty—Breach no Actual Injury.—Where the Legislature has in express terms imposed certain conditions upon a public company for the protection of the public, it is the duty of the Court, on the application of the Attorney-General on the relation of the local authority charged with the protection of the public rights in question, to enforce the provisions of the law. *Att.-Gen. v. London and North-Western Railway*, 69 L. J. Q.B. 26; [1900] 1 Q.B. 78; 63 J. P. 772—C.A.

Therefore where a statute provides that where a railway crosses any turnpike road trains shall not cross the same at any greater speed than four miles an hour, and a railway company cause their trains to cross the turnpike road at a speed greatly exceeding four miles an hour, the Court is bound to grant an injunction restraining the railway company from disregarding the statutory provision, even though no actual injury to the public be proved. *Ib.*

Infringement of Legal Right—Statutory Powers.—The Court will grant an injunction to restrain the infringement of a legal right by a company acting under statutory powers when the plaintiff's rights will not be adequately protected or vindicated by damages. *Jordeson v. Sutton, Southcoates and Drypool Gas Co.*, 68 L. J. Ch. 457; [1899] 2 Ch. 217; 80 L. T. 815; 63 J. P. 692—C.A.

The principles laid down in *Martin v. Price* (63 L. J. Ch. 209; [1894] 1 Ch. 276) and *Shelfer v. City of London Electric Lighting Co.* (64 L. J. Ch. 216; [1895] 1 Ch. 287) applied. *Ib.*

Per RIGBY, L.J.—In dealing with the question of remedy by injunction or damages in such a case, the Court ought to take care to prevent undertakers with statutory powers from exceeding those powers, and under pretence and colour thereof in effect expropriating landowners whose lands are outside their real scope. *Ib.*

Statutory Remedy—Proceedings before Justices—Jurisdiction to Restrain.—The Court will not interfere by way of injunction or declaration of right where the Legislature has pointed out a mode of procedure before a magistrate; unless (it seems) in very special circumstances. *Grand*

Junction Waterworks v. Hampton Urban Council (No. 1), 67 L. J. Ch. 603; [1898] 2 Ch. 331; 78 L. T. 673; 46 W. R. 644; 62 J. P. 566—Stirling, J.

— **Ancient Market—Statutory Regulation—Disturbance—Common Law Action.**—Where an ancient market is regulated by an Act of Parliament, an action at law will lie for disturbance of the market, notwithstanding provisions giving a summary remedy before a special tribunal. But the remedy formerly administered by the Court of Chancery by injunction was more extensive than any common law remedy, and may be invoked to prevent an invasion of proprietary rights, whether newly created or merely confirmed by statute, unless the statute expressly or by a necessary implication excludes that remedy, and the Court will not infer this intention from a provision for the purpose of protecting the right. *Stevens v. Chown*, 70 L. J. Ch. 571; [1901] 1 Ch. 894; 84 L. T. 796; 49 W. R. 460; 65 J. P. 470—Farwell, J.

Alternative Remedy—Election—Contract—Liquidated Damages in Case of Breach.—The plaintiffs appointed the defendant their agent under an agreement by which he agreed that, if he should cease to act for the plaintiffs under the agreement, he would not give information about the plaintiffs' connections, or interfere, directly or indirectly, with their business, or represent any other corporation doing a similar business within a certain radius from the place to which he should be appointed, within one year at least from the date of his ceasing to receive remuneration from the plaintiffs. In case of breach of the agreement the defendant was to pay to the plaintiffs 100l. by way of liquidated damages. The defendant having committed breaches of the agreement,—*Held*, that the plaintiffs were not entitled to an injunction as well as to the 100l. liquidated damages, but were bound to elect between the two remedies. *General Accident Assurance Corporation v. Noel*, 71 L. J. K.B. 236; [1902] 1 K.B. 377; 96 L. T. 555; 50 W. R. 381—Wright, J.

Mandatory Injunction—Damages in Lieu of—Exercise of Statutory Powers—Acquiescence.—The defendant corporation had statutory power to improve the navigation of Carlingford Lough. In one of their statutes express reference was made to certain oyster beds in the lough, the property of the original sole plaintiff, as equitable tenant for life, and it was provided that during the construction of their works defendants should protect these oyster beds. In 1890-91 the defendants cast a quantity of stones, ballast, &c., upon a portion of the ground within the ambit of the oyster beds, although expressly warned against doing so by the plaintiff and his lessee, but the present action was not commenced until 1895. It was proved that the expense of removing the deposit and restoring the beds as far as possible to their original state would occasion an expense to the defendants considerably out of proportion to any advantage the plaintiff would derive from the restoration. The trustees of the property, who intervened in the action, having insisted on a mandatory injunction instead of damages,—*Held*, that there was no acquiescence which would deprive them of their right to such relief,

and that a mandatory injunction should be granted. *Woodhouse v. Newry Navigation Co.*, [1898] 1 Ir. R. 161—C.A.

— **Form of Order.**—A mandatory injunction directed to the removal of buildings from land should expressly direct the buildings to be pulled down, not, as formerly was the practice, restrain the defendant from allowing the buildings to remain on the land. *Jackson v. Normanby Brick Co.*, 68 L. J. Ch. 407; [1899] 1 Ch. 438—C.A.

Undertaking in Lieu of Injunction—Cross-undertaking by Plaintiff as to Damages.—Where, before the opening of a motion for an interim injunction, the defendant offers out of Court an undertaking which is embodied in the order in lieu of an injunction, there is no practice under which a cross-undertaking in damages by the plaintiff is to be implied. Such an implication may arise where the defendant's undertaking is given under pressure from the Court. *Howard v. Press Printers, Lim.*, 74 L. J. Ch. 100; 91 L. T. 718; 53 W. R. 98—C.A.

Damages—Trespass—Circumstances under which Damages are Given instead of Injunction.—The defendants purchased from the plaintiffs under compulsory powers certain lands for the construction of a reservoir. In executing the works the defendants found a fissure in the ground which might have caused a leak in the reservoir, and they accordingly followed out the fissure and filled in the space with concrete, carrying the heading a distance of forty-two feet into the plaintiffs' land. The surface of the plaintiffs' land was not disturbed. The plaintiffs claimed an order for the removal of the works on their land, and it was proved that it would cost a considerable sum to do so:—*Held*, that, as the injury to the plaintiffs' rights were small and could be adequately compensated by a small money payment, and as it would be oppressive to make an order for the removal of the works, the Court would refuse to make such an order, and would give damages instead. *Riley v. Halifax Corporation*, 97 L. T. 278; 71 J. P. 428; 5 L. G. R. 909; 23 T. L. R. 613—Joyce, J.

— **Interdict too Wide—Measure of Damages.**—An interim interdict was obtained by the defenders against the pursuers, a mineral company, who owned a large shale and limestone mineral field, and also large works for extracting and refining oils. The interdict restrained the pursuers from working and winning the seams of the shale and other minerals within forty yards of the defenders' water-pipes, which passed through the pursuers' property. The interdict was in force for eleven months, when it was recalled. During the eleven months shale to keep the works going could have been obtained from other sources, but only at an expense which would not have been profitable. The pursuers' capital in hand was limited, and prices in the oil trade were at the lowest point. In these circumstances the pursuers closed their works, with the result that their machinery deteriorated, their business connections were lost, and it was found impossible to re-start the works after the recall of the interdict. In an action for damages for wrongous interdict, the

First Division of the Court of Session gave the pursuers judgment for 27,000*l.* damages out of a claim for 137,000*l.*:—*Held*, that the pursuers were not entitled to recover as damages the total loss consequent on the closing of their works; that both parties were in fault; and that the damages awarded were not insufficient. *Clippens Oil Co. v. Edinburgh District Water Trustees*, 76 L. J. P.C. 79; [1907] A.C. 291—H.L. (Sc.)

Attorney-General—Right of, to.]—*See* CROWN.

Copyright—To Restrain Infringement.]—*See* COPYRIGHT.

Covenants in Leases to Restrain.]—*See* LANDLORD AND TENANT.

Discretion of Court to Refuse.]—*See* *Behrens v. Richards*—WAY.

Libel, to Restrain Publication of.]—*See* DEFAMATION.

Lights—Obstruction of—Mandatory Injunction.]—*See* EASEMENT.

Nuisance—To Restrain.]—*See* WAY.

Overhanging Trees.]—*See* NUISANCE.

Partner—Expulsion Clause in Articles.]—*See* PARTNERSHIP.

Patent, to Restrain Infringement of.]—*See* PATENT.

Slander of Title—To Restrain.]—*See* DEFAMATION.

Statutory Remedy—In Addition to.]—*See* LOCAL GOVERNMENT.

Trade Name, to Restrain Use of.]—*See* TRADE.

Works Constructed under Statutory Authority—To Restrain Operations likely to Injure.]—*See* STATUTE.

INJURY.

See NEGLIGENCE.

INNKEEPER.

Duty to Receive Guest—Inn Full.]—An innkeeper, the bedrooms in whose inn are occupied, is not bound to receive a guest who desires to sleep the night at the inn. *Browne v. Brandt*, 71 L. J. K.B. 367; [1902] 1 K.B. 696; 86 L. T. 625; 50 W. R. 654—D.

Relationship of Innkeeper and Guest—Dining-room Used by Persons other than those Sleeping at the Inn—Supply of Refreshment only.]—The plaintiff, who had an office in Liverpool, resided outside the city and came in and out every day by train. On his way home in the evening he called at the defendant's hotel, which was between his office and the railway station, for the purpose of dining only, and he was supplied with dinner in the dining-room of the hotel, a large room structurally forming part of the

hotel and reached by the same entrance as the rest of the hotel, but capable of accommodating and went to accommodate a large number of persons in addition to those who were staying in the house:—*Held*, that there was evidence that the relationship of guest and innkeeper existed between the plaintiff and the defendant so as to make the defendant liable to the plaintiff for the value of his overcoat lost in the hotel. *Orchard v. Bush*, 67 L. J. Q.B. 650; [1898] 2 Q.B. 284—D.

Deposit of Goods—Liability beyond 30*l.*]—A guest who deposits an article with an innkeeper cannot, in the absence of default or neglect, hold the innkeeper responsible to a greater amount than 30*l.* for its loss, unless, when making the deposit, he informs the innkeeper, in a reasonable and intelligible manner, that the deposit is for the safe custody of the article. *O'Connor v. Grand International Hotel Co.*, [1898] 2 Ir. R. 92—Q.B. D.

INN OF COURT.

See CHARITY.

INNUENDO.

See DEFAMATION.

INSANITY.

See LUNATIC.

INSOLVENCY.

See BANKRUPTCY.

INSPECTION OF DOCUMENTS.

See DISCOVERY.

INSURANCE.

1. *General Principles*, 1018.
2. *Accident*, 1019.
3. *Burglary*, 1025.
4. *Fire*, 1025.
5. *Life*, 1027.
6. *Marine*, 1035.
7. *Guarantee*, 1077.
8. *Other Insurances and Matters*, 1079.

1. GENERAL PRINCIPLES.

Concealment and Misstatement of Material Facts—Risk of Solvency—Guarantor of Promissory Note.]—The rule that a policy of insurance is vitiated by the concealment by the assured of material facts of which the assured is cognisant and the underwriter is not, extends

to all contracts of insurance, and is not confined to contracts of life, fire, and marine insurance. *Seaton v. Heath*, 63 L. J. Q.B. 631; [1899] 1 Q.B. 782; 80 L. T. 579; 47 W. R. 487—C.A.

In an action against an underwriter upon a contract in writing in the form of a policy of insurance by which the underwriter in consideration of a premium guaranteed the solvency of a guarantor of a promissory note payable to the plaintiff,—*Held*, that the contract was one of insurance, and that the assured was bound to disclose all material facts of which the assured was cognisant and the underwriter was not, and that the concealment, designed or undesigned, or the misstatement of any fact materially varying the risk, would, if the underwriter was influenced thereby in underwriting the policy, debar the assured from recovering upon it. *Id.*

2. ACCIDENT.

Proposal and Declaration—Falsity of Answers Forming Basis of Contract—Fraud of Agent—Liability of Insurer upon Policy obtained by False Answers made by Agent.—An agent of an insurance company who is allowed by a proposer to invent the answers to questions which form the basis of the contract between the proposer and the company, and to send them in as the answers of the proposer, is for that purpose the agent of the proposer, and not of the insurance company; and under such circumstances the insurance company is not liable upon a claim under the policy by the proposer, even though he did not instruct or authorise the agent to make any false answer, and did not know that the agent had answered any question falsely. *Biggar v. Rock Life Assurance Co.*, 71 L. J. K.B. 79; [1902] 1 K.B. 516; 85 L. T. 636—Wright, J.

Agent—Authority—Knowledge of Agent—Insurance Company Receiving Premiums—Estoppel.—The plaintiff effected an insurance with an insurance company through their agent against the liability to his workmen under the Workmen's Compensation Act, 1897. The plaintiff was, to the knowledge of the agent, a joiner and builder. The agent filled in a proposal form, which was stated to be the basis of the contract, and in which the plaintiff was described as a joiner. The plaintiff did not read the form, but when the policy arrived, he objected to his being described as a joiner, and refused to take up the policy with that description in it, and the agent obtained the sanction of the chief clerk of the insurance company's branch office for the district to alter the policy by inserting the words "and builder" after the word "joiner." This was accordingly done, and the plaintiff paid the first premium, and he continued to pay the premiums, which were forwarded to the company. No communication was made to the head office of the company of the addition to the policy. A workman in his employment having been injured by an accident, the plaintiff had to pay him compensation under the Workmen's Compensation Act, 1897, and sued to recover the amount from the company under the policy:—*Held*, that the company were liable, upon the grounds first, that, by receiving the premiums, they were precluded from denying the agent's

authority to alter the contract; and that in those circumstances the knowledge of the agent was the knowledge of the company; and secondly, that, even if the policy had not been altered, the company would have been liable, because the contract must be treated as having been negotiated by the agent with a joiner and builder, and the knowledge of the agent must be treated as the knowledge of the company. *Holdsworth v. Lancashire and Yorkshire Insurance Co.*, 23 T. L. R. 521—Bray, J.

—Misstatements in Proposal made by, of Insurers without Knowledge of Insured—Liability of Insured.—The agent of an insurance company called on Y., a milk purveyor, and asked him to take out a policy against driving accidents. Y. consented, but, being busy at the time, requested the agent to fill up the proposal form. The agent did so, without asking Y. what answers to make to the questions in the proposal form, and the form so filled up, concluding with a declaration that the statements therein were true to the best of the proposer's knowledge and belief, was signed by Y. without reading it over. Following on the proposal a policy of insurance was issued to Y., one of the conditions of which was that if there was any misstatement in the proposal the policy should be void. To one of the questions in the proposal, "Has any accident happened in connection with the vehicles or horses now in your use?" the agent inserted the answer, "No." This answer was untrue, the fact being, as Y. knew, that one horse and one vehicle which had each been concerned in an accident were still in use by Y. at the date of the proposal. The damage caused by these two accidents was trifling. In an action by the insurance company against Y. to have the policy set aside,—*Held*, first, that the answer to the question above quoted was a misstatement of a fact material to the policy; and secondly, that the agent in filling in the false answer to the question was acting as agent of Y., and not of the insurance company, and that Y. must be held to have read and adopted the answer; and therefore, thirdly, that the policy was void. *Life and Health Assurance Association v. Yule*, 6 F. 437—Ct. of Sess.

Proposal Filled in by Servant of Insurance Company and Signed by Insured—Misstatement in Proposal.—A was insured against accident upon a policy which bore that he had caused to be delivered at the office of the insurance company "a proposal in writing which he has agreed shall be the basis of this contract and be considered as incorporated herein." The policy contained the condition that "if this policy be obtained through any misrepresentation or concealment by or on behalf of the insured," the policy should become absolutely void; and that "the company shall not be held liable in respect of any knowledge of, or notice to, an agent which shall not have been communicated to, and have been acknowledged in writing by, the company at its registered office." The proposal was signed by A, and contained answers to a number of printed questions and this clause:—"I warrant that the above statements are true, and I agree that this proposal shall be taken as the basis of the proposed contract between me and your company, and shall be deemed to be incorporated

in such contract." The answers were filled in by an inspector in the employment of the insurance company. One of the answers was in fact untrue. In an action on the policy by A against the insurance company, the latter pleaded that the policy was void in respect of the untrue answer in the proposal. The pursuer alleged that he had given correct information to the defenders' inspector, who filled in the answers; that he had not read over the answers before signing the proposal, because he had relied on the inspector filling in the answers correctly; and that the inspector in all he did was acting within the scope of his employment by the defenders. The pursuer therefore pleaded that the defenders were barred from disputing liability:—*Held*, that the defenders were not liable, as the inspector in filling in the answers was acting as the agent of the pursuer and not of the defenders, and that the pursuer was responsible for the correctness of the answers. *M'Millon v. Accident Insurance Co.*, [1907] S. C. 484—Ct. of Sess.

Injury Caused by "accidental means" — Assured Injured in Ejecting a Drunken Man—Heart of Assured Previously in Weak Condition—Liability.—S. effected a policy of insurance with the defendant company by which the sum of 500*l.* became payable if the assured should sustain "any bodily injury caused by violent accidental external and visible means." The policy contained a condition excepting death or injury "arising from any natural disease or weakness or exhaustion consequent upon any disease . . . although accelerated by accident." In attempting to eject a drunken man from the premises where he was employed, S. used some physical exertion in order to overcome the man's resistance. The effect of this was that S. immediately became ill, and it was found that his heart was seriously dilated, and he shortly afterwards died. His executrix having made a claim under the policy, it was referred to an arbitrator, who found that the heart of the deceased was on and prior to the date of the occurrence in a weak and unhealthy condition, rendering it less capable of working under strain, but that if it had not been for the exertion used by the deceased he might have lived for a considerable time:—*Held*, that the deceased had not sustained any bodily injury caused by "accidental means" within the meaning of the policy, and that the company were not liable. *Scarr v. General Accident Assurance Corporation*, 74 L. J. K.B. 237; [1905] 1 K.B. 387; 92 L. T. 128; 21 T. L. R. 173—Bray, J.

Injury by Accident from an Outward, External, and Visible Means or Cause—Drowning—Condition in Policy against Suicide—Presumption against Crime.—Death by drowning is death from an outward, external, and visible means or cause, and death from such a cause is *prima facie* death by accident; and where the tribunal of fact has found the evidence so equally balanced that there is precisely the same weight of evidence in favour of accident as of suicide, the presumption of law against crime will determine the case in favour of accident and against suicide. *Harvey v. Ocean Accident and Guarantee Corporation*, [1905] 2 Ir. R. 1—C.A.

Insurance against Accident which is the "direct and sole" Cause of Death—Exception of "Disease"—Accident giving rise to Disease—Liability of Insurer.—By a policy of insurance the insurers agreed that if personal injury caused by external and accidental violence should be the "direct and sole" cause of the death of the insured they would pay to his personal representatives a specified sum; and, further, that if the insured should be incapacitated by disease as defined in a notice indorsed on the policy, they would pay to him certain compensation. The policy contained a clause providing that with reference to injury to the insured it applied only to "accidents, injuries, death or disablement directly and solely caused by some outward and visible means . . . and . . . not . . . to accidents, injuries, death or disablement caused by or arising wholly or in part from fits, disease, or other intervening cause, or weakness or exhaustion, even although the disease or other intervening cause may either directly or otherwise be brought on or result from or have been aggravated by accident or be due to weakness or exhaustion consequent on accident or the death accelerated thereby." A notice indorsed on the policy stated that the word "disease" in the policy meant typhus, scarlet, or typhoid fever, small-pox, diphtheria, or measles. The insured while taking off his sock accidentally inflicted a wound with his thumb-nail upon his leg. Within a fortnight, and in consequence of the accident, erysipelas, septicæmia, and septic pneumonia successively supervened, and within three weeks death resulted from the last-mentioned affection. It was admitted on behalf of the insurers that the septic poison had been introduced into the system of the deceased when the wound was inflicted:—*Held*, first, that the injury was the "direct and sole cause" of the death of the insured within the meaning of the policy; secondly, that the death was not caused by "disease" nor by "other intervening cause" within the meaning of the exception clause; and consequently that the insurers were liable to pay to the executors of the deceased the sum payable under the policy in case of the death of the insured by accidental injury. *Mardorf and Accident Insurance Co., In re*, 72 L. J. K.B. 362; [1903] 1 K.B. 584; 88 L. T. 330—Wright, J.

Indemnity to Master—Delay in giving Notice of Accident to Workman.—Employers took out a policy of insurance against injury to their workmen under (*inter alia*) the Workmen's Compensation Act, 1897. Clause 3 of the policy provided that the employers were "to give immediate notice to the company of any accident causing injury to a workman," and that "time should be the essence of this condition." At the foot of the policy was a notification that every notice to be given by the assured should be in writing sent by post to, or delivered at, the head office of the insurance company. An accident having happened to a workman on October 10, 1900, the employers notified the fact of the accident by telephone to the person who had introduced the insurance company to them. The employers received a notice in writing from the injured workman dated December 1, 1900, of his intention to claim compensation, and they forwarded this notice to the insurance company on December 4. An award of compensation under the Act of 1897

having been made in favour of the workman, the employers claimed to be indemnified by the insurance company:—*Held*, that the giving of immediate notice of the accident was a condition precedent to the employers' right to be indemnified, that the communication to the person who had introduced the employers to the company was not notice to the company, and that therefore the company were not liable. *Williams and Lancashire and Yorkshire Accident Insurance Co., In re*, 51 W. R. 222—Bigham, J.

Workmen's Compensation—Premium Payable according to Wages Paid—Assured to furnish Account of Wages.—An employer insured against his liability under the Workmen's Compensation Act, 1897, or at common law, in respect of accidents to his workmen. The proposal stated that the total estimated amount of wages paid annually by the assured was 3,000*l.*, and he agreed to pay a premium of 5*s.* 6*d.* per cent. on the total amount of wages paid, and to render at the end of each year an account of the wages paid. The first payment "on account of premium" was 8*l.* 5*s.*, which was 5*s.* 6*d.* on the 3,000*l.* estimated amount of wages. The assured ceased to insure at the end of the second year:—*Held*, that the assured was bound to render an account of the wages actually paid during the two years. *General Accident Assurance Corporation v. Day*, 21 T. L. R. 88—Buckley, J. *And see* MASTER AND SERVANT, col. 1479.

Application for Policy—Covering Note—Policy Delivered to Assured after Happening of Accident—Terms of Policy not Brought to Notice of Assured—"Immediate notice of accident" to be Given—Failure by Assured to Give Notice—Condition Precedent—Condition to Forward Written Claim within Three Days of Receipt—Repudiation by Insurer of Claim for Compensation—Waiver of Condition by Insurer.—The respondents signed a proposal form for insurance by the appellants against injury by accident to their workmen, and received a cover note, signed by the appellants' local agent, which contained the words "cover to hold good from this date." A few days subsequent to the receipt of the covering note, one of the respondents' workmen received injuries in the course of his employment which resulted in death nearly three months later. A policy, sealed by the appellants the day following the accident, but only delivered to the respondents about a week later, contained a clause that "the employer shall give immediate notice to the" appellants "of any accident . . . and shall forward to the" appellants "every written . . . notice of claim received within three days after receipt" thereof, and also a clause that the observance and performance by the respondents of the times and terms above set out, so far as they contained anything to be done by the respondents, were to be the essence of the contract. No notice of the accident was given until the day before the workman's death, when verbal notice was given to the appellants' local representative. Subsequent to the workman's death written notice of a claim by his dependants for compensation was given to the respondents; but this was not forwarded to the appellants, who were merely informed by letter that such a claim had been made. The

appellants having repudiated liability, the respondents, in arbitration proceedings, settled the claim for compensation, and sought to recover the amount so paid from the appellants:—*Held* (VAUGHAN WILLIAMS, L.J., and BUCKLEY, L.J.; FLETCHER MOULTON, L.J., dissenting), that the giving of immediate notice of the accident was not a condition precedent to the respondents' right to recover, inasmuch as in the absence of evidence that the respondents knew or had the opportunity of knowing the conditions of the policy (the onus of proving which lay on the appellants), the risk undertaken by the appellants for the period prior to the delivery of the policy did not impose upon the respondents the obligation to give such notice prior to the receipt by them of the policy or of information that it contained such a condition. *Held*, also, that the appellants, by repudiating the claim for compensation, had waived performance of the condition that the respondents should forward to the appellants the written notice of claim for compensation within three days after receipt thereof by the respondents. *Coleman's Depositories, Lim., and Life and Health Assurance Association, In re*, 76 L. J. K.B. 865; [1907] 2 K.B. 798; 79 L. T. 420; 23 T. L. R. 638—C.A.

Accident Insurance by Newspaper—Payment to Person Adjudged by Editor to be Next-of-kin—Next-of-kin.—A weekly periodical named *Answers* contained a statement that in the event of any person being killed by an accident to any train in which he was travelling as a passenger with a copy of the current number in his possession, 1,000*l.* would be paid to "the person adjudged by the editor to be the next-of-kin of the deceased." It was added that "the person or persons who shall be adjudged by the editor to be the next-of-kin of the deceased shall be the only person or persons entitled to receive and give a valid discharge for the money." A person was killed in an accident to a train in which he was travelling, having in his possession a copy of the current number of *Answers*. He was survived by three brothers and a sister. After enquiry, the editor adjudged the sister to be his next-of-kin, and paid 1,000*l.* to her. In an action by the brothers against her,—*Held*, that they had no right to share in the sum so paid. *Hunter v. Hunter*, 7 F. 136—Ct. of Sess.

Continuing Declaration—Proviso against Insurance in other Office—Second Proposal and Policy between First Proposal and Policy.—A policy contained a proviso "that if the insured be at any time during the continuance of this policy insured against death or disablement by accident or disease in any other company without notice being given to the said directors and their written consent obtained . . . this policy shall be absolutely void." After the proposal for this policy was made, but before it was issued, the insured made a proposal, which was accepted, and the policy issued, by another company. No consent was obtained in accordance with the proviso:—*Held*, that the first policy was void. Declarations made in the proposal for a policy are in the nature of continuing declarations until the issue of the policy. *Marshall and Scottish Employers' Liability Co., In re*, 85 L. T. 757—Wright, J.

3. BURGLARY.

Burglary and Housebreaking—Loss by Theft—**“Actual forcible and violent entry upon premises”**—**Thief Turning Door-handle and Entering Shop.**—A policy, after reciting that the plaintiff was desirous of insuring his goods against loss or damage “by burglary and housebreaking as hereinafter defined,” witnessed that if the goods should be lost “by theft following upon actual forcible and violent entry upon the premises,” the defendants would make such loss good. The premises were described in the proposal for the policy as shop, warehouse, and dwelling, protected by wood shutters and iron bars and iron plates inside. Early in the morning, during the temporary absence of the shopman, a thief entered the shop by turning the handle of the door, and having wrenched an iron plate to which a locked padlock was attached off the door of a glass shop front or show case, stole the goods in the show case:—*Held*, that the entry by the thief was not an “actual forcible and violent entry upon the premises” within the meaning of the policy, so as to entitle the plaintiff to recover, inasmuch as the entry contemplated was an entry effected by real violence or force, and not, for instance, by stealth. *George v. Goldsmiths’ and General Burglary Insurance Association*, 68 L. J. Q.B. 365; [1899] 1 Q.B. 595; 80 L. T. 248; 47 W. R. 474—C.A.

Held also, that, assuming the entry effected by turning the handle of the door was not an “actual forcible and violent entry,” then what happened afterwards in the shop did not constitute an entry within the meaning of the policy, as the entry must be an entry from outside the shop. *Id.*

4. FIRE.

Agreement to Insure—Consensus—Condition—Mutual Insurance Company.—A firm agreed to insure their works against fire with the pursuers. The policy tendered by the pursuers stated that the insured had agreed to become members of the insurance company. Under the articles of association of the company the members were liable to contribute in the event of the liquidation of the company. The firm refused to accept the policy. In an action by the insurance company against the firm for payment of the premium,—*Held*, that they had not agreed to become members of the company. *Star Fire and Burglary Insurance Co. v. Davidson*, 5 F. 83—Ct. of Sess.

Goods Sent by Customer for Manufacture—Receipt Note with Printed Clause, “All goods held in trust covered by insurance against fire”—**Obligation of Manufacturer to Insure on Behalf of Customer.**—L., a miller, received from customers hay to be chopped, and on receipt of each lot of hay he sent a note setting out the quantity received, with a statement of the charges for chopping it, under this printed heading: “All goods held in trust covered by insurance against fire.” A fire having occurred at L.’s mills, hay belonging to C., which had been sent in to be chopped (the receipt of which had been acknowledged as above stated), was destroyed. At the date of the fire L. held a

policy of insurance in his own name which insured “stock-in-trade, the property of the insured, or held by him in trust or on commission, for which he is responsible.” The insurance company paid a sum which included the value of C.’s hay:—*Held*, first, that L. had contracted to insure the hay on behalf of C.; and secondly, that even if the policy did not cover customers’ risk C. was entitled to a preferential claim on the sum recovered under the policy, the insurance company having in fact paid the value of C.’s hay. *Cochran v. Leckie’s Trustee*, 8 F. 975—Ct. of Sess.

Policy—Condition that no Additional Policy Allowed except by Consent.—The respondents effected policies of fire insurance with the appellants. A condition of the policies was that no additional insurance on the property covered was allowed except with the consent of the company indorsed thereon, and the policies were to be void on breach of the condition. Shortly before the occurrence of a fire the respondents took out a policy in another company, by which it was executed. A condition of this policy was that it should be of no effect unless the premium due had been wholly or partially paid. No payment was made in respect of it:—*Held*, that there had been no breach of the condition in the policy issued by the appellants. *Equitable Fire and Accident Office v. The Ching Wo Hong*, 76 L. J. P.C. 81; [1907] A.C. 96; 96 L. T. 1; 23 T. L. R. 200—P.C.

Lloyd’s Policy—“Subject to average”—**Average Clause.**—In a Lloyd’s fire policy the words “subject to average” imply the following average clause: Whenever a sum insured is declared to be subject to average, if the property covered thereby shall at the breaking out of any fire be collectively of greater value than such sum insured, then the insured shall be considered as being his own insurer for the difference, and shall bear a rateable share of the loss accordingly. The effect of the words is not altered where specific parts of the property so insured are covered by other policies. *Aeme Wood Flooring Co. v. Marten*, 90 L. T. 313; 9 Com. Cas. 157; 20 T. L. R. 229—Bruce, J.

Warranty—Condition Precedent.—Underwriters at Lloyd’s subscribed a fire policy on the plaintiffs’ stock in trade. The policy contained the following clause: “Warranted same gross rate, terms, and conditions as, and to follow, the British Law, which company has 1,750l. on the block of brick buildings in which the risk is a portion of the same.” The buildings were not insured with the British Law Company for 1,750l., but for 1,350l. During the currency of the policy some of the plaintiffs’ goods were destroyed by fire:—*Held*, affirming the judgment of Mathew, J. (5 Com. Cas. 110), that the statement that the company had 1,750l. on the buildings was a warranty, the performance of which was a condition precedent to the liability of the underwriters on the policy, and, there having been a breach of the warranty, the underwriters were not liable to pay a loss. *Bancroft v. Heath*, 6 Com. Cas. 137—C.A.

Subrogation—Compulsory Purchase—Notice to Treat—Fire Occurring after Notice—Payment by Insurers—Rights against Assured.—The defendant effected an insurance upon certain

buildings with the plaintiff company. During the currency of the policy the P. Corporation, under the powers conferred by the Lands Clauses Consolidation Act, 1845, served upon the defendant a notice to treat for the property. Before anything had been done under the notice, the buildings were destroyed by fire, and the plaintiffs paid to the defendant 925*l.*, the agreed amount of the loss. The amount to be paid by the corporation for the property was afterwards agreed between the defendant and the corporation at a sum arrived at by taking into account the 925*l.* paid by the plaintiffs to the defendant, the corporation agreeing to indemnify the defendant against any claim by the plaintiffs. In an action by the plaintiffs against the defendant to recover back the 925*l.*, —*Held*, that, the contract being one of mere indemnity, the plaintiffs, on payment of the loss, became entitled to the rights then vested in the defendant in respect of the destroyed property, including a right to be paid by the corporation the value of the property as at the date of the notice to treat; that it was not competent to the defendant by any arrangement with the corporation to deprive the plaintiffs of the benefit of such right; and that they were therefore entitled to recover. *Phœnix Assurance Co. v. Spooner*, 74 L. J. K.B. 792; [1905] 2 K.B. 753; 93 L. T. 306; 54 W. R. 313; 10 Com. Cas. 282; 21 T. L. R. 577—Bigham, J.

Re-insurance—Slip—Construction of Contract.]

—A re-insurance against fire was effected by one company with another by the attachment of a typewritten slip or rider containing the special terms of the contract to a printed form of policy, which was not amended except by the addition of the syllable “re” to “insure.” One of the stipulations of the printed form was that no suit or action on the policy should be sustainable unless commenced within twelve months after the fire:—*Held*, that this stipulation could not apply to the contract of re-insurance, which was completely expressed in the typewritten slip, as it was foreign to the purpose of re-insurance, and its observance was dependent on the conduct of other persons, including possibly persons in whose favour time was running. *Home Insurance Co. of New York v. Victoria-Montreal Fire Insurance Co.*, 76 L. J. P.C. 1; [1907] A.C. 59; 95 L. T. 627; 23 T. L. R. 29—P.C.

Right to Policy Moneys—Tenant for Life.]— See SETTLED LAND.

5. LIFE.

By-laws of Company—Power to Alter By-laws —Prospectus—Participating Policy-holder.]

Where a policy of life assurance is expressed to be issued subject to the deed of settlement of the company and its by-laws, and by the constitution of the company power is given in a proscribed manner to alter the by-laws from time to time, and no reference is made in the policy to prospectuses issued by the company, the policy constitutes the whole contract, and the Court cannot for the purpose of construing the contract refer to the prospectuses. *British Equitable Assurance Co. v. Baily*, 75 L. J. Ch. 73; [1906] A.C. 35; 94 L. T. 1; 13 Manson, 13; 22 T. L. R. 152—H.L. (E.)

Life Annuities Granted by Tea Merchants to Customers Becoming Widows—Deposit.]—N. & Co. were tea merchants who, in connection with their business as such, had since 1897 offered to married women who had bought their tea for a certain time before the death of their husbands annuities of a certain amount so long as they remained widows. N. & Co. were not registered under the Acts relating to friendly societies, and had not deposited 20,000*l.* with the Accountant-General of the Court of Chancery:—*Held*, that they were a company within the Life Assurance Act, 1870, and liable to a penalty for commencing business without making such deposit. *Nelson v. Board of Trade*, 84 L. T. 565; 49 W. R. 590; 65 J. P. 487—D.

Policy on the Life of Another—Absence of Insurable Interest—Recovery of Premiums.]

The agent of the defendants, an insurance company, in good faith and believing his statement to be true, represented to the plaintiff that an insurance effected by him on the life of his mother would be a valid insurance, and the plaintiff, relying upon that representation, effected such an insurance and paid premiums thereunder. In an action to recover back the premiums,—*Held*, that, assuming the policy to be illegal and void for want of an insurable interest, the representation having been innocently made by the agent, the parties were *in pari delicto*, and the premiums could not be recovered back. *Harse v. Pearl Life Assurance Co.*, 73 L. J. K.B. 373; [1904] 1 K.B. 558; 90 L. T. 245; 52 W. R. 457; 20 T. L. R. 264—C.A.

—**Insurable Interest—Condition that the Policy shall, after a whole Year, be “incontestable.”**—A condition in a policy of life insurance that, provided the premiums have been regularly paid, it shall, after a year, be “incontestable,” does not override the enactment of the Legislature that “the insured must have an insurable interest in the life upon which the insurance is effected”; and an insurer who does not possess an “insurable interest” as defined in the Code of Lower Canada is not a lawful holder of the policy, though it is more than a year old, and the premiums have been regularly paid. *Anctil v. Manufacturers’ Life Insurance Co.*, 68 L. J. P.C. 123; [1899] A.C. 604; 81 L. T. 279—P.C.

Life Policy—Misstatement of Age—Receipt of Premiums after Knowledge of Misstatement —Affirmation of Policy.]

In a proposal for a life policy a lady, by mistake, declared her age to be forty-one next birthday, instead of forty-four, which it in fact was. The policy was effected in 1888, and by it the defendant company undertook to pay the sum of 2,000*l.* upon the death of the assured, or on her attaining the age of sixty years. The mistake was not discovered until 1897, and after being informed of it the defendant company accepted from an assignee of the policy two premiums on the old footing, but subsequently declined to receive any more, and claimed to avoid the policy under the terms of the proposal and contract. The lady attained the age of sixty on March 6, 1904, and was still living:—*Held*, that the defendants must be treated as having affirmed the policy as it stood, and were liable to pay the

money secured thereby when the lady in fact attained sixty years. *Hemmings v. Sceptre Life Association*, 74 L. J. Ch. 281; [1905] 1 Ch. 365; 92 L. T. 221; 21 T. L. R. 207—Keke-wich, J.

Misrepresentation — Rescission — Maximum Rate of Premium Calculated according to Age of Member—Age of Member at Date of Policy or at Date of Call.]—F. took out a policy with the appellant company, which policy, by one of its clauses, provided that at stated intervals there should be payable to the company a mortuary premium for such an amount as the executive committee might deem requisite, which amount should not exceed the maximum rates indorsed on the policy, according to the age of each member. After some years the company demanded higher premiums, contending that they were entitled under the terms of the policy to make a call upon F. not exceeding the maximum amount stated in the table indorsed on his policy, according to his age at the date when the call was made, and not at the date when the policy was issued:—*Held*, that the conditions on the policy were so worded as to mislead F., and that he was entitled to rescind the contract and to claim a return of the amount of the premiums he had paid. *Mutual Reserve Life Insurance Co. v. Foster*, 20 T. L. R. 715—H.L. (E.)

— Maximum Calls—Rate Calculated according to Age of Member — Delay — Rescission of Contract.]—Contract rescinded on the ground of misrepresentation and the sums paid under the policy returned, notwithstanding the delay in bringing the action. *Cross v. Mutual Reserve Life Insurance Co.*, 21 T. L. R. 15—Buckley, J. S.P. *Merino v. Mutual Reserve Insurance Co.*, 21 T. L. R. 167—Joyce, J.

— Parol Representation—Agent—Collateral Contract — Varying Terms of Policy.]—The plaintiff effected a semi-tontine life policy for 5,000*l.* with the defendants through their agent, who had previously represented to him in writing that the cash value at the end of fifteen years would be 7,390*l.* Clause 11 of the policy stated that the contract between the parties was completely set forth in the policy and the application therefor, and that none of its terms could be modified except by an agreement signed by one of certain officers, of which the agent was not one. At the end of the fifteen years the plaintiff claimed 7,390*l.*, which the defendants refused to pay, upon the ground that under the policy only 6,106*l.* 5*s.* was due:—*Held*, that, assuming that the agent had authority to make the representation, it was not a separate and collateral agreement, as it was inconsistent with the terms of the policy and expressly excluded by clause 11, and that therefore it was not admissible in evidence against the defendants. *Horncastle v. Equitable Life Assurance Society of the United States*, 22 T. L. R. 735—C.A.

— By Agent—Policy of Insurance—Void through Misrepresentations — Ratification of Misrepresentations by Insurance Company—Premiums Retained by Company—Premiums Repayable by Company.]—The plaintiff, who had taken out a policy with an insurance company on the life of her brother, was induced to continue

paying the premiums by statements made by agents of the company, which they were not authorised to make, and which were in fact untrue—that at the end of five years she would get a free policy, and that she would then get out all she put in:—*Held*, that the insurance company were liable to repay to the plaintiff all the premiums which she had paid since the misrepresentations were made to her, on the ground—first, that the misrepresentations made the contract of insurance void; and secondly, that the company could not retain the benefit of a contract which the plaintiff was induced to enter into by a misrepresentation, even though the agent had no authority to make it. *Kettlewell v. Refuge Assurance Co.*, 76 L. J. K.B. 711; [1907] 2 K.B. 242; 97 L. T. 106; 23 T. L. R. 506—D. On appeal, *see* 77 L. J. K.B. 421; [1908] 1 K.B. 545; 97 L. T. 896.

Premium—Payment by Quarterly Instalments — Days of Grace — Death of Assured before Premium Paid.]—By a policy of life insurance the assured had the option of paying the premiums half-yearly or quarterly instead of annually, and one of the conditions indorsed on the policy provided that if the premiums were paid by such instalments, and a claim arose at any time during the subsistence of the policy and before all the premiums, whether half-yearly or quarterly, for the then current year had become due and been paid, the amount of such half-yearly or quarterly premiums, so not having become due and been paid, should be deducted from the sum assured and the balance alone be payable by the insurance company. Thirty days' grace was allowed by the policy for payment of the premiums, and this period was by arrangement extended to thirty-one days. During the subsistence of the policy one of the premiums (which was paid quarterly) was paid by the assignee of the policy within the extended days of grace, but at the time it was paid the assured had been dead some hours, although this fact was not known to the assignee or to the insurance company:—*Held*, that, notwithstanding the death of the assured before payment of the premium, the insurance company was liable on the policy. *Pritchard v. Merchants etc. Life Assurance Society* (27 L. J. C.P. 169; 3 C.B. (n.s.) 622) distinguished. *Stuart v. Freeman*, 72 L. J. K.B. 1; [1903] 1 K.B. 47; 87 L. T. 516—C.A.

Per MATHEW, L.J.—Payment of a premium at any time within the stipulated days of grace is equivalent to payment on the day when the premium became due. *Id.*

— Non-payment—Lapse of Policy—Subsequent Payment—Conditional Receipt by Insurance Company—Neglect of Assured to Read Conditions—Duty of Company—Estoppel.]—A policy of life insurance effected with an insurance company was expressed to be conditional upon the payment of the premiums each year within thirty days of their becoming due. The holder of the policy failed to pay a certain premium within thirty days of its becoming due. On his afterwards sending the money to the company they sent back to him a receipt upon a printed form, which stated that the policy had lapsed and that the payment was accepted subject to

certain conditions printed on the back of the receipt. He received this receipt, but did not read it. One of these conditions was that the person whose life was insured had been during the past twelve months in continuous good health and free from all disease; and he was in fact, and to his knowledge, suffering at that time from a disease of which he afterwards died. Until he died the subsequent premiums were punctually paid. On his death the company refused to pay the sum for which his life had been insured on the ground that the policy had lapsed, and the conditions of the receipt above mentioned had not been complied with. In an action to recover the amount of the insurance money,—*Held*, that, as the policy had lapsed on account of the breach of its conditions, and the plaintiff had given no evidence of any conduct on the part of the company which would justify him in thinking that the policy had not lapsed, and would estop them from relying on the lapsing of the policy, he was not entitled to succeed in the action. *Handler v. Mutual Reserve Fund Life Association*, 90 L. T. 192—C.A.

Suicide—Agreement by Assured not to Commit—Condition Precedent—Insurance for Benefit of Creditors.—An application for a policy of life insurance with the defendant company, which was expressed to be part of the contract, contained the following clause: "I also warrant and agree that I will not commit suicide, whether sane or insane, during the period of one year from the date of the said contract." The policy stated that "in consideration of the application for this policy, which is hereby made part of this contract," the company promised to pay to the plaintiffs, who were creditors of the assured, the sum insured upon proof of his death within five years from the date of the policy. Within the period of a year from the date of the policy the assured committed suicide during a fit of insanity:—*Held*, that the clause as to suicide operated as a limitation of the defendants' liability, and afforded a defence to the action. *Ellinger v. Mutual Life Insurance Co. of New York*, 73 L. J. K.B. 546; [1904] 1 K.B. 832; 90 L. T. 484; 52 W. R. 866; 9 Com. Cas. 217; 20 T. L. R. 368—Bigham, J. Affirmed, 74 L. J. K.B. 39; [1905] 1 K.B. 31; 53 W. R. 134; 21 T. L. R. 20—C.A.

— **Warranty against in Application—Life Policy for Benefit of Creditor—Application made Part of Contract—Suicide of Assured while Insane—Liability of Insurer.**—An application for a policy of life insurance, made to the defendants as the basis and a part of a contract, contained the clause: "I also warrant and agree that I will not commit suicide, whether sane or insane, during the period of one year from the date of the said contract." By the policy the company, in consideration of the application, which was thereby made part of the contract, promised to pay the sum assured to the plaintiffs, who were creditors of the assured, upon proof of his death within five years. Within the period of one year the assured committed suicide whilst insane:—*Held*, that the defendant company were not liable upon the policy. *Ellinger v. Mutual Life Insurance Co. of New York*, 74 L. J. K.B. 39; [1905] 1 K.B. 31; 91 L. T. 733; 10 Com. Cas. 22; 21 T. L. R. 20—C.A.

Mortgage of Policies—Payments by Puisne

Mortgages to Keep up Policies—Salvage Claim.]

—In 1872 the owner of two policies on her own life mortgaged the same, along with an annuity and certain sums of money charged on land, to Mrs. H. to secure the sum of 1,700l. In 1877 K., who was the agent of the mortgagor and solicitor for both mortgagor and mortgagee, took a puisne mortgage of the policies to secure some advances made by him to the mortgagor. Thereafter the charges on the land became valueless, owing to eviction, and the policies became the only security for the loan. The mortgagor ceased paying the premiums, and K. paid same, but did not for some years inform Mrs. H. of the fact. In 1888 he wrote informing her that he had been paying the premiums for her benefit, but not stating that he was himself a mortgagee. She replied repudiating the idea that she had ever given him authority to do so, to which he answered that he had no objection to continue paying the premiums and to be reimbursed for the same out of the policy moneys. Mrs. H. made no reply to this letter. The mortgagor died in 1896, and K. and his representatives continued paying the premiums down to her death. The insurance company paid the money into Court under the Payment into Court Act:—*Held*, that K. was only entitled to a lien upon the policy moneys in priority to Mrs. H.'s mortgage for the premiums paid by him, and interest thereon, after the date of the correspondence. *Leslie v. French* (52 L. J. Ch. 762; 23 Ch. D. 552) discussed. *Power's Policies, In re*, [1899] 1 Ir. R. 6—C.A.

Application by Assured for Admission to Another Company—Notice of Application—Transfer—Person "sought to be transferred."

—A person insured with the appellants, having been asked by one of the respondents' collectors to transfer to them, signed a proposal form in the respondent society, and gave up to the collector his books and policies in the appellant company, receiving policies in the respondent society. The policies in the appellant company remained in existence, and it was not the wish or intention of the appellants to cancel them. Both the appellant company and the respondent society were within the Collecting Societies and Industrial Assurance Companies Act, 1896, but no notice was given by the latter under section 4, sub-section 2 of the Act:—*Held*, that the respondents were a society to which the assured was "sought to be transferred" within the meaning of section 4, sub-section 2, and that they had therefore committed an offence under section 14, sub-section 1 (c) of the Act. *Pearl Life Assurance Co. v. Scottish Legal Life Assurance Society*, 70 L. J. K.B. 360; [1901] 1 K.B. 528; 84 L. T. 153; 49 W. R. 493—D.

Resulting Trust—Purchase of Policy of Assurance in Name of Stranger—"On behalf of"

a Stranger—No Gift or Consideration—Assured Beneficially Entitled.]—W. S. effected a policy of assurance on his own life, which policy was on the face of it expressed to be taken out "for behoof of H. S.," and provided that the policy-moneys should be payable to H. S., her executors, administrators, and assigns. Subsequently W. S. went through the form of marriage with H. S., who was in fact his deceased wife's sister. The policy was never handed over to H. S., and the premiums down to the date of his death were regularly paid by W. S., who survived

H. S. No consideration passed from H. S., and there was no evidence that the policy was meant as a provision for her:—*Held*, that as the relationship between the parties was not such as to raise any presumption of advancement, the administratrix of H. S., although entitled to receive the policy-moneys at law, was in equity a trustee thereof for the estate of W. S. *Scottish Equitable Life Assurance Society, In re*, 71 L. J. Ch. 189; [1902] 1 Ch. 282; 85 L. T. 720; 50 W. R. 327—Joyce, J.

Policy Moneys—Payment into Court—Lost Life Policy.]—In an action against an assurance company to recover the money payable under a policy of life assurance, it appeared that many years previously notice of the loss of the policy had been given to the company by the trustees to whom it had been assigned, and that since the notice the trustees had paid and the company received all premiums payable in respect of the policy. No notice had been given to the company of any assignment of the policy other than that to the trustees, or of any mortgage or other claim upon the policy. The company having applied under Order LIV.c, rule 3, for leave to pay the money due under the policy into Court upon an affidavit that in the opinion of the board of directors of the company no sufficient discharge could otherwise be obtained,—*Held*, that the company had brought themselves within the terms of section 3 of the Life Assurance Companies (Payment into Court) Act, 1896, and were entitled to the protection of that section. *Harrison v. Alliance Assurance Co.*, 72 L. J. K.B. 115; [1903] 1 K.B. 184; 88 L. T. 4; 51 W. R. 281—C.A.

Action for Declaration of Validity of Policy.]—The defendants, an insurance company, refused to continue to accept payment of premiums on a life policy on the ground that it was invalid. In an action for a declaration that the policy was valid,—*Held*, that it was premature to decide the question, and that the action would be dismissed on the defendants' undertaking not to rely on the non-payment as a bar to any future action. *Honour v. Equitable Life Assurance Society*, 69 L. J. Ch. 420; [1900] 1 Ch. 852; 82 L. T. 144; 48 W. R. 347—Buckley, J.

Life Assurance Company—Scheme—Compulsory Winding-up—Other Business—Reduction of Contracts.]—Where a company carries on life insurance business in conjunction with other business, and, in consideration of an enhanced price charged for an article it sells, offers its customers contingent insurance benefits, the requirements of section 4 of the Life Assurance Companies Act, 1870, are not capable of being satisfied, for the price paid is a contributory sum to secure two benefits, and the proportion paid as premium cannot be appropriated in accordance with the section. *Nelson & Co., In re*, 74 L. J. Ch. 290; [1905] 1 Ch. 551; 92 L. T. 404; 53 W. R. 361; 12 Manson, 54; 21 T. L. R. 274—Buckley, J.

The Court will not sanction a scheme for carrying on such a life insurance business so as to avoid a compulsory winding-up on the petition of creditors. *Id.*

Section 22 of the same Act allows a reduction of the contracts between a company and its creditors, but does not authorise a provision

under which the latter would get reduced benefits from those contracts as the result of new contracts entered into with a new company. *Id.*

What the last-named section allows is a reduction of all contracts for the relief of the common debtor, and not one which operates unequally as between the common creditors. Absolute arithmetical equality is not required, but a scheme which proceeds upon a principle of inequality of reduction is not within the Act. *Id.*

Other Business besides Life Assurance—Insufficiency of Insurance Fund—Winding-up Petition—Scheme.]—A company which carried on the business of selling tea combined with that of life assurance was ordered to be wound up by Buckley, J. On appeal, a scheme having been prepared and approved by all parties enabling the company to carry on its businesses separately, so as to comply with section 4 of the Companies Assurance Act, 1870, and affording reasonable security to the assured, the Court sanctioned the scheme and discharged the order of Buckley, J., the company undertaking to carry on its business in accordance with the scheme. Form of scheme. *British Widows Assurance Co., In re*, 74 L. J. Ch. 525; [1905] 2 Ch. 40; 93 L. T. 38; 54 W. R. 53; 12 Manson, 407; 21 T. L. R. 519—C.A.

Company Carrying on Other Business—Deposit—Winding-up of Company—Contract with Policy-holders.]—The objects of the company were to sell tea and to pay weekly pensions to such of their customers as should become widows who bought tea from them for a certain period. By one of the articles of association the directors were to set aside three-fourths of the profits earned by the company in each week as a fund to meet the liabilities of the company in respect of the pensions, and the sum so set apart was to be applied in discharge of the current liabilities thereunder, and the company was not to be under any liability in respect of the pensions beyond the amount of the three-fourths of the profits, and if in any week the three-fourths should be insufficient for the payment of the weekly pensions the same might be abated rateably. The company deposited 20,000*l.*, as required by section 3 of the Life Assurance Companies Act, 1870. The company having been ordered to be wound up,—*Held*, that the 20,000*l.* was made, by section 4 of the Life Assurance Companies Act, 1870, and section 1 of the Life Assurance Companies Act, 1872, a security for the policy-holders in addition to the three-fourths of the profits; but that the general assets of the company, apart from the three-fourths of the profits, did not belong to them. *Nelson & Co., In re*, 22 T. L. R. 406—Warrington, J.

Assignability of Policy—No Nomination—Assignee for Value.]—*See FRIENDLY SOCIETY.*

Assignment of Policy—Estate Duty.]—*See REVENUE.*

Construction of Policy—Wife and Children.]—*See HUSBAND AND WIFE.*

Covenant to Pay Premiums on Policy on Princi-

pal's Life—Bankruptcy of Principal.]—See *Moss, In re*, 74 L. J. K.B. 764; *ante*, BANKRUPTCY.

Rescission of Contract to Purchase Life Policy—Death of Assured before Contract.]—See CONTRACT.

Wife—Life Policy for Benefit of.]—See HUSBAND AND WIFE.

6. MARINE.

- (1) *General Principles*, 1035.
- (2) *Insurable Interest*, 1036.
- (3) *Policy*, 1039.
 - (a) *Generally*, 1039.
 - (b) *Perils Insured Against*, 1049.
 - (c) *Warranty*, 1056.
 - (d) *Repairs*, 1059.
 - (e) *Premiums*, 1060.
- (4) *General Average*, 1062.
- (5) *Total, Constructive, and Partial Loss*, 1064.
- (6) *Re-insurance*, 1070.
- (7) *Discovery*, 1073.
- (8) *Mutual Marine Insurance*, 1074.
- (9) *Apportionment of Policy Moneys*, 1076.

(1) GENERAL PRINCIPLES.

Concealment of Facts—Illegal Adventure—Prohibition never Acted Upon—Importation of Arms.]—By an edict of the Persian Government in 1881, the importation of arms and ammunition was forbidden into Persia. This edict has never been enforced, but was probably only to allow the farmers of the customs to levy arbitrary and heavy duty on such goods. The plaintiffs shipped some cases of cartridges and rifles, some of which were for a port in Persian territory and others were to go *via* such ports. The prohibition was believed by the plaintiffs to be a dead letter, but these goods were seized and confiscated by H.M.S. *Lapwing*. They were insured under two policies of marine insurance with the defendants, and an action was now brought to recover a total loss caused by the capture at sea:—*Held*, that these facts, as to the prohibition as known to the plaintiffs, were not circumstances material in estimating the risk, and that, therefore, the plaintiffs had not, when effecting the insurance, concealed a fact material to the estimation of the risk; and *further*, that this adventure was not illegal. *Fraxis v. Sea Insurance Co.*, 79 L. T. 28; 47 W. R. 119; 8 Asp. M.C. 418—Bigham, J. And see *Wilson v. Salamandra Assurance Co.*, 88 L. T. 96, col. 1047.

Relation of Broker and Underwriter—Duty of Broker—Open Covers—Rectification of Policies—Evidence of Contract of Sea Insurance.]—A broker effecting a contract of insurance with an underwriter on the instructions of a principal owes no duty to the underwriter. *Empress Assurance Corporation v. Bowring*, 11 Com. Cas. 107—Kennedy, J.

A firm of insurance brokers effected with an

insurance company a number of open covers for the purpose of re-insuring risks taken by their principals. The premiums under the open covers were to be the same as those received by the original insurers less a brokerage to the firm. The brokers, in declaring risks under the open covers, stated definite amounts of premiums, without explaining what deductions had been made by the original insurers, their principals, in order to determine the rates received by them. In each case policies were drawn up by the company containing the premiums stated by the brokers. The insurance company, afterwards learning the facts, disputed the correctness of these deductions, and sued the brokers for breach of duty to the company in not securing correct amounts of premium. The brokers acted in good faith:—*Held*, that, apart from any question of the correctness of the actual figures, the brokers owed no duty to the insurance company and could not be held liable to such a claim even if negligence on their part were proved. *Held*, further, that the cover slips could not be used as evidence in order to shew that the agreed terms of the re-insurance would have given to the plaintiffs larger premiums than those which had been inserted in the policies and paid to the plaintiffs in accordance with the policies. *Ib.*

The insurance company also claimed rectification of the policies as against the brokers so as to comply with their view of the effect of the open covers. The claim was made more than six years after the issue of the policies:—*Held*, that, apart from any question under the Statute of Limitations, there was no clear evidence of common mistake, and the policies ought not to be rectified as against the brokers in an action to which their principals were not parties. *Ib.*

(2) INSURABLE INTEREST.

Son on Life of Mother—Funeral Expenses.]—A son is not by virtue merely of his relationship under such a prospective liability to pay the funeral expenses of his mother as gives him an insurable interest in her life. *Harse v. Pearl Life Assurance Co.*, 72 L. J. K.B. 638; [1903] 2 K.B. 92; 89 L. T. 94—D.

Foreign Ship—Advances by Ship's Agents—Necessaries—Debt—Right to Arrest Ship *ad Fundandam Jurisdictionem*.]—Agents for a foreign ship who have advanced money for necessaries within the meaning of section 6 of the Admiralty Court Act, 1840, having a right to arrest the ship, not in respect of any maritime lien, but merely *ad fundandam jurisdictionem*, have in respect of that right an insurable interest in the ship for the balance of advances unsatisfied by exercising their lien on freight. *Moran, Galloway & Co. v. Uzielli*, 74 L. J. K.B. 494; [1905] 2 K.B. 555; 54 W. R. 250; 10 Com. Cas. 203; 21 T. L. R. 378—Walton, J.

Industrial Assurance Company—Premiums Paid under Void Policy—Claim for Return of Premiums—Jurisdiction of Justices.]—Section 7 of the Collecting Societies and Industrial Assurance Companies Act, 1896, provides that in all disputes between an industrial assurance com-

pany and any member or person insured, that member or person may apply to the Court of summary jurisdiction for the place where that member or other person resides, and the Court may settle the dispute:—*Held*, that the section applies only to the settling of disputes between the assurance company and its members, or persons insured, or under the rules of the society; and that, consequently, where a person, who has effected an insurance with an industrial assurance company on the life of another person, afterwards claims the return of premiums paid under the policy, on the ground that the insurance never was a valid insurance, and the policy was void for want of insurable interest, the section does not apply, and the Court of summary jurisdiction has no jurisdiction to determine such claim, as the claimant's case then is that he never was insured with the company at all, and therefore he is estopped from saying that he is a "person insured." In such case the objection that there is no jurisdiction in the Justices can be taken before the Divisional Court, although such objection was not taken or raised, before the Justices, and no question as to it is left to the Court by the Justices; but the party so taking the objection may have to pay the costs thrown away by not taking the objection at the proper time. *London, Edinburgh, and Glasgow Assurance Co. v. Partington*, 88 L. T. 732; 67 J. P. 255—D.

Contract for Sale of Goods—Insurance for Invoice Price Plus 5 per cent. to be Effected by Sellers for Buyers—Covering Letter for Larger Amount of Insurance Handed to Buyers—Right to Excess.—Under a c.i.f. contract for the sale of Manila hemp to be shipped to London, it was provided that insurance for 5 per cent. over net invoice price was to be effected by the sellers, for account of the buyers. At the date of the contract there was no policy in existence, but subsequently an insurance was effected by the sellers, who, when the hemp was paid for, handed to the buyers the shipping documents, including an undertaking to hold 1,280*l.*, the amount of the policy on the hemp, for the buyers. This sum was in excess of the net invoice price plus 5 per cent. A portion of the hemp having been destroyed by fire, the sellers claimed that they were entitled to so much of the insurance money as represented the excess over the net invoice price plus 5 per cent.:—*Held*, that as at the time of the loss the sellers had no interest in the subject-matter of the insurance, they had no claim to such excess, and that the whole interest in the insurance had passed to the buyers. *Tandauer v. Asser*, 74 L. J. K.B. 659; [1905] 2 K.B. 184; 93 L. T. 20; 53 W. R. 534; 10 Com. Cas. 265; 21 T. T. 1*t.* 429—D.

"P.P.I." or Honour Policy "on ship"—Insurable Interest—Wagering or Speculative Policy.—A "p.p.i." or "honour" policy of marine insurance which indemnifies the assured, who has no further proof of insurable interest, against loss in respect of the non-arrival of a ship at a certain port by a given date is a policy "on a ship" within section 1 of the Marine Insurance Act, 1745, and illegal. *Gedge v. Royal Exchange Assurance*, 69 L. J. Q.B. 506; [1900] 2 Q.B. 214; 82 L. T. 463; 9 Asp. M.C. 57; 5 Com. Cas. 229—Kennedy, J.

Policy Effected on Behalf of Owners of Ship—Right of Charterers to Sue on Policy—Charterparty—Construction—Authority to Effect Policy on Behalf of Charterers.—A policy of insurance on a ship *B*, was effected by H. & Sons, insurance brokers, on the instructions of C. & Sons. The policy was a time policy, and there were collision and other clauses. The plaintiffs were charterers of the ship. During the currency of the policy the *B* came into collision with another ship and sank it. The collision was caused by the negligence of the master and crew of the *B*, which was at the time being employed by the plaintiffs under the charterparty. In litigation in the American Courts between the owners of the sunk ship and the owners and charterers of the *B*, it was held that the charterers were liable to pay for the damage, and they paid, and now brought this action against the underwriters on the policy to recover their proportion of the sum paid as a loss under the policy. The policy was effected by H. & Sons "as well in their own name as for and in the name and names of all and every other person or persons to whom the subject matter of this policy does, may, or shall appertain in part or in all." The name of the plaintiffs nowhere appeared in it. The charterparty was made between C. & Sons, described as agents for the owners, and the plaintiffs. It amounted to a demise of the ship. Under it the owners were to maintain the hull and machinery in an efficient state, and the charterers were to appoint and pay the captain and crew, and were to pay for coals, fuel, port charges, and pilotages; and it was provided: "in the event of loss of time from collision, stranding, want of repairs, break down of machinery, or any cause appertaining to the duties of the owner preventing the working of the vessel for more than 24 working hours, the payment of the hire shall cease from the hour when detention begins until she be again in an efficient state to resume her service. Further, if in consequence of such deficiency, collision, want of repairs, break down, or other causes the vessel should put into any port or ports other than those to which she is bound, port charges, pilotages, and other expenses at those ports shall be borne by the owners; but should the vessel be driven into port or to anchorage by stress of weather, such detention or loss of time shall fall on the charterers. It is understood in the event of the steamer from above causes putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses as the owners are by their insurance; the owners shall pay for the insurance on the vessel":—*Held*, that only those persons were entitled to the benefit of the policy on whose behalf it was in fact effected; that the only persons on whose behalf the brokers were instructed were the owners; and no inference could be drawn from the charterparty that the owners were under any obligation to effect an insurance on behalf of the charterers, or that the policy ought to be treated as having been taken out on behalf of the charterers. *Boston Fruit Co. v. British and Foreign Marine Insurance Co.*, 74 L. J. K.B. 273; [1905] 1 K.B. 637; 92 L. T. 514; 53 W. R. 420; 10 Asp. M.C. 37; 21 T. L. R. 248—C.A.

Custom of Lloyd's—Knowledge.—*See* CUSTOM.

(3) POLICY.

(a) Generally.

Open Cover Slip—Sum or Sums Insured—Stamp.]—The plaintiffs, a marine insurance company, sued the defendant, an underwriter, on an open cover or slip issued at Lloyd's, for the re-insurance of excess of insurance on goods over certain amounts by certain lines of steamships. The sum of 4,000*l.* was specified as being the limit of excess taken on any ship, and the sum of 400*l.* was initialled by the defendant as being his proportion of that limit:—*Held*, that the plaintiffs could not maintain an action on such document, for it was a contract of sea insurance, and therefore was not valid unless it was in the form of a policy; and it was not a valid policy, because it did not specify the sum or sums insured, as required by section 93, sub-section 3 of the Stamp Act, 1891. *Home Marine Insurance Co. v. Smith*, 67 L. J. Q.B. 777; [1898] 2 Q.B. 351; 78 L. T. 734; 46 W. R. 661; 8 Asp. M.C. 408—C.A.

Policy on Hull and Machinery of Torpedo-boat Destroyer — "Latent defect" — "Breakage of shafts" — "Trials."]—A policy of marine insurance upon the hull and machinery of a torpedo-boat destroyer covered the following perils: "Fire in shops and on board, on stocks, trials, and all marine risks to completion and acceptance by the admiralty . . . and all other perils, losses, or misfortunes." Attached to the policy was this clause: "This insurance is also specially to cover loss of or damage to hull or machinery through the negligence of mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect . . . with leave to go on trial trips." During the trial the connecting-rod of the star-board engine broke, causing great damage:—*Held*, that "latent defect in machinery" did not cover a weakness in design; that the breakage of the connecting-rod was not a "breakage of shafts"; and that "trials" did not denote a period during which the assured were to be insured against fire, but specified a particular peril insured against—namely, peril of trials. *Jackson v. Mumford*, 51 W. R. 91; 8 Com. Cas. 61—Kennedy, J.

Policy on Ship—Collision—Cargo Rendered Worthless—Cost of Discharging—Liability of Underwriter.]—Under an ordinary policy upon the hull and machinery of a steamship, the underwriters are not liable for expenses incurred by the shipowner in discharging and disposing of a cargo which, by reason of a collision, has become worthless, and has been rejected by the cargo-owners. *Field Steamship Co. v. Burr*, 67 L. J. Q.B. 528; [1898] 1 Q.B. 821; 78 L. T. 293; 46 W. R. 490; 8 Asp. M.C. 384—Bigham, J.

— "Whilst at port or ports, place or places" — "Place." — The plaintiff company re-insured their vessel with the defendant company against perils of the sea "whilst at port or ports, place or places in New Caledonia." The vessel struck a reef (which was held to be part of New Caledonia) and loss was incurred:—*Held*, that the spot where the vessel struck was not a "place" within the meaning of the policy, "place" in collocation with "port" meaning a

place where a ship is for some purpose, and not a place where she happens to be in passing. *Maritime Insurance Co. v. Alianza Insurance Co. of Santander*, 77 L. J. K.B. 69; [1907] 2 K.B. 660; 13 Com. Cas. 46; 23 T. L. R. 703—Walton, J.

— **Fracture in Shaft—Cost of Replacing Shaft.]**—A policy of marine insurance effected on a vessel from May, 1902, to May, 1903, contained the *Inchmaree* clause—namely, "This insurance also specially to cover loss of ^{and} or damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the vessel, or any of them, or by the manager." In 1891 a new end was welded on to the tailshaft. That weld caused a flaw in the shaft. In 1900 the shaft was drawn and passed by Lloyd's surveyor. The flaw developed into a crack so as to become visible on the surface of the shaft some time between April, 1900, and October, 1902, but so long as the shaft was *in situ* could not be discovered. In October, 1902, the shaft was drawn and the crack was discovered. The shaft was condemned, and was replaced by a new shaft. In an action to recover the cost of replacing the shaft, —*Held*, that a latent defect becoming patent was not within the words of the clause. The crack which was the damage was not a damage to machinery caused by a latent defect; it was the latent defect itself. There was no damage to the machinery through a latent defect. Such damage through a latent defect must be caused by or arise during the currency of the policy, of which there was no evidence. The word "through" in the clause meant "in consequence of" or "caused by." *Semble*, "Damage to . . . machinery . . . through . . . breakage of shafts" means damage caused by and consequent upon the breakage of shafts, and not the mere breakage of shafts unless caused by a peril insured against. *Oceanic Steamship Co. v. Huber*, 97 L. T. 466; 13 Com. Cas. 28; 23 T. L. R. 673—C.A.

— **"Furniture"—Separation Cloths for Grain Cargoes—Dunnage Mats.]**—Where a ship is generally employed in carrying grain, and separation cloths and dunnage mats are necessary for the proper carriage of the cargo in the trade in which she is employed, a time policy on the ship and its furniture will cover the cloths and mats, although they are not being used upon the particular voyage on which the loss occurs. *Hoggarth v. Walker*, 69 L. J. Q.B. 634; [1900] 2 Q.B. 283; 82 L. T. 744; 48 W. R. 545; 5 Com. Cas. 292; 9 Asp. M.C. 84—C.A.

Policy on Cargo—Cattle Ship—Seaworthiness—Implied Warranty—Ventilation—Attendance on Cattle—Certificate of Fitness of Appliances by Lloyd's Agent's Surveyor.]—An implied warranty of seaworthiness in a policy on cargo may be defined as a condition that the ship shall be fit for the proposed service—fit, that is, in respect of all those things which appertain to the safe carriage of the cargo in question to its destination. Insufficient ventilation of a cattle ship and an insufficient supply of men to attend the

cattle on board constitute a breach of the implied condition of seaworthiness; and a stipulation in the policy that "the fittings and condition of the cattle to be approved by Lloyd's agent's surveyor" does not exclude the implied warranty. *Sleigh v. Tyser*, 69 L. J. Q.B. 626; [1900] 2 Q.B. 333; 82 L. T. 804; 5 Com. Cas. 271; 9 Asp. M.C. 97—Bigham, J.

— **Insurance against War Risks**—"Consequences of hostilities"—**Blockade of Port of Destination—Ship Returning to Port of Loading**—**Liability of Underwriter for Expenses.**—The plaintiffs effected with the defendants a policy upon 810 bags of rice by a vessel named from Liverpool to any port in Cuba. The policy was expressed to be against "all consequences of . . . hostilities or warlike operations." The vessel sailed from Liverpool for Havana, and in the course of the voyage war was declared and hostilities began between the United States and Spain, and Havana was blockaded. On learning this at a port of call, the master, under powers conferred upon him by the bill of lading, refused to proceed with the voyage, and returned to Liverpool. The plaintiffs paid the freight and incurred certain other expenses:—*Held*, that the defendants were not liable upon the policy, as the plaintiffs' loss was due, not to the consequences of hostilities, but to a proper exercise by the master of his discretion under the bill of lading. *Nickels v. London and Provincial Marine and General Insurance Co.*, 70 L. J. K.B. 29; 6 Com. Cas. 15—Mathew, J.

Lloyd's Policy with Clauses Attached—"All risks by land and by water"—**Delay in Transit**—**Damage to Goods by Accidental Causes in Consequence of Delay**—**Liability under Policy.**—Goods were insured from Savanilla, a seaport in Colombia, to Medellin, a town in the interior; the transit was in stages, partly by rail, partly by boat up the river, and partly on mules. The policy was in the form of an ordinary Lloyd's policy, with the addition of clauses on a slip attached to the policy, one of which was as follows: "Including all risk of craft or boats to and from the vessel and all risks (including fire) from the warehouse factory or calendar while in transit by railway or any conveyances, and while in warehouse and/or shed or on wharf whilst awaiting forwarding or shipment and of transshipment and all risks by land and by water by any conveyance until safely delivered into the consignee's warehouse or elsewhere." The goods were very much delayed in transit owing to the transport being disorganised by a civil war in Colombia, and when they arrived at their destination some of them were found to be damaged by damp, wetting, and by insects:—*Held*, that the damage was covered by the policy, as the insurance against all risks was in addition to the ordinary perils insured against. *Held*, also, that the non-disclosure by the assured of the fact that the transport arrangements were disorganised was not the non-disclosure of such a material fact as would make the policy void. *Schloss v. Stevens*, 75 L. J. K.B. 927; [1906] 2 K.B. 665; 96 L. T. 205; 11 Com. Cas. 270; 10 Asp. M.C. 331; 22 T. L. R. 774—Walton, J.

Deck Cargo—Voyage by Canal and River—**Liability of Underwriter.**—The rule exempting underwriters from liability for the loss of deck

cargo on a voyage by sea does not extend to an inland voyage by canal and river which is contemplated by the policy, and on which it is the established practice for vessels to carry cargoes on deck. *Quere*, whether the rule can in any case be applicable to an inland voyage. *Apollinaris Co. v. Nord-Deutsche Insurance Co.*, 73 L. J. K.B. 62; [1904] 1 K.B. 252; 89 L. T. 670; 52 W. R. 174; 9 Com. Cas. 91; 9 Asp. M.C. 526; 20 T. L. R. 79—Walton, J.

Shipowner's Liability to Cargo-owners for Negligence—Insurance against, to Limited Amount—Sue and Labour Clause—Applicability to Subject-matter of Insurance.—Shipowners effected a policy of marine insurance to cover their liability of any kind to the owners of a cargo up to a specified sum (which was about half the value of the cargo) owing to the omission of the negligence clause in the contract of affreightment. A printed form was used as the basis of the policy, which form contained a clause authorising the assured to sue, labour, and travel for and about the defence, safeguard, and recovery of the said goods, merchandises, and ship. The ship stranded owing to the negligence of the master, and became a total loss. The shipowners incurred expenses in saving part and attempting to save the rest of the cargo, and sought to recover these expenses from the insurers under the suing and labouring clause:—*Held*, that that clause was not applicable to the subject of the insurance, and the expenses could not be recovered under it. *Cunard Steamship Co. v. Marten*, 72 L. J. K.B. 754; [1903] 2 K.B. 511; 89 L. T. 152; 52 W. R. 39; 9 Com. Cas. 9; 9 Asp. M.C. 452—C.A.

Policy in Names of Owners and of "every other person"—**Concerned—Intention—Ratification—Time Charter—Claim of Charterers to Sue on the Policy—Construction of Charterparty.**—By a time charter which amounted to a demise of the ship it was provided "that the owners shall pay for the insurance on the vessel." It was also provided that in the case of the steamer in certain events putting into any port other than ports for which she was bound, "the charterers are covered as to expenses as the owners are by their insurance." The policy, effected by the owners without communication to the charterers, whose name did not appear in it, was expressed to be "as well in their own names as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does or shall appertain in part or in all." During the currency of the charterparty the ship came into collision with another vessel, and was held solely to blame. The charterers were compelled to pay damages to the owners of the other vessel. In the collision action the charterers stated that they had no insurance on the ship, and the action proceeded on the footing that the owners intended to insure their own interests only. In an action by the charterers against the insurance company to recover their loss caused by the collision,—*Held*, that they were not entitled to the benefit of the policy, as the owners were under no obligation to the charterers to insure; that the charterers were not persons intended to be covered by the policy, to which they were strangers, and that they were precluded by their own statements in the collision action from asserting that they

had adopted or ratified the policy. *Boston Fruit Co. v. British and Foreign Marine Insurance Co.*, 75 L. J. K.B. 537; [1906] A.C. 336; 94 L. T. 806; 54 W.R. 557; 11 Com. Cas. 196; 22 T. L. R. 571—H.L. (E.)

Policy on Profit on Cargo—"To pay on such portion as does not reach its destination"—**Abandonment of Voyage**—**Part of Cargo Subsequently forwarded by Different Ship**—**Delay**.—The plaintiffs effected an insurance on profit on a cargo *per* the *Giovanni Albanese*. The policy had a printed clause attached, which, as it stood originally, ran as follows: "Warranted free from all average and without benefit of salvage; but to pay a loss on such portion as does not reach its destination in the said ship"; but the latter words—namely, "in the said ship"—had been deleted. The cargo was bought under a contract which stated that it was "expected to arrive *per* sailer from Fray Bentos and to discharge at Ayr as *per* charterparty, August, September, October, 1905, shipment." The contract also contained the following clause: "In case of non-arrival, this contract to be void, and should the vessel from any unforeseen circumstances be prevented from delivering the whole of the cargo originally shipped this contract to be void as regards the undelivered portion." The cargo was loaded in the *Giovanni Albanese* in September, 1905, but in the course of the voyage the vessel became a total loss, and the sellers gave the plaintiffs notice that the cargo would not come forward, as it had been abandoned to the underwriters. Part of the cargo was, however, re-shipped, and brought by another vessel to this country, where it arrived in March, 1906, but the plaintiffs declined to accept it. In an action on the policy, *Held*, that the parties had elected to choose one of the two forms in which an insurance on profits is effected, that the form chosen did not require that the goods should be brought to their destination in the ship in which they were loaded, and consequently that there had been no loss of that portion of the cargo which was tendered to the plaintiffs, as it had arrived at its destination within the meaning of the attached clause, although it did not arrive in the original ship. *Held*, further, that the delay that occurred in not delivering the cargo till March, 1906, was not such a delay as frustrated the adventure. *Wyllie v. Povah*, 12 Com. Cas. 317; 23 T. L. R. 687—Pickford, J.

Policy on "Chartered or hire money" to Cover the "Loss of hire money"—**Loss of Hire through Vessel becoming Inefficient**—**Government Charterparty**—**Option to Discharge Vessel**—**Loss by Discharge of Vessel**—**Right of Assured to Recover**.—By a charterparty in the Government form the Admiralty chartered a vessel for transport service for three months certain, and thenceforward until they should give notice to the owners that the vessel was discharged from their service, such notice to be given when the vessel was in port in the United Kingdom; and the charterparty provided that if the ship became incapable from any defect, or from any cause whatsoever, to perform the service efficiently, the Admiralty might make abatement by way of mulet out of the freight. The shipowners effected a time policy upon "chartered or hire money" to "cover the loss of hire money calculated at" so

much per day caused by (amongst other things) want of repairs or breakdown of machinery, rendering the vessel inefficient for the service. Under the charterparty the vessel had made a voyage and had returned to England, and, the three months having previously expired, the Admiralty had continued the employment, and had given instructions that the vessel was to proceed on another voyage on a certain day. While the vessel was in dry dock it was discovered that some of the blades of her propeller were cracked and that it would take some time to repair the damage. In consequence of this the Admiralty, under their option in the charterparty, gave the owners notice discharging the vessel, and the vessel was discharged from the Government service as from that date. The vessel then underwent repairs, which took fifteen days from the date of her discharge by the Admiralty. In an action on the policy by the owners of the ship to recover from the insurers the loss of hire money for the fifteen days, *Held*, that the "chartered or hire money" in the policy meant "hire money" in the nature of freight payable under a contract; that the loss of such hire to the shipowners for the fifteen days was caused by the exercise of the option which the Admiralty had under the charterparty to discharge the vessel from their service, and not by the want of repair, breakdown of machinery, or other perils insured against under the policy, and that there was therefore no loss under the policy, for which the shipowners were entitled to recover. *Manchester Liners v. British and Foreign Marine Insurance Co.*, 86 L. T. 148; 9 Asp. M.C. 266; 7 Com. Cas. 26—Walton, J.

Shipper's Goods—**Freight Payable at Port of Refuge**—**Forwarding Expenses**.—Under a separate policy on goods effected by the plaintiffs in their own names, but for the benefit of J. Singer, for the same voyage by the same steamer, the defendants insured certain resin and rice, shipped by and belonging to Singer. By the terms of the bills of lading, if the vessel was prevented from reaching her destination and returned to London, the freight on the resin and rice was payable on the discharge of the goods in London. The resin and rice were discharged in London and forwarded to their destination by Singer, at a considerable expense:—*Held*, that the plaintiffs were entitled to recover the forwarding expenses without making any deduction on account of the freight payable in London. *Popham v. St. Petersburg Insurance Co. (No. 2)*, 10 Com. Cas. 276—Walton, J.

Value of Goods—**Open Cover**—**Slip**—**Goods**—"and (or) freight"—"Invoice cost plus freight and insurance plus 10 per cent."—**Loss before Declaration**—"Contingency freight if required at half premium."—*Held*, that, the loss having occurred before the assured declared the shipment under the open cover, in assessing the insured value of the goods the word "freight" in the clauses in the open cover, "and (or) freight," "Invoice cost plus freight and insurance plus 10 per cent.," was distinguished from "Contingency freight," and meant freight which at the time of the loss the assured had paid or had become liable to pay, and not the freight which would have become payable at destination on the whole cargo if the whole had

been delivered. *Kung v. Methuen*, 23 T. L. R. 69—*Channell, J.* Affirmed in C.A., 24 T. L. R. 145.

Freight—Charterparty—Total Loss—Commission on Obtaining Charterparty—Deduction for Hire of Ship.—The plaintiffs, the charterers of a ship under a time charter, insured the freight and (or) chartered freight for twelve months with the defendants against (*inter alia*) perils of the seas. During the currency of the policy, and while the ship was carrying a cargo under a sub-charter, she stranded, and there was a total loss of freight in respect of a part of the cargo. The plaintiffs claimed that, in ascertaining the amount recoverable under the policy, they were entitled to add a sum which they had paid for commission for obtaining the sub-charter. The defendants claimed to deduct the amount of two days' hire of the vessel which the plaintiffs had saved by reason of the stranding:—*Held*, first, that, in the absence of evidence of a custom to include such commission, the plaintiffs were not entitled to recover it; and secondly, that the defendants were not entitled to deduct the amount of the two days' hire of the vessel from the sum recoverable on the policy. *United States Shipping Co. v. Empress Assurance Corporation*, 76 L. J. K.B. 225; [1907] 1 K.B. 259; 12 Com. Cas. 142; 23 T. L. R. 137—*Channell, J.* Affirmed on question of fact, 77 L. J. K.B. 120; [1908] 1 K.B. 115; 13 Com. Cas. 90; 24 T. L. R. 45—C.A.

Policy on "Advances"—"Warranted free of all average"—Master's Note—Bottomry Bond—Conditional Promise to Pay—Charge on Freight—Pro Rata Freight—Partial Loss.—The plaintiffs advanced to the master of an Italian ship at a foreign port a sum of money for disbursements. The master signed and handed to the plaintiffs a document in these terms: "Ten days after arrival at Southampton . . . I promise to pay 760l. . . for necessary disbursements of my vessel . . . for the payment of which I hereby pledge my vessel and freight; and my consignees at the port of destination are hereby directed to pay the amount of this obligation from the first amount of freight received for account of my said vessel. . . ." The plaintiffs then effected with the defendants a policy of insurance against total loss by perils of the seas upon "advances valued at 775l." from the foreign port to Southampton. The cost of this insurance was included in the sum of 760l. secured by the document above mentioned. On the voyage to Southampton the vessel, through perils of the seas, became a constructive total loss. Part of the cargo was saved and sold at a port of refuge. *Pro rata* freight, payable by Italian law to the amount of 790l., was paid to the master by purchasers of the cargo:—*Held*, that the charge on freight was not conditional on the vessel's arrival at Southampton; that it covered *pro rata* freight paid at the port of refuge; and that therefore there was not a total loss within the meaning of the policy. *Price v. Maritime Insurance Co.*, 70 L. J. K.B. 780; [1901] 2 K.B. 412; 85 L. T. 101; 49 W. R. 645; 6 Com. Cas. 168; 9 Asp. M.C. 213—C.A.

Policy on Disbursements—Voyage Out and Home—Anticipated Profits on Homeward Voyage.—The plaintiff's ship was chartered to take a

cargo to the west coast of South America; it was the intention of the plaintiff to obtain a cargo there for the homeward voyage. The plaintiff effected policies on hull, chartered freight, and "disbursements and [or] advances warranted free from all average, valued at 3,000l." On the outward voyage fire broke out in the cargo, and some damage was done to the ship and to part of the cargo, but the ship was not a total loss, actual or constructive. The plaintiff, acting reasonably, abandoned the voyage, and brought the ship home to be repaired. The disbursements included outlay, before the ship started, on provisions, stores, outfit, port dues, and insurance:—*Held*, that the plaintiff was not entitled to recover a total loss under the policy on disbursements. *Lawther v. Black*, 6 Com. Cas. 196—C.A.

Policy upon Bull—"Being against all risks including mortality"—Municipal Law—Compulsory Slaughter—"Warranted nevertheless free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat."—By a Lloyd's policy of marine re-insurance a bull was insured "against all risks including mortality, jettison, and washing overboard":—*Held*, that the word "mortality" ought to be understood as meaning death from natural influences and diseases, and not violent death caused to the animal after its arrival at the port of destination by reason of local regulations which compelled its slaughter, in consequence of the existence of foot-and-mouth disease amongst the animals aboard the vessel; but that even if "mortality" did mean such violent death, the underwriters of the Lloyd's policy were protected from liability in respect of it by the warranty. *Lawrence v. Aberdeen* (5 B. & Ald. 107) followed. *St. Paul Fire and Marine Insurance Co. v. Morice*, 11 Com. Cas. 153; 22 T. L. R. 449—*Kennedy, J.*

Policy on Dog—All Risks including Mortality—Walking to be Deemed Safe Arrival.—A policy of insurance on a dog during transit from Liverpool to Lahore contained the following clause: "This insurance is against all risks, including mortality from any cause, jettison and washing overboard, but walking at Lahore, Punjab, to be deemed a safe arrival." The dog was injured during the transit, and on arrival at Lahore could only walk on three legs:—*Held*, first, that the policy covered all risks, and not merely mortality; secondly, that the dog did not walk at Lahore within the meaning of the policy. *Jacob v. Gaviller*, 87 L. T. 26; 50 W. R. 428; 7 Com. Cas. 116—*Kennedy, J.*

Policy on Cases of Whiskey—Damage to Labels and Packing by Sea Peril.—The plaintiffs insured cases of whiskey for a voyage from Glasgow to Singapore. Owing to a sea peril the straw in which the bottles were packed became wet and discoloured, and some of the labels were damaged by contact with the straw. The cases of whiskey were sold in their damaged condition at Singapore:—*Held*, that the plaintiffs were entitled to recover from the underwriters the amount of the loss upon the sale, and were under no obligation to re-pack or re-label the bottles before selling. *Cator v. Great Western Insurance Co. of New York* (42 L. J. C.P. 266; L. R. 8 C.P. 552) distinguished. *Brown v. Fleming*, 7 Com. Cas. 245—*Bigham, J.*

Value of Ship in Policy—Assessment of Salvage and General Average on Greater Value—Liability of Underwriters.—Where there is a valued policy, and a general average loss is sustained and salvage services rendered to the ship, and the ship is valued in the salvage action at a higher sum than the value assigned in the policy, the shipowners are only entitled to recover from the underwriters the proportion of the amount due from the ship for general average and salvage represented by the ratio of the policy value to the value in the action. *Balmoral Steamship Co. v. Marten*, 71 L. J. K.B. 819; [1902] A.C. 511; 87 L. T. 247; 51 W. R. 175; 7 Com. Cas. 292; 9 Asp. M.C. 321—H.L. (E.)

Concealment of Facts—Knowledge of Lloyd's Agent—Knowledge of Individual Member of Lloyd's.—The knowledge of Lloyd's agents cannot be taken to be the knowledge of an individual member of Lloyd's, so as to make void a policy of marine insurance on the ground of concealment of facts, where such individual member has no actual knowledge in fact. *Wilson v. Salamandra Assurance Co.*, 88 L. T. 96; 8 Com. Cas. 129; 9 Asp. M.C. 370—Bruce, J.

Attaching of Policy—Insurance of Ships "Sailing" after Specified Date—Commencement of Voyage.—A policy of marine insurance was effected upon goods on ships "sailing on or after March 1" from a certain port. A ship fully equipped and loaded for her voyage with her crew on board moved from her loading berth at the port and moored some five hundred yards distant and nearer the sea on the evening of February 29. The ship was so moved with the object of preventing the crew from going ashore that evening, so that the ship might be ready to start upon her voyage early the following morning. The ship proceeded upon her voyage on the following morning, March 1:—*Held*, that the ship "sailed" within the meaning of the policy on March 1, and not on February 29, and that the policy attached. *Sea Insurance Co. v. Blogg*, 67 L. J. Q.B. 757; [1898] 2 Q.B. 398; 78 L. T. 735; 47 W. R. 71; 8 Asp. M.C. 412—C.A.

Policy Effected on Behalf of Owners—Policy in Names of Owners and of "every other person" Concerned—Intention—Ratification—Time Charter—Claim of Charterers to Sue on the Policy—Construction of Charterparty.—By a time charter which amounted to a demise of the ship it was provided "that the owners shall pay for the insurance on the vessel." It was also provided that in the case of the steamer in certain events putting into any port other than ports for which she was bound, "the charterers are covered as to expenses as the owners are by their insurance." The policy, effected by the owners without communication to the charterers, whose name did not appear in it, was expressed to be "as well in their own names as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does or shall appertain in part or in all." During the currency of the charterparty the ship came into collision with another vessel, and was held solely to blame. The charterers were compelled to pay damages to the owners of the other vessel. In the collision action the charterers

stated that they had no insurance on the ship, and the action proceeded on the footing that the owners intended to insure their own interests only. In an action by the charterers against the insurance company to recover their loss caused by the collision,—*Held*, that they were not entitled to the benefit of the policy, as the owners were under no obligation to the charterers to insure; that the charterers were not persons intended to be covered by the policy, to which they were strangers, and that they were precluded by their own statements in the collision action from asserting that they had adopted or ratified the policy. *Boston Fruit Co. v. British and Foreign Marine Insurance Co.*, 75 L. J. K.B. 537; [1906] A.C. 336; 94 L. T. 806; 54 W. R. 557; 11 Com. Cas. 196; 10 Asp. M.C. 260; 22 T. L. R. 571—H.L. (E.)

Time Policy—Ship Damaged by Perils Insured Against—Ship Pledged for Cost of Repairs—No Personal Liability on Owner—Subsequent Total Loss under Policy—Liability of Underwriters.—Where under a time policy a ship has sustained damage by perils insured against, and has been repaired abroad under an arrangement by which the ship is pledged for the cost of the repairs, but no personal liability is incurred by the shipowners for those repairs, and the ship is subsequently lost on the voyage home, the underwriters are not liable to pay the cost of repairs in particular average, in addition to the total loss. *The Dora Forster*, 69 L. J. P. 85; [1900] P. 241; 40 W. R. 271—Gorell Barnes, J.

Liability of Underwriter—Cost of Discharging Cargo Rendered Worthless by Peril Insured Against.—A ship insured under a time policy on hull and materials, machinery and boilers, against perils of the sea and all other perils, losses, and misfortunes that should come to the hurt, detriment, or damage of the ship or any part thereof, was, while on a voyage to London with a cargo of cotton-seed, so damaged by collision in the Thames that it was necessary to run her ashore. After the ship had been lightened and towed to a place where she was temporarily patched, and thence into the dock where it was intended that the remainder of the cargo should be discharged, it was found that the cargo had become rotten through the action of water and mud which had made their way into the ship in consequence of the damage caused by the collision, and a sanitary authority ordered the shipowners to abate the nuisance thereby caused. The cargo-owners and their underwriters declined to pay freight or take delivery of the cargo on the ground that it had ceased to be cotton-seed and become worthless, and the shipowners thereupon employed contractors to remove and dispose of the cargo:—*Held*, that the shipowners were not entitled to recover from the underwriters of the policy any of the costs of dealing with, discharging, or disposing of the cargo. *Field Steamship Co. v. Burr*, 68 L. J. Q.B. 426; [1899] 1 Q.B. 579; 80 L. T. 445; 47 W. R. 341; 8 Asp. M.C. 529—C.A.

Time Policy for Twelve Months with Continuation Clause—Specification of Risk—Validity.—A policy of re-insurance effected on a ship for twelve months contained a continuation clause which provided that, "should the vessel be at sea or abroad on the expiration

of this policy, it is agreed to hold her covered until arrival at her port of final destination in the United Kingdom or on the Continent of Europe at a *pro rata* daily premium to the within." At the expiration of the twelve months the ship was at Quebec, and subsequently on her homeward voyage was lost. In an action on the policy, *Held*, that it was invalid under section 93 of the Stamp Act, 1891, as being a time policy for a time exceeding twelve months, and because the particular risk or adventure was not specifically defined. *Royal Exchange Assurance Corporation v. Sjöforsakrings Aktie-Bolaget Vega*, 71 L. J. K.B. 739; [1902] 2 K.B. 384; 87 L. T. 356; 50 W. R. 694; 7 Com. Cas. 205; 9 Asp. M.C. 329—C.A.

Lloyd's Time Policy—Ship's "Furniture"—Separation Cloths and Dunnage Mats—Liability of Underwriters.—Separation cloths and dunnage mats used by a vessel engaged in the grain trade are part of her "furniture" within the meaning of that expression in an ordinary Lloyd's time policy. *Hoggarth v. Walker*, 68 L. J. Q.B. 885; [1899] 2 Q.B. 401; 48 W. R. 47—Bigham, J.

Voyage Policy—Insurance for Period after Arrival—Duration of Risk—Construction.—Where in a policy of insurance on ship in the ordinary Lloyd's form the risk is defined as being for a voyage to a port named in the policy "until she hath there moored at anchor in good safety" and "for 30 days in port after arrival however employed," the thirty days are to be reckoned as thirty successive periods of twenty-four hours each, the first of which commences to run as soon as the ship is moored at anchor in good safety in her port of destination. *Cornfoot v. Royal Exchange Assurance Corporation*, 73 L. J. K.B. 22; [1904] 1 K.B. 40; 89 L. T. 490; 52 W. R. 49; 9 Com. Cas. 80; 9 Asp. M.C. 489; 20 T. R. 34—C.A.

"Usual Lloyd's conditions"—Jute Shipped from Calcutta to Dundee—Warehouse to Warehouse Clause.—A contract for the sale of jute, to be shipped from Calcutta to Dundee, contained the following clause: "Insurance . . . to be effected under an f.p.a. policy on usual Lloyd's conditions, at Lloyd's, or with a London insurance company, or with Calcutta insurance companies or agencies having a responsible and well-known London agent." Policies were effected with three insurance companies. Each policy contained a clause by which the goods were covered while temporarily placed on quay and until delivered to the export vessel, or at any wharf or warehouse within the limits of the port:—*Held*, that by the terms of the contract the policies effected with the companies must contain the usual Lloyd's conditions; that the clause in question was not a usual Lloyd's condition; and that the usual Lloyd's condition in such a case was a clause covering the goods until they were safely delivered into the warehouse of the consignee. *Ide v. Chalmers*, 5 Com. Cas. 212—Kennedy, J.

Conflict of Laws—By what Law Governed.—See INTERNATIONAL LAW.

(b) *Perils Insured Against.*

Perils of the Sea—Policy free from "claim consequent on loss of time, whether arising from a

peril of the sea or otherwise"—**Frustration of Adventure by Peril of Sea involving Delay for Repair.**—A time policy of marine insurance on the freight of a ship against risks which included perils of the sea contained the clause, "Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise." The ship in pursuance of a charterparty loaded a cargo and sailed, and on the following day her mainshaft broke by reason of perils of the sea. She was towed back to the port of loading, and it was there found that the delay necessary for the repair of the damage would frustrate the object of the adventure, and the charterers, as they were entitled, determined the charterparty, and the ship-owners lost the freight:—*Held*, that the loss of freight was consequent on loss of time arising from a peril of the sea within the meaning of the clause, and that the underwriters were not liable under the policy. *Bensaude v. Thames and Mersey Marine Insurance Co.*, 66 L. J. Q.B. 666; [1897] A.C. 609; 77 L. T. 282; 46 W. R. 78; 8 Asp. M.C. 315—H.L. (B.)

Ice Caused by Winds and Currents—"Landing, warehousing, and forwarding charges"—Duty Payable on Arrival of Goods in Foreign Country.—By policies of marine insurance the plaintiffs insured with the defendants goods and freight by named steamers from London to inland places in Siberia *via* the Kara Sea. The policies enumerated the usual perils, and contained the following clause: "To pay landing, warehousing, and forwarding charges, should the same be incurred. . . ." The steamers left London in July, 1899, and on August 16 got into heavy ice at the entrance to the Kara Sea. They were involved in the ice till September 3, when, finding it impossible to proceed and being in danger, they returned to London. This ice was unusual at that time of the year, and was caused by the prevalence of north winds and Arctic currents. After reaching London the plaintiffs returned goods, which they had contracted to carry, to their owners, and sold a large part of their own goods. In June, 1900, the plaintiffs forwarded the remainder of their goods to the destination in Siberia by railway through Russia, and paid in respect thereof much heavier duties to the Russian Government than they would have paid if the goods had arrived in Siberia *via* the Kara Sea:—*Held*, first, that the presence of ice under the circumstances stated was a peril insured against; secondly, that the plaintiffs were entitled to recover in respect of landing, warehousing, and forwarding charges; thirdly, that the increased amount of duty was recoverable as part of the forwarding charges. *Popham and Willett v. St. Petersburg Insurance Co. (No. 1)*, 10 Com. Cas. 31—Walton, J.

Lloyd's Policy with Clauses Attached—"All risks by land and by water"—Delay in Transit—Damage to Goods by Accidental Causes in Consequence of Delay—Liability under Policy.—Goods were insured from Savanilla, a seaport in Colombia, to Medellin, a town in the interior; the transit was in stages, partly by rail, partly by boat up the river, and partly on mules. The policy was in the form of an ordinary Lloyd's policy, with the addition of clauses on a slip attached to the policy, one of which was as follows: "Including all risk

of craft or boats to and from the vessel and all risks (including fire) from the warehouse factory or calendar while in transit by railway or any conveyances, and while in warehouse and/or shed or on wharf whilst awaiting forwarding or shipment and of transshipment and all risks by land and by water by any conveyance until safely delivered into the consignee's warehouse or elsewhere." The goods were very much delayed in transit owing to the transport being disorganised by a civil war in Colombia, and when they arrived at their destination some of them were found to be damaged by damp, wetting, and by insects:—*Held*, that the damage was covered by the policy, as the insurance against all risks was in addition to the ordinary perils insured against. *Held*, also, that the non-disclosure by the assured of the fact that the transport arrangements were disorganised was not the non-disclosure of such a material fact as would make the policy void. *Schloss v. Stevens*, 75 L. J. K.B. 927; [1906] 2 K.B. 665; 11 Com. Cas. 270; 22 T. L. R. 774—Walton, J.

Freight—Fire, &c.—General Clause—Cargo Heated and Discharged—Consequent Loss of Freight.—A shipowner insured with the defendants freight on a voyage from Newcastle, New South Wales, to Valparaiso, against loss, by perils (*inter alia*) of "fire, . . . and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage" of the said freight. On the day after sailing from Newcastle part of the cargo, which consisted of coals, was found to be very hot, and it became necessary, for the safety of the whole adventure, to put into Sydney and there discharge and sell a large portion of the cargo. The freight which would have been payable if the cargo so discharged had been carried to its destination was consequently lost to the shipowner. In an action brought by the shipowner against the underwriters on the policy,—*Held*, that, though fire had not actually broken out, there was an existing state of peril by fire, and that the loss, if not strictly a loss by fire, was a loss *ejusdem generis*, and was covered by the general words. *The Knight of St. Michael*, 67 L. J. P. 19; [1898] P. 30; 73 L. T. 90; 46 W. R. 396; 8 Asp. M. C. 360—Gorell Barnes, J.

Lump Chartered Freight—Partial Loss of Bill of Lading Freight—No Loss of Chartered Freight—"Freight chartered or as if chartered."—A ship was chartered for a general cargo at a lump sum freight of 3,000*l.*, payable in part, if required, at port of loading, and the balance on true delivery of the cargo. The charterparty provided that the master should sign bills of lading at any rate of freight, not less than the chartered rate, that the charterers should require. The charterers' liability was to cease on shipment of cargo, but the vessel was to have a lien thereon for freight, dead freight, and all other charges. The shipowners insured against sea peril to the amount of 3,000*l.* upon "freight chartered or as if chartered." The master signed bills of lading which gave no lien on cargo for chartered freight. Part of the cargo was lost by peril of the sea, so that the bill of lading freight on the residue which reached port amounted to less than the chartered freight, though the remaining cargo was still worth the freight, dead freight, and demurrage:

—*Held*, that there had been no loss of chartered freight through perils insured against, the loss having been sustained through the omission to preserve a lien over the whole cargo. *Williams v. Canton Insurance Office*, 70 L. J. K.B. 962; [1901] A.C. 462; 85 L. T. 317; 9 Asp. M.C. 247; 6 Com. Cas. 256—*H.L. (E.)* Affirming, 47 W. R. 611; 8 Asp. M.C. 563—C.A.

Damage to Machinery through any Latent Defect in the Machinery—Latent Defect becoming Patent—Development of Flaw—Fracture in Shaft—Cost of Replacing Shaft.—A policy of marine insurance effected on a vessel from May, 1902, to May, 1903, contained the *Inchmaree* clause—namely, "This insurance also specially to cover loss of ^{and} damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the vessel, or any of them, or by the manager." In 1891 a new end was welded on to the tailshaft. That weld caused a flaw in the shaft. In 1900 the shaft was drawn and passed by Lloyd's surveyor. The flaw developed into a crack so as to become visible on the surface of the shaft some time between April, 1900, and October, 1902, but so long as the shaft was *in situ* could not be discovered. In October, 1902, the shaft was drawn and the crack was discovered. The shaft was condemned, and was replaced by a new shaft. In an action to recover the cost of replacing the shaft,—*Held*, that a latent defect becoming patent was not within the words of the clause. The crack which was the damage was not a damage to machinery caused by a latent defect; it was the latent defect itself. There was no damage to the machinery through a latent defect. Such damage through a latent defect must be caused by or arise during the currency of the policy, of which there was no evidence. The word "through" in the clause meant "in consequence of" or "caused by." *Semble*, "Damage to . . . machinery . . . through . . . breakage of shafts" means damage caused by and consequent upon the breakage of shafts, and not the mere breakage of shafts unless caused by a peril insured against. *Oceanic Steamship Co. v. Faber*, 95 L. T. 607; 11 Com. Cas. 179; 22 T. L. R. 527—Walton, J.

"Restraint of princes and people"—Lawful Order of Government Forbidding Landing of Cargo—Warranty against "capture, seizure, and detention."—The prohibition of the landing of a cargo, insured under a Lloyd's policy of marine insurance, by an order of the Government of the country of the port of destination, made in accordance with the municipal law of that country, falls within the meaning of the words "arrests, restraints, and detentions of all kings, princes, and people" in the body of the policy, but a warranty in the policy against "capture, seizure, and detention" exempts the insurer from liability under the above-mentioned clause in respect of the loss occasioned by the prohibition. *Miller v. Law Accident Insurance Society*, 72 L. J. K.B. 428; [1903] 1 K.B. 712; 88 L. T. 370; 51 W. R. 420; 8 Com. Cas. 161; 9 Asp. M.C. 386—C.A.

"Trials."—A time policy of marine insurance upon the hull and machinery of a vessel (a torpedo-boat destroyer) contained a clause "against fire in shops and on board on stocks, trials and all marine risks to completion and acceptance by the Admiralty." The policy also contained the ordinary Lloyd's perils clause covering damage or loss by fire, and expressly provided that there was leave to go on trial trips in ballast or otherwise:—*Held*, first, that the word "trials" denoted a risk insured against, and not merely, like the preceding expressions "in shops" and "on board stocks," a period or state of things during which the vessel was to be insured against fire; secondly, that loss through breakage of a connecting-rod under the stress of a trial was a misfortune covered by the word "trials." *Jackson v. Mumford*, 52 W. R. 342; 9 Com. Cas. 114; 20 T. L. R. 172—C.A.

Loss through Negligence of Master, &c.—Where a steamship started upon a stage of a round voyage with insufficient coal, and a portion of her fittings, spars, and cargo had consequently to be used for fuel,—*Held*, that the underwriters were not liable under a clause in the policy that "this insurance also to cover loss through the negligence of master, mariners, engineers, or pilots," inasmuch as the loss was not due to any negligent act, but to the voluntary act of those engaged in the navigation of the ship. *Held*, also, that under a clause "Held covered in case of any breach of warranty . . . at a premium to be hereafter arranged," there had been a general average loss for which the underwriters would have been liable, but that as the additional premium they would have been entitled to charge would have been at least equal to the loss claimed, the shipowners were not entitled to recover. *Greenock Steamship Co. v. Maritime Insurance Co.*, 72 L. J. K.B. 59; [1903] 1 K.B. 367; 88 L. T. 207; 51 W. R. 447; 8 Com. Cas. 78; 9 Asp. M.C. 364—Bigham, J. See s.c. in C.A., *supra*.

Mortgage of Ship—Policy Effected by Mortgagor on Behalf of Mortgagee—Barratry by Mortgagor as Master—Right of Mortgagee to Recover.—A mortgagee advanced the part owner of a ship a sum of money upon a mortgage of his shares in the ship, it being a part of the arrangement that the mortgagor should be the master of the ship, and that an insurance should be effected by the mortgagor to cover the interest of the mortgagee. In pursuance of the arrangement the mortgagor caused an insurance to be effected to cover the interest of the mortgagee and his own interest. The perils covered by the policy of insurance included perils of the sea and barratry of the master and mariners. The ship having been lost, as the underwriters of the policy alleged, by the barratry of the mortgagor as master,—*Held*, that, assuming the allegation to be true, then, if the mortgagor was master for the mortgagee, the mortgagee was entitled to recover against the underwriters for a loss by barratry; and if the master was not master for the mortgagee, the mortgagee was entitled to recover for a loss by perils of the sea. *Small v. United Kingdom Marine Mutual Insurance Association*, 66 L. J. Q.B. 786; [1897] 2 Q.B. 811; 76 L. T. 828; 46 W. R. 24; 8 Asp. M.C. 293—C.A.

Collision Clause—"Collision"—Contact between Two Navigable Things—Steamship and Half-submerged Barge.—A steamship in the course of navigation ran into a half-submerged barge which had just previously been run down by another vessel, and sustained considerable damage. The barge, which was very slightly damaged, was raised shortly afterwards and proceeded in safety to her home port. The steamship was insured by the plaintiff with the defendant against "damage done and (or) received through collision":—*Held*, that, assuming the definition of the word "collision" in the policy to be "contact between two navigable things," the barge was, upon the facts of the case, a navigable thing, as was also the steamship, and therefore that the plaintiff was entitled to recover upon the policy for damage received by the steamship through "collision" with the barge. *Chandler v. Blogg*, 67 L. J. Q.B. 336; [1898] 1 Q.B. 32; 77 L. T. 524; 8 Asp. M.C. 349—Bigham, J.

— "Actual collision between any tug and any vessel"—**Damage Caused by Anchor Attached by Length of Chain to Ship.**—An anchor in the bed of the Thames, attached by twenty or thirty fathoms of chain to the bows of a schooner lying partly on the bank, is part of the ship, and damage caused to a tug by striking upon it is covered by a policy that the insurers will pay to the assured the amount of any damage owing to "actual collision between any tug and any vessel." *Margetts and Ocean Accident and Guarantee Corporation, In re*, 70 L. J. K.B. 762; [1901] 2 K.B. 792; 85 L. T. 94; 49 W. R. 669; 9 Asp. M.C. 217—D.

— **Sums Paid by Assured "in respect of injury to such other ship or vessel"**—**Expenses of Removal of Wreck of other Vessel.**—A collision clause in a policy of marine insurance provided that if the ship assured should come into collision with any other ship or vessel, and the assured should in consequence be found liable to pay and should pay any sums "in respect of injury to such other ship or vessel, or to the goods and effects on board thereof, or for loss of freight then being earned by such other ship or vessel," the underwriters would pay the assured a proportion of such sums; but the agreement was not to extend to any sums the assured might become liable to pay in respect of loss of life or personal injury to individuals from any cause whatever. The ship assured came into collision with a tug, which thereby became a wreck. The wreck was removed by conservancy commissioners under statutory powers, and the owners of the tug recovered from the assured the expenses of the removal which they had been compelled to pay to the commissioners:—*Held*, that the sum so paid by the assured was not a sum paid "in respect of injury to such other ship or vessel itself" within the meaning of the collision clause, and that the assured was not entitled to recover it from the underwriters of the policy. *Buryer v. Indemnity Mutual Marine Assurance Co.*, 69 L. J. Q.B. 838; [1900] 2 Q.B. 348; 82 L. T. 831; 48 W. R. 613; 5 Com. Cas. 315; 9 Asp. M.C. 85—C.A.

— **Exemption in Respect of Moneys Paid "for removal of obstructions under statutory powers."**—A marine policy contained a clause by which

the underwriters, in the event of the vessel insured coming into collision with any other vessel, and the assured having to pay damages in respect of that collision, became liable for three-fourths of the sum so paid as damages, as also for a like proportion of costs of any proceedings to limit the assured's liability, "provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision." While the vessel insured was proceeding up the Clyde it ran upon a steamship, the *Hermia*, which was sunk in the river, and was at the time the subject of salvage operations by a salvage company under contract with the Clyde Navigation Trustees, who were exercising their statutory powers in removing the *Hermia*. In consequence of this collision various claims were made against the assured, who admitted liability, and took proceedings to limit same. Eventually by agreement the following sums were found to be payable by the assured in consequence of the collision: 2,350*l.* to the salvage company for increased expenses of raising the *Hermia*; 220*l.* to the salvage company for damage to buildings and trunkways on the *Hermia*; 1,008*l.* to the *Hermia* and Clyde Trustees (who had a lien upon the vessel for the costs of removing her from the navigation) for depreciation in the value of the *Hermia*.—*Held*, that the underwriters were liable for their proportion of three-fourths of 1,008*l.* and 220*l.* and of the costs of the limitation proceedings, but not in respect of the 2,350*l.*, which came within the proviso of the collision clause. *Chapman v. Fisher*, 20 T. L. R. 319—Walton, J.

— **River Insurance—Policy—Construction—Loss in Consequence of Detention during Repairs—Whether Recoverable under Policy.**—Where a river insurance policy provides that "if . . . the insured shall sustain or become liable to others for loss or damage by reason of the collision of any vessel of the insured . . . with any other vessel or with any buoy, mooring, . . . wharf, or any other similar structure, . . . the" insurer "shall, subject as herein mentioned, pay or make good to the insured such loss or damage and indemnify him against such liability, . . ." but that "this policy shall not extend to, nor cover . . . loss or damage which the insured may sustain or be liable to others for . . . in respect of the cargo or engagements of the insured's vessel," the insured cannot recover under the policy a loss in consequence of detention of his vessel, which has been damaged by a collision, during repairs. The loss intended to be recovered is the actual detriment to the vessel itself. The loss by detention is not, under the fundamental principle of insurance, a loss proximate to the injury sustained; it is a consequence of the repairs rather than the collision. *Shelbourne v. Law Investment Corporation*, 67 L. J. Q.B. 944; [1898] 2 Q.B. 626; 79 L. T. 278; 8 Asp. M.C. 445—Kennedy, J.

— **Exemption—Removal of Obstructions.**—A proviso to a collision clause in a policy of marine insurance that no liability is to attach to the underwriters in respect of "any sum

which the assured may become liable to pay, or shall pay, for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury," exempts the insurer from liability whether the amount so payable be payable to the local authority invested with such powers, or to the owners of the other vessel in collision. *The North Britain* (63 L. J. P. 33; [1894] P. 77) approved. *The Engineer*, 67 L. J. P. 61; [1898] A.C. 382; 78 L. T. 478; 46 W. R. 530; 8 Asp. M.C. 401—H.L. (E.)

War Risks—Policy Covering—Capture of Ship—Abandonment by Owners—Action against Underwriters for Total Loss—Restoration of Ship after Writ Issued, but before Trial.—The abandonment, as a total loss, of a ship insured against war risks, which has been captured, is not defeated by the restoration of the ship at a date subsequent to the commencement of an action for total loss on the policy by the ship-owners against the underwriters. *Ruys v. Royal Exchange Assurance Corporation*, 66 L. J. Q.B. 534; [1897] 2 Q.B. 135; 77 L. T. 23; 8 Asp. M.C. 294—Collins, J.

— **Partial Restitution of Commandeered Gold—Diminution of Loss—Interest.**—Gold of the defendants (mine-owners), which had been insured by the plaintiffs (underwriters), was commandeered by the South African Government shortly before the declaration of war. The defendants having asked for a return of part of the gold, the South African Government paid them a sum of money in respect of it, on the understanding that the defendants' mine would be kept open, and that 50 per cent. of the gold won would be handed to the South African Government. The plaintiffs, having paid as for a total loss, claimed the sum received by the defendants from the South African Government.—*Held*, that the sum received by the defendants from the South African Government was a payment in diminution of the loss which the plaintiffs were entitled to recover, but that the defendants were not trustees for the plaintiffs, nor liable to pay interest on the amount while it had remained in their hands. *Randul v. Cockran* (1 Ves. sen. 98) and *Burnand v. Rodocanachi* (51 L. J. Q.B. 548; 7 App. Cas. 333) explained and distinguished. *Stearns v. Village Main Reef Gold-Mining Co.*, 10 Com. Cas. 89; 21 T. L. R. 236—C.A.

(c) *Warranty.*

Seaworthiness, of—Voyage Policy—Insufficiency of Coal—Ship's Fittings, Spars, and Cargo used for Fuel—Liability of Underwriters.—The appellants insured their steamship with the respondents for a round voyage to any port in the United Kingdom or Continent between Bordeaux and Hamburg, and while there and thence to any port and place on the west coast of South America, with leave to call at any port and place for all purposes, and any port or place on the east coast of South America. The insurance included general average. During the voyage the ship called at Monte Video, and through the negligence of the master sailed thence without sufficient coal to enable her to

reach St. Vincent, her next stage and coaling-place. To enable her to reach St. Vincent the master burnt as fuel some of the ship's spars and fittings and portions of the cargo, and if this had not been done she would have been in danger of being totally lost. In an action by the appellants on the policy to recover in respect of the spars, fittings, and cargo,—*Held*, that there was an implied warranty of seaworthiness on the part of the appellants which, according to the law laid down in *The Vortigern* (68 L. J. P. 49; [1899] P. 140), was broken when the ship left Monte Video without sufficient coal to enable her to reach her next stage, and that the appellants were not entitled to recover. *Greenock Steamship Co. v. Maritime Insurance Co.*, 72 L. J. K.B. 868; [1903] 2 K.B. 657; 89 L. T. 200; 52 W. R. 186; 9 Com. Cas. 41; 9 Asp. M.C. 463—C.A.

Implied Warranty—Policy on Cargo—Cattle Ship—Seaworthiness—Ventilation—Attendance on Cattle—Certificate of Fitness of Appliances by Lloyd's Agent's Surveyor.—An implied warranty of seaworthiness in a policy on cargo may be defined as a condition that the ship shall be fit for the proposed service—fit, that is, in respect of all those things which appertain to the safe carriage of the cargo in question to its destination. Insufficient ventilation of a cattle ship and an insufficient supply of men to attend the cattle on board constitute a breach of the implied condition of seaworthiness; and a stipulation in the policy that "the fittings and condition of the cattle to be approved by Lloyd's agent's surveyor" does not exclude the implied warranty. *Sleigh v. Tyser*, 69 L. J. Q.B. 626; [1900] 2 Q.B. 333; 82 L. T. 804; 5 Com. Cas. 271—Bigham, J.

Presumption of Unseaworthiness—Loss of Ship from Unknown Cause—Rebutting Evidence.—The presumption of unseaworthiness in the case of the loss of a ship soon after leaving port, of which the insured cannot prove the cause, is rebutted when the balance of evidence is that she was neither overloaded nor top-heavy when she left port, and that the loss was attributable rather to mistakes of management after she started than to unseaworthiness when she left port. *Pickup v. Thames and Mersey Marine Insurance Co.* (47 L. J. Q.B. 749; 3 Q.B. D. 594) approved. *Ajum Goolam Hossen & Co. v. Union Marine Insurance Co.*, 70 L. J. P.C. 34; [1901] A.C. 362; 84 L. T. 366; 9 Asp. M.C. 167—P.C.

A ship ought not to be treated as unseaworthy by reason of something objectionable but easily curable by those on board. *Ib.*

"Free from capture, seizure, and detention"—Gold in Transit—Gold Lawfully Requisitioned by Government on the Eve of War—Liability of Insurers.—Gold consigned to Europe by a company registered under the laws of the late South African Republic was on the eve of war requisitioned within the territory of the Republic by the Government. No resistance was made, and a receipt was given. The gold was insured under a policy which contained a clause, "Warranted free of capture, seizure, and detention, and the consequences thereof":—*Held*, that the gold was "seized" within the meaning

of the warranty, and that the insurers were not liable. *Robinson Gold-Mining Co. v. Alliance Marine and General Assurance Co.*, 73 L. J. K.B. 898; [1904] A. C. 359; 91 L. T. 202; 53 W. R. 160; 9 Com. Cas. 301; 20 T. L. R. 645; —H.L. (E.)

"Warranted free from capture, seizure and detention, and the consequences of hostilities"—Capture of Vessel—Subsequent Loss by Shipwreck—Condemnation in Prize Court—Relation Back to Capture.—The mere capture of a vessel does not divest the owner of his property therein; it, however, entitles him, if it is insured, to give notice of abandonment to the underwriters. But when the vessel is condemned in a Prize Court the effect of that decision is to pass the property in it to the captors as from the date of the capture. *Andersen v. Marten*, 76 L. J. K.B. 674; [1907] 2 K.B. 248; 97 L. T. 375; 12 Com. Cas. 309; 23 T. L. R. 534—Channell, J. Affirmed, *Andersen v. Marten*, [1908] 1 K.B. 601; 98 L. J. 146—C.A.

By a time policy the disbursements in respect of a steamship were insured against total loss only. Attached to the policy were certain clauses, including, *inter alia*, the following: "Warranted free from capture, seizure and detention, and the consequences of hostilities." The vessel was captured by the Japanese during the Russo-Japanese war, and a prize crew put on board. At the time of her capture she was damaged, and was then making for a port of refuge. The Japanese directed her captain to proceed in an opposite direction to a port where there was a Prize Court, and while on her way there she encountered heavy seas, and, being run ashore with the view of beaching her, became a total loss. She was subsequently condemned in the Prize Court:—*Held*, that as on condemnation there was a divesting of the assured's property in the vessel as from the date of the capture, there had been a loss by "capture" within the warranty, and therefore that the assured was not entitled to recover on the policy. *Ib.*

Semble, that the loss by shipwreck was not in consequence of hostilities within the meaning of the warranty. *Ib.*

"Not to proceed east of Singapore"—Voyage to a Port East of Singapore—Vessel Lost before Singapore Reached.—A time policy of marine insurance contained the following warranty: "Warranted not to proceed east of Singapore." The vessel was chartered to carry coals from Cardiff to a port east of Singapore. While on her voyage she was wrecked off the Tunis coast and lost:—*Held*, that the loss was covered by the policy, and that at the time of the loss there had been no breach of the warranty. *Simpson Steamship Co. v. Premier Underwriting Association*, 92 L. T. 730; 53 W. R. 512; 10 Com. Cas. 198; 10 Asp. M.C. 127; 21 T. L. R. 485—Bigham, J.

Freight—Loss of—"Claim consequent on loss of time"—Liability of Underwriter.—The plaintiffs effected with the defendants a policy of insurance upon a steamship on her outward voyage from London for freight expected to be earned on her homeward voyage. The policy was "upon freight of frozen meat," and con-

tained the following clause: "Chartered freights and freights are warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise." After the vessel had discharged her outward cargo at the port of discharge a fire occurred on board, which so damaged her refrigerating machinery that she was disabled from carrying a cargo of frozen meat. Materials for the repair of the machinery could not be procured at the port, and must have been brought from England, which would have involved considerable delay:—*Held*, that the delay which would have been necessary in order to repair the refrigerating machinery rendered the earning of freight upon a frozen-meat cargo commercially impossible and that the loss of such freight was therefore "consequent on loss of time" within the words of the warranty. *Turnbull, Martin & Co. v. Hull Underwriters Association*, 69 L. J. Q.B. 588; [1900] 2 Q.B. 402; 82 L. T. 818; 5 Com. Cas. 248; 9 Asp. M.C. 93—Mathew, J.

Wool—Carriage of from Import Ship to Bradford—Contract Customary in the Wool Trade.—The contract of carriage customary in the trade for the carriage of wool from import ship in London to Bradford via Goole is one by which the carrier undertakes to deliver the wool in as good condition as he receives it, the act of God and the King's enemies excepted. *France, Fenwick & Co. v. Mannheim Insurance Co.*, 10 Com. Cas. 242—Channell, J.

(d) Repairs.

Ship Docked for Underwriter's Repairs—Survey while in Dock for Re-classification at Lloyd's—Expenses of Taking Ship into and out of Dock—Dock Dues—Apportionment.—Where a ship has been placed in dock for the purpose of repairs for which the underwriters are liable, and while she is in dock the owner takes advantage of the opportunity to have her surveyed for re-classification at Lloyd's, the owner cannot be called upon to bear part of the expense involved in the docking of the vessel and keeping her there while the repairs are being executed. *Marine Insurance Co. v. China Transpacific Co.* (56 L. J. Q.B. 100; 11 App. Cas. 573) distinguished. *Ruabon Steamship Co. v. London Assurance*, 69 L. J. Q.B. 86; [1900] A.C. 6; 81 L. T. 585; 48 W. R. 225; 9 Asp. M.C. 2; 5 Com. Cas. 71—H.L. (E.)

Damage Repairs at Foreign Port—Cost of Sending Owners' Surveyor from United Kingdom—English Bankers' Charges for Transmitting Money and for Overdraft to Pay Repairs Bill—Right of Shipowner to Claim Reinstatement of Damaged Parts of Ship.—A British steamship, having been damaged in New Zealand, was repaired at Melbourne at a cost of 4,000*l.* The owners claimed as part of the particular average loss from the underwriters the cost (about 750*l.*) of sending out a surveyor to represent their interests from the United Kingdom, the underwriters having refused in the first instance to agree to such a course. The shipowners further claimed to recover their bankers' charges for an overdraft which they had to obtain to send money to Melbourne to pay the repairs bill; and they also claimed the cost of reinstating certain damaged parts

of the vessel, instead of repairing in a less expensive but more unsightly form:—*Held*, first, that, though the shipowner is entitled to have at the expense of the underwriters a surveyor to represent him in carrying out repairs, the question whether a surveyor can be sent from the United Kingdom to a foreign port by the shipowner for the purpose must depend on the extent and nature of the repairs and the possibility of getting competent surveyors at or near the foreign port; secondly, that, under the circumstances, the shipowner was entitled to the bankers' charges for the overdraft; thirdly, that he was entitled to have his ship repaired with materials and workmanship corresponding to the original work. *Agenorina Steamship Co. v. Merchants Marine Insurance Co.*, 8 Com. Cas. 212—Kennedy, J.

Loss of Freight—"Claim consequent on loss of time"—Liability of Underwriter.—The plaintiffs effected with the defendants a policy of insurance upon a steamship on her outward voyage from London for freight expected to be earned on her homeward voyage. The policy was "upon freight of frozen meat," and contained the following clause: "Chartered freights and freights are warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise." After the vessel had discharged her outward cargo at the port of discharge a fire occurred on board, which so damaged her refrigerating machinery that she was disabled from carrying a cargo of frozen meat. Materials for the repair of the machinery could not be procured at the port, and must have been brought from England, which would have involved considerable delay:—*Held*, that the delay which would have been necessary in order to repair the refrigerating machinery rendered the earning of freight upon a frozen-meat cargo commercially impossible, and that the loss of such freight was therefore "consequent on loss of time" within the words of the warranty. *Turnbull, Martin & Co. v. Hull Underwriters Association*, 69 L. J. Q.B. 588; [1900] 2 Q.B. 402—Mathew, J.

(e) Premiums.

Express Promise by Assured to Pay—Liability of Broker—Custom.—The rule of law based upon the recognised custom in the ordinary course of business of marine insurance, by which the broker and not the assured is held liable to the underwriter for payment of the premiums upon a policy of marine insurance, is not rendered inapplicable by the fact that the policy contains an express promise by the assured to pay the premiums to the underwriter. *Universo Insurance Co. of Milan v. Merchants Marine Insurance Co.*, 66 L. J. Q.B. 564; [1897] 2 Q.B. 98; 76 L. T. 748; 45 W. R. 625; 8 Asp. M.C. 279—C.A.

"The whole currency of this policy"—Return of Premium.—A policy on the plaintiffs' ship from March 18, 1899, to March 13, 1900, provided for the return of a part of the premium, "should the vessel be employed in the Eastern trade during the whole currency of this policy." The ship was employed in the Eastern trade from March 13, 1899, until July 23, 1899, when

she was lost:—*Held*, that the ship had been employed in the Eastern trade during the whole currency of the policy, and that the plaintiffs were entitled to have the part of the premium returned to them. *Gorsedd Steamship Co. v. Forbes*, 5 Com. Cas. 413—Bigham, J.

Return of—Transfer of Ship to “new management”—**Ship Carrying Contraband of War—Seizure by Belligerent—Condemnation by Prize Court.**—A time policy on ship contained a clause that “should the vessel be sold or transferred to new management, then unless the underwriters agree in writing to such sale or transfer this, policy shall thereupon become cancelled from date of sale or transfer unless the vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, in either of which cases such cancellation clause shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A *pro rata* daily return of premiums to be made.” The policy contained a warranty free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations. The ship was, during the currency of the policy, seized by the Japanese during the war with Russia while she was on a voyage to Vladivostok with coal, and was taken to a Japanese port, and there condemned by a Prize Court. The shipowner claimed a *pro rata* return of the premium upon the ground that the ship had by her seizure and condemnation been “transferred to new management” within the meaning of the policy:—*Held*, that as there was no evidence of any sale of the ship by the Prize Court there was no transfer to new management, but merely a change of ownership, and that, therefore, the shipowner was not entitled to recover. *Semble*, that even if there had been a sale by the Prize Court the shipowner would not have been entitled to recover. *Pyman v. Marten*, 22 T. L. R. 834—Phillimore, J.

—Cancellation of Policy on Sale or Transfer of Ship to New Management—Condemnation of Ship by Prize Court—Warranty “Free of capture,” &c.]—A time policy containing the clause, “Should the vessel be sold or transferred to new management then, unless the underwriters agree in writing to such sale or transfer, this policy shall thereupon become cancelled from date of sale or transfer. . . . A *pro rata* daily return of premiums to be made.” The policy also contained the usual clause, “free of capture and seizure,” &c. While on a voyage from Port Talbot to Vladivostok, with a cargo of coal, the vessel was captured by the Japanese, taken to Yokosuka, and subsequently condemned by a Prize Court. In an action by the shipowner for a *pro rata* return of premiums, —*Held*, that the ship was not transferred to new management within the meaning of the policy, and that, therefore, the shipowner was not entitled to a *pro rata* return of premiums. *Semble*, the ship was lost by capture, and that the “free of capture” &c. warranty applied. *Pyman v. Marten*, 13 Com. Cas. 64—C.A.

Insurance Premiums—Action in Rem—Necessaries.]—See SHIPPING.

(4) GENERAL AVERAGE.

Time Charter—Sub-charter—Loss of Hire under Time Charter during Time Ship under Repair owing to General Average Sacrifice—Contribution.]—By a time charter it was provided that in the event of loss of time from damage preventing the working of the vessel for more than twenty-four hours, the payment of hire should cease until she should be again in an efficient state to resume her service. Whilst loading a cargo of coals under a sub-charter, a fire broke out on board the ship, and certain refrigerating machinery with which she was fitted was damaged by water used to extinguish it, necessitating repairs which occupied thirty-one days. In an action brought by the shipowners against underwriters to recover a general average contribution in respect of the loss of hire during the time the damage by water was being repaired,—*Held*, that such contribution could not be recovered. *The Leitrim*, 71 L. J. P. 108; [1902] P. 256; 87 L. T. 240; 51 W. R. 158; 9 Asp. M.C. 317; 8 Com. Cas. 6—Goroll Barnes, J.

Loss through Negligence of Master, &c.]—Where a steamship started upon a stage of a round voyage with insufficient coal, and a portion of her fittings, spars, and cargo had consequently to be used for fuel,—*Held*, that the underwriters were not liable under a clause in the policy that “this insurance also to cover loss through the negligence of master, mariners, engineers, or pilots,” inasmuch as the loss was not due to any negligent act, but to the voluntary act of those engaged in the navigation of the ship. *Held*, also, that under a clause “Hold covered in case of any breach of warranty . . . at a premium to be hereafter arranged,” there had been a general average loss for which the underwriters would have been liable, but that as the additional premium they would have been entitled to charge would have been at least equal to the loss claimed, the shipowners were not entitled to recover. *Greenock Steamship Co. v. Maritime Insurance Co.*, 72 L. J. K.B. 59; [1903] 1 K.B. 367; 88 L. T. 207; 51 W. R. 447; 8 Com. Cas. 78; 9 Asp. M.C. 364—Bigham, J. See s.c. in C.A., *supra*, col. 1057.

Charterparty to Proceed to Port for Cargo—Freight Payable on Delivery at Port of Destination—Sacrifice by Ship on Way to Port of Loading—Liability of Freight to Contribute.]—A vessel was chartered to proceed from Fleetwood to Savannah and there load for the charterers a cargo which she was to deliver at a specified port of discharge on being paid freight. On the voyage to Savannah the ship grounded, and in getting off sustained injuries which constituted a general average loss. The injuries were repaired, and the vessel duly loaded the cargo under the charterparty and earned the chartered freight. In an action by shipowners against underwriters on ship to recover the loss sustained,—*Held*, that the chartered freight was liable to contribute to the general average loss. *Williams v. London Assurance Co.* (1 M. & S. 318) approved. *Carisbrook Steamship Co. v. London and Provincial Marine and General Insurance Co.*, 71 L. J. K.B. 978; [1902] 2 K.B. 681; 87 L. T. 418; 50 W. R. 691; 7 Com. Cas. 235; 9 Asp. M.C. 332—C.A.

Ship and Cargo belonging to Same Owner.]—Where there has been a general average sacrifice, the assured is not precluded from recovering upon a policy against general average losses due to perils of the sea by reason of the fact that he is owner of both ship and cargo, and that there can therefore be no contribution as between the two interests. *The Brigella* (62 L. J. P. 81; [1893] P. 189) disapproved of *Montgomery v. Indemnity Mutual Marine Assurance Co.*, 71 L. J. K.B. 467; [1902] 1 K.B. 734; 86 L. T. 462; 50 W. R. 440; 9 Asp. M.C. 289; 7 Com. Cas. 120—C.A.

Average Bond—Average Statement—Place of Adjustment.]—The parties to an average bond agreed to pay their proper and respective proportions of any general average charges to which they might be liable, and forthwith to furnish to the captain or owners of the ship a correct account and particular of the value of the goods delivered to them respectively, in order that any such general average charges might be ascertained and adjusted in the usual manner:—*Held*, that there was no implied condition to employ an average stater residing at the port of discharge. *Wavertree Sailing Ship Co. v. Love*, 66 L. J. P.C. 77; [1897] A.C. 373; 76 L. T. 576; 8 Asp. M.C. 276—P.C.

There is no obligation on shipowners to employ an average stater at all for the adjustment of liabilities. *Simonds v. White* (2 L. J. (o.s.) K.B. 159; 2 B. & C. 805) explained. *Ib.*

Value of Ship in Policy—Assessment of Salvage and General Average on Greater Value—Liability of Underwriters.]—Where there is a valued policy, and a general average loss is sustained and salvage services rendered to the ship, and the ship is valued in the salvage action at a higher sum than the value assigned in the policy, the shipowners are only entitled to recover from the underwriters the proportion of the amount due from the ship for general average and salvage represented by the ratio of the policy value to the value in the action. *Balmoral Steamship Co. v. Marten*, 71 L. J. K.B. 819; [1902] A.C. 511; 87 L. T. 247; 51 W. R. 173; 7 Com. Cas. 292—H.L. (E.)

"General average payable according to foreign statement"—Foreign Law—Special Contract—Charterparty.]—A policy of insurance upon a ship contained a stipulation that general average should be payable "according to foreign statement, if so made up, or York-Antwerp Rules if in accordance with contract of affreightment." The vessel was chartered under a charterparty containing a clause that "In case of average the same to be settled according to York-Antwerp Rules 1890 excepting that jettison of deck cargo (and the freight thereon) for the common safety shall be allowable as general average." In the course of the voyage it became necessary for the common safety to jettison part of a deck load which the vessel was carrying. An average statement was afterwards prepared at Antwerp which included the deck cargo jettisoned and its freight as general average. By the Belgian law, apart from special agreement, the jettison of deck cargo is not the subject of general average; but the Belgian law expressly recognises the terms of special agreements between the parties as to what

shall be the subject of general average:—*Held*, that the underwriters were bound by the statement, and were liable to indemnify the shipowner on the footing that the items in question were the subject of general average. *De Hart v. Compania Anonima de Seguros "Aurora,"* 72 L. J. K.B. 818; [1903] 2 K.B. 503; 89 L. T. 154; 52 W. R. 36; 8 Com. Cas. 314; 9 Asp. M.C. 454—C.A.

Per ROMER, L.J.—The case would have been otherwise if the statement had not been made up in good faith; and, *semble*, if the contract of affreightment had imported terms as to general average of a special and unusual character which could not reasonably have been contemplated by the parties to the policy of insurance. *Ib.*

And see SHIPPING.

(5) TOTAL, CONSTRUCTIVE, AND PARTIAL LOSS.

Total Loss—Valued Policy on Ship—Sum Insured Less than Stated Value—Ship Sunk by Negligence of another Ship—Division of Amount Recovered from Ship in Fault.]—A ship was insured for 1,000*l.*, her value being stated in the policy as 1,350*l.* During the currency of the policy the ship was sunk by the fault of another ship, and the insurers paid the assured 1,000*l.* Subsequently the insurers brought an action against the ship in default, and, liability being admitted, the claim was referred to the registrar, who assessed the value of the insured ship at 1,000*l.* This sum was paid into Court. The owners of the insured ship contended that, as they were their own insurers for 350*l.*, they were entitled to 350-1,350 of the 1,000*l.*:—*Held*, that this contention was correct. *The Welsh Girl*, 22 T. L. R. 475—Bargrave Deane, J.

— Perils of the Sea—Notice of Abandonment.]—The plaintiff effected a policy of insurance with the defendants in the sum of 240*l.*, on a cargo of potatoes to be carried by sea from Annalong in county Down to Southampton, such insurance to be free from particular average. The loading, which commenced on January 27, 1897, was completed on February 11, 1897. There was evidence that the cargo would sprout if kept in the hold for three weeks, even though unwet. From adverse weather, the vessel carrying the cargo had to put in to several intermediate ports. At St. Tudwell's Roads, which she reached on March 11, she met a gale, which caused her to ship water. The vessel arriving at Pwllheli, North Wales, on March 18, the cargo was examined and found to be sprouting and heated. The ship, from the storm, required some repairs, which could have been executed in a short time; and the defendants requested the captain to proceed with the voyage, which he refused to do. A negotiation took place for the sale of the cargo, but this the Court held did not constitute an admission of liability for a total loss. Offers of 100*l.* and 110*l.* were made for the cargo and refused. Ultimately the captain, who claimed to retain the cargo against freight, sold the potatoes at Pwllheli for 55*l.*, the purchaser making a large profit on re-sale. Formal notice of abandonment was given after the sale, but it was admitted that such notice was

too late:—*Held*, first, that the damage to the potatoes was not exclusively and proximately caused by perils of the sea; secondly, that even if the damage was so caused there was no evidence of a total loss, actual or constructive; and thirdly, that even if the potatoes if carried to Southampton would have been a total loss, notice of abandonment under the circumstances was necessary. *Roux v. Salvador* (3 Bing. N.C. 266) distinguished. *Cunningham v. Maritime Insurance Co.*, [1899] 2 Ir. R. 257—Q.B. D.

Ship Sunk, Raised, and Repaired—Notice of Abandonment—Expenditure by Underwriters after Notice—Total or Partial Loss.—The appellants' ship was sunk, and they gave notice of abandonment to the underwriters, which the latter refused to accept. The underwriters themselves then raised and repaired the ship, and claimed thereby to have converted a total into a partial loss:—*Held*, that the owners were entitled to recover as for a total loss. *The Blairmore*, 67 L. J. P.C. 96; [1898] A.C. 593; 79 L. T. 217; 8 Asp. M.C. 429—H.L. (Sc.)

By LORD WATSON.—The rule of law applicable to contracts is that neither of the parties can by his own act or default defeat the obligations which he has undertaken to fulfil, or escape those obligations by offering to the other party an indemnity which is not that which the other party contracted to accept. *Ib.*

The proper test for ascertaining whether or not a ship has become a constructive total loss is the same in Scotch as in English law. To establish such a loss it must be shewn that a shipowner of ordinary prudence and uninsured would not have gone to the expense of raising and repairing the vessel, because her market value when raised and repaired would probably be less than the cost of restoration. *Ib.*

Differences between the admiral's jurisdiction in England and Scotland explained by LORD WATSON. *Ib.*

"Advances"—Security of Freight—Average Loss or Total Loss.—The plaintiffs advanced money for disbursements to the captain of an Italian ship at Pensacola, and took from him a document reading: "Ten days after arrival at . . . Southampton . . . I promise to pay 700l., . . . for the payment of which I hereby pledge my vessel and freight, and my consignees at port of destination are hereby directed to pay [this] amount from . . . freight received." The plaintiffs effected an insurance with the defendants upon "advances valued at 775l." from Pensacola to Southampton, and expressed to be "free of all average." Through perils of the seas the ship became a total loss at the Azores, but cargo was salvaged, upon which the master received 700l. distance freight:—*Held*, that the plaintiffs could not recover a total loss under the policy. *Price v. Maritime Insurance Co.*, 5 Com. Cas. 332—Bigham, J.

Constructive Total Loss—Valuation Clause—Insured to be taken as Repaired Value—Vessel becoming Constructive Total Loss on Basis of Actual though not of Insured Value—Payment by Insurer—Liability of Re-insurer.—By a policy of marine insurance the plaintiffs insured the owners of a vessel

against all risks thereon for twelve months, the policy containing a valuation clause and a clause that the insured value should be taken as the repaired value in ascertaining whether the vessel was a constructive total loss. By a policy of re-insurance the defendants re-insured the plaintiffs in respect of the vessel "against the risk of total and (or) constructive total loss only . . . being a re-insurance applying to policy or policies and to pay as may be paid thereon," the policy containing a valuation clause similar as regards the sum specified to that in the original policy. The above-mentioned clause as to the mode of ascertaining a constructive total loss had been printed on this policy, but was struck out by a line drawn through it. During the period covered by the policies the vessel ran ashore and became, on the basis of her actual repaired value, though not on the basis of her insured value, a constructive total loss. The plaintiffs having paid the shipowners for such a loss, brought an action against the defendants on the re-insurance policy:—*Held*, that they could not recover, inasmuch as the only constructive total loss for which the defendants had undertaken liability by the re-insurance policy was that for which the plaintiffs had undertaken liability by the original policy—that, namely, which arose when the repaired value was taken as the insured value—and the plaintiffs had never themselves become liable for such a constructive total loss. *Marten v. Steamship Owners' Underwriting Association*, 71 L. J. K.B. 718; 87 L. T. 208; 50 W. R. 587; 7 Com. Cas. 195; 9 Asp. M.C. 339—Bigham, J.

— "If stranded for six months and during such period it has been found impracticable to save" the ship.]—A rule of a marine insurance company provided that if any ship insured in the company had been stranded and remained in such position for a period of six months, and during such period it had been found impracticable to save her, the ship should be held to be a constructive total loss, and the insured member might abandon her. A vessel insured under a policy, which incorporated the above rule, was stranded, and remained stranded for more than six months, during which time she was not saved, but it was admitted that it would be practicable to save the vessel at a future date:—*Held*, that the vessel, not having been saved within the six months, was a constructive total loss. *Rowland and Marwood's Steamship Co. v. Maritime Insurance Co.*, 6 Com. Cas. 160—Bigham, J.

— **Vessel Stranded—Right of Owner to Abandon—Cost of Repair—Value of Damaged Vessel.**—A vessel valued at 23,000l. was insured by a policy of marine insurance against risks which included perils of the sea, the insured value to be taken as the "repaired value" in ascertaining whether the vessel was a constructive total loss. The vessel while covered by the policy was driven on to rocks. Notice of abandonment was given by the assured, but the underwriters declined to accept it. The ship was floated by persons employed with the consent and for the benefit of all concerned, and was temporarily repaired and brought to England. In an action on the policy the assured claimed to recover as for a constructive total loss. The vessel was not permanently repaired at the time of trial, but the Judge found that

about 22,359*l.* was the proper amount to fix as the total cost of repair, and held that there was not a constructive total loss;—*Held* (VAUGHAN WILLIAMS, L.J., *dubitante*), that, in determining the question whether he had a right to abandon the vessel as a constructive total loss, the assured was not entitled to add the damaged value of the vessel to the cost of repair. *Dictum* of the COURT OF EXCHEQUER CHAMBER in *Young v. Turing* (2 Man. & G. 593) disapproved. *Angel v. Merchants' Marine Insurance Co.*, 72 L. J. K.B. 498; [1903] 1 K.B. 811; 88 L. T. 717; 51 W. R. 530; 8 Com. Cas. 179; 9 Asp. M.C. 406—C.A.

— **Policy on Cattle—Prohibition on Landing** —“**Restraints of princes and people**”—**Slaughter of Cattle at Sea—Notice of Abandonment—Inability to Land Cattle at any other Port.**—Cattle were insured on a voyage from Liverpool to Buenos Ayres against the usual marine risks, including restraints of princes and people, and also against all risks of mortality and injury from any cause whatever. On arrival at Buenos Ayres the cattle were not allowed to be landed by order of the Argentine Government on account of certain other cattle on board suffering from cattle disease. The cattle insured were taken to sea and slaughtered, and in doing so the assured acted as a prudent uninsured owner would have done. No notice of abandonment was given to the underwriters;—*Held*, that as in the circumstances it was not impossible that the difficulty of landing the cattle might have been got over, the loss was not an absolute one, but was a constructive total loss, and the underwriters were not liable for the loss in the absence of a notice of abandonment. *Mansell v. Hoade*, 20 T. L. R. 150—Walton, J.

— **Ship and Cargo—Abandonment of Voyage** —**Notice to Underwriters.**—Notice of abandonment of freight need not be given to underwriters if the circumstances are such that the underwriters could do nothing if such notice were given to them. *Trinder, Anderson & Co. v. Thames and Mersey Marine Insurance Co.*, 67 L. J. Q.B. 666; [1898] 2 Q.B. 114; 78 L. T. 485; 46 W. R. 561; 8 Asp. M.C. 373—C.A.

Loss by Stranding—Proximate Cause, Perils of the Seas—Remoter Cause, Negligence of Assured —**Liability of Underwriters.**—Where a loss by stranding has been proximately caused by perils of the seas, the circumstance that it was remotely occasioned by the negligence of the assured in navigating the ship is no defence to a claim by the assured against underwriters upon a policy covering loss by perils of the seas. *Id.*

— **Sue and Labour Clause—Claim by Underwriters for Work and Labour Done, or as Salvors.**—A vessel was insured against total and (or) constructive total loss only, and the policy contained the sue and labour clause. During the continuance of the policy the vessel was stranded and the crew left her. Before the insurer's representatives arrived to take charge of the vessel considerable damage was done by looting. The insurers, through a contractor on the “no cure no pay” system, raised the vessel and brought her into port. The insurers claimed for an award as salvors or for an amount for work and labour done;—*Held*, that there was no constructive total loss, and that the under-

writers were not entitled to an award as salvors, and that there was no common-law right to recover. *The Pickwick* (16 Jur. 669) distinguished. *Crouan v. Stanier*, [1904] 1 K.B. 87; 52 W. R. 75; 9 Com. Cas. 27—Kennedy, J.

— **Notice of Abandonment—Policy of Re-insurance**—“**To pay as may be paid thereon**”—“**No salvage charges**”—**Suing and Labouring Charges.**—The owners of a ship insured her with the plaintiffs for a voyage. The policy covered partial as well as total loss. The plaintiffs effected a policy of re-insurance with the defendant against total or constructive total loss only. The policy was on the ordinary Lloyd's form, but written on its face were the following clauses: “Being a re-insurance subject to the same clauses and conditions as the original policy and to pay as may be paid thereon,” and “No claim to attach to this policy for salvage charges.” While on the insured voyage the ship stranded and sustained damage. The probable cost of getting her to a repairing port and making good the damage exceeded the value of the vessel as fixed in the original policy. The shipowners, however, gave no notice of abandonment, but elected to keep the vessel and claim for a partial loss, and the plaintiffs paid them in all 107 per cent. on the original policy, made up of a large partial loss and a sum for suing and labouring. The plaintiffs having sued the defendant to recover the whole amount insured by the re-insurance policy as for a constructive total loss,—*Held*, that notice of abandonment was a necessary preliminary to a claim for a constructive total loss, and that, there having been no such notice, the plaintiffs were not liable to pay the shipowners as for a constructive total loss, and that the fact that they had paid them 107 per cent. did not entitle them to recover against the defendants as for a constructive total loss, notwithstanding the clause “to pay as may be paid thereon.” *Held*, further, that the clause that no claim was to attach for salvage charges relieved the defendant from the obligation to contribute to the suing and labouring charges notwithstanding that the usual printed clause in the policy had not been struck out. *Western Assurance Co. of Toronto v. Poole*, 72 L. J. K.B. 195; [1903] 1 K.B. 376; 88 L. T. 362; 8 Com. Cas. 108; 9 Asp. M.C. 390—Bigham, J.

— **Value of Wreck.**—In an action on a policy of marine insurance on ship, the question being whether or not the vessel was a constructive total loss, evidence as to the value of the wreck was tendered;—*Held*, that the evidence was admissible. *Beaver Line Associated Steamers v. London and Provincial Marine and General Insurance Co.*, 5 Com. Cas. 269—Phillimore, J.

Policy against Total or Constructive Total Loss Only—Sue and Labour Clause—Salvage Services Rendered by Underwriters—Right of Underwriters to Recover against Owners.—By a policy of marine insurance a ship was insured against the risk of total or constructive total loss only, and it was provided that the owner, his factors, servants, and assigns, might sue and labour for the defence, safeguard, and recovery of the ship. The ship stranded, and the owner gave notice of abandonment. She was afterwards floated and brought into port by a firm

of ship-repairers, who were employed and paid by the underwriters. It was eventually found that she was not a constructive total loss:—*Held*, that the underwriters could not recover from the owner the expenses incurred by them either on a claim for work and labour, inasmuch as they were themselves liable for these expenses under the sue and labour clause, or as salvage, for the same reason, and also because they had themselves an interest in the safety of the ship. *The Pickwick* (16 Jur. 669) distinguished. *Crouan v. Stanier*, 73 L. J. K.B. 102; [1904] 1 K.B. 87; 52 W. R. 75; 9 Com. Cas. 27—Kennedy, J.

The Insured Value to be taken as the Repaired Value in Ascertaining whether the Vessel is a Constructive Total Loss—Meaning of Repaired Value.—Where a Lloyd's policy of marine insurance contains the clause "the insured value to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss," the words "repaired value" mean the repaired value with reference to the particular vessel. The vessel is not merely to be made seaworthy, nor on the other hand is she to be reconstructed; but, as far as repairs can effect it, she is to be made of the same classification and as nearly as possible the thing which was valued. *North Atlantic Steamship Co. v. Burr*, 9 Com. Cas. 164; 20 T. L. R. 266—Kennedy, J.

Partial Loss—Part Insurance—Assured Suing Lighterman on Behalf of Underwriters—Implied Agreement to Pay Costs—Contribution.—Certain goods, which were partly insured, were damaged whilst in a lighterman's barge. On the ground that the barge was unfit, it was suggested that the lighterman should be sued. The underwriters assenting, an action was brought by the assured against the lighterman, which failed. The costs in the unsuccessful action were 48*l.* The insured value of the goods was 184*l.* The average statement gave the sound arrived value as 220*l.*; the damage to the goods as 46*l.*; and certain charges in the nature of suing and labelling expenses as about 30*l.* In an action to recover the whole of the costs of the unsuccessful action,—*Held*, that the action was brought in the interests of both the assured and underwriters; that there was no rule of law which settled the question as to who should pay the costs, nor was there any custom suggested or proved; that the rights of the parties depended on what the agreement was; and that there being no express agreement as to the costs, the inference to be drawn from the circumstances of the case was that to the extent of their respective interests in the litigation the parties agreed tacitly to bear each their share of the costs. The underwriters' interest was $\frac{184}{220}$ ths of the loss (46*l.*), plus the sue and labour charges. *Duus Brown & Co. v. Binning*, 11 Com. Cas. 190; 22 T. L. R. 529—Walton, J.

Chartered Freight—Abandonment of Voyage—Cargo Salvaged and Carried to Port of Delivery—Total Loss of Freight.—A ship was chartered for a voyage from Chittagong with a cargo of jute in bales for delivery at Dundee. The ship, cargo, and chartered freight were insured. When about fifty miles from Dundee the ship went ashore, and the master and crew, in order to save their lives, abandoned her; but it was

not proved that they at that time had no intention of returning. Notices of abandonment were given to underwriters on all three interests, and were all refused in the first instance, but eventually the underwriters on ship and cargo paid a total loss. The underwriters on all three interests instructed the Salvage Association independently to protect their interests, and the association entered into a salvage contract with a salvage company. A large quantity of the jute was salvaged, partly in bulk and partly in bales, and was carried to Dundee, where it was sold on behalf of whom it might concern:—*Held*, first, that upon the facts there was nothing to shew that the shipowners, by any act or omission on their part, prevented the transshipment of the goods and their delivery under the contract of affreightment, inasmuch as the cargo-owners, by their underwriters, dealt with the cargo at a time when the shipowners, without fault of theirs, had not resumed possession or control of the cargo; secondly, that the adventure was determined, if not by the action of the cargo-owners alone, at all events by the common action of all parties interested through their underwriters; thirdly, that the jute having been carried to Dundee under the salvage contract, and not under the charterparty, the chartered freight had not been earned, and the underwriters on chartered freight were liable to pay a total loss without any deduction in respect of actual or possible salvage. *Guthrie v. North China Insurance Co.*, 7 Com. Cas. 130—C.A.

(6) RE-INSURANCE.

On Cargo—Voyage—Unreasonable Delay in Sailing—Material Alteration in Risk.—The plaintiffs insured all shipments of coal by coal-owners for twelve months by cover note at premiums varying with the port of destination and time of year. On July 30, 1900, the coal-owners requested them to insure coals under the open policy per s.s. *Brenttor* on her voyage from Blyth to Lulea. The premiums the plaintiffs were entitled to charge were 12*s.* 9*d.* for August and 15*s.* for September. On August 2 the plaintiffs re-insured at Lloyd's for 1,500*l.* at 6*s.* 8*d.* premium by a slip initialled on that day by underwriters who were under the impression that the ship would sail in a few days, or at least during August. The *Brenttor* did not sail till September 25, and became with her cargo a total loss on October 2. The plaintiffs, having paid the coal-owners for a total loss, claimed payment from the defendant upon a policy of re-insurance issued in pursuance of the cover slip of August 2:—*Held*, that the delay in the date of sailing having materially altered the risk, the underwriters were not liable. *Marine Insurance Co. v. Stearns*, 71 L. J. K.B. 86; [1901] 2 K.B. 912; 50 W. R. 238; 6 Com. Cas. 182—Mathew, J.

"To pay as may be paid thereon"—Third Party—Claim of Indemnity.—An underwriter of a policy of marine insurance effected a re-insurance of the same subject-matter by a policy which contained a clause, "Being a re-insurance subject to the same clauses and conditions as the original policy, and to pay as may be paid thereon." An action having been brought upon the original policy,—*Held*, that the under-

writer was not entitled to bring in the underwriter of the policy of re-insurance as a third party to the action under Order XVI. rule 48. *Nelson v. Empress Assurance Corporation*, 74 L. J. K.B. 699; [1905] 2 K.B. 281; 93 L. T. 62; 53 W. R. 648—C.A.

Time Policy—"Subject to the same clauses and conditions as the original policy"—**Continuation Clause**—"Should the vessel be at sea or abroad on the expiration of this policy"—**Usual Clause**—"Policy for a Period Exceeding Twelve Months—Null and Void."—A policy of re-insurance on a ship, expressed to be for and during the space of twelve months commencing October 18, 1898, and ending October 18, 1899, contained the clause, "being a re-insurance subject to the same clauses and conditions as the original policy, and to pay as may be paid thereon." The original policy was for the same period as the re-insurance policy, and contained the following clause: "Should the vessel be at sea or abroad on the expiration of this policy it is agreed to hold her covered until the arrival at her port of final destination . . . at a *pro rata* daily premium." After October 18, 1899, the ship was lost while on a voyage to her port of final destination. In an action on the re-insurance policy, —*Held*, that the continuation clause in the original policy was a usual clause, and that the re-insurance policy was not invalidated by reason of the non-disclosure of the fact that the original policy contained the clause; but that the re-insurance policy being for a period exceeding twelve months was null and void. *Charlesworth v. Faber*, 5 Com. Cas. 408—Bigham, J.

"Subject to same terms as original policy and to pay as may be paid thereon"—**Substitution of Fresh Policy**—**Liability of Re-insurer**.—A time policy on a ship contained the following clause: "Being a re-insurance of policy or policies" (here followed a blank space) "and subject to the same terms, conditions, and clauses as original policy or policies, whether re-insurance or otherwise, and to pay as may be paid thereon." At the time this policy of re-insurance was effected there were in existence two time policies of insurance on the ship underwritten by the re-assured, in both of which the valuation of the ship was the same as in the policy of re-insurance. During the currency of the policy of re-insurance one of these policies expired and the other was cancelled, and thereupon the re-assured underwrote a new time policy of insurance on the ship, in which the valuation of the ship was less than in the policy of re-insurance. By the time clauses in the different policies the insured value was to be taken as the repaired value in ascertaining whether the ship was a constructive total loss. The ship having become a total loss, the re-assured paid his assured under the new policy as for a total loss.—*Held*, that upon the true construction of the policy of re-insurance, the re-assured was insured only against loss incurred under the two policies in existence at the time the policy of re-insurance was effected, and therefore that the re-insurers were not liable to indemnify him against a loss incurred under the new policy underwritten by him. *Lower Rhine and Wurttemberg Insurance Association v. Sedgwick*, 68 L. J. Q.B. 186; [1899] 1 Q.B. 179; 80 L. T. 6; 47 W. R. 261; 8 Asp. M.C. 466—C.A.

Slip—Admissibility in Evidence.—*Held*, also, that the slip upon which the policy of re-insurance was effected was admissible in evidence to explain the meaning of the expression in the policy "original policy or policies." *Ib.*

"In excess of" 500*l.*—"Each craft to be a separate insurance"—**Loss of Part of Cargo on Barge**—**Interest of Original Insurer Less than 500*l.* in Cargo of Barge, but Greater than 500*l.* in Cargo of Ship**—**Payment by Original Insurer**.—The plaintiffs were liable as insurers under a policy of marine insurance for 1,914*l.* on a cargo of wheat in a specified ship, including risk of craft to and from ship, the policy containing a clause that each craft should be deemed a separate insurance. By a subsequent policy the plaintiffs re-insured themselves with the defendants for "1,000*l.* excess of 500*l.*" upon their interest as insurers, this policy also containing a clause, "each craft to be deemed a separate insurance." At the port of loading a barge of wheat on its way to the ship sank, and part of the wheat was lost. The plaintiffs' interest in the cargo of the barge did not amount to 500*l.* The plaintiffs having paid upwards of 298*l.*, the amount of their liability for the loss under the original policy, claimed from the defendants their proportion under the policy of re-insurance.—*Held*, that the words "excess of 500*l.*" in the re-insurance policy did not imply that the plaintiffs were to become liable to a claim for more than 500*l.*, but only that they should have an interest for more than that sum; and that the words "each craft to be deemed a separate insurance" had reference only to particular average claims and not to a claim under a policy of re-insurance; and consequently that, as the plaintiffs' interest in the whole cargo exceeded 500*l.* they were entitled to recover. *South British Fire and Marine Insurance Co. of New Zealand v. Da Costa*, 75 L. J. K.B. 276; [1906] 1 K.B. 456; 94 L. T. 435; 54 W. R. 420; 11 Com. Cas. 81; 10 Asp. M.C. 227; 22 T. L. R. 305—Bigham, J.

Cotton on Deck—Damaged Cotton.—The plaintiffs, who had insured a cargo of damaged cotton, re-insured the same with the defendant, but did not inform him that it was damaged cotton. The slip contained the terms, "cotton on deck, f. p. a. &c., including jettison and washing overboard." When the policy of re-insurance was tendered to the defendant for signature it differed from the slip, for, instead of the words "f. p. a. and c., &c.," it was "f. p. a. &c., as in original policy," and in that policy the risk was described as "f. p. a., but including risk of jettison and washing overboard"; but he signed it without enquiry or objection. The quantity of cotton insured "on deck" amounted to 7,500*l.*—*Held*, that the instructions being to insure such a quantity "on deck" clearly showed that it was damaged cotton, and that, under the circumstances, there was no concealment; also, that, although an attempt had been made to establish that the course of business was to say that cotton was damaged, no such course of business was established. *British and Foreign Marine Insurance Co. v. Sturge*, 77 L. T. 208; 8 Asp. M.C. 303—Mathew, J.

Payment by Re-insurer—Misrepresentation by Insurance Broker—Damages for Misrepresenta-

tion—Subrogation of Re-insurer to Rights of Insurer—Deduction of Costs of Recovering Money.]

—The defendants re-insured with the plaintiffs certain risks in connection with two vessels. The defendants had given an open cover slip to the insurance brokers with instructions not to insure interests in vessels belonging to a certain firm. These two vessels in fact belonged to that firm, and the risks were accepted by the defendants without the knowledge of that fact. Losses having occurred, the defendants were paid by the plaintiffs on their re-insurance. Subsequently the defendants brought an action claiming certain relief against the insurance brokers, and in the course of that action they discovered the facts in regard to these two vessels; they thereupon amended their claim and eventually recovered judgment for the amount of the insurance money in respect of these two vessels, but failed to obtain the other relief claimed:—*Held*, that as the money was recovered from the insurance brokers by the enforcement of a right which diminished the defendants' loss, the plaintiffs were subrogated to the rights of the defendants, and were entitled to recover the amount they had paid on the re-insurance. *Dictum* of BRETT, L.J., in *Castellain v. Preston* (52 L. J. Q.B. 366, at p. 370; 11 Q.B. D. 380, at p. 388), applied. *Assicurazioni Generali de Trieste v. Empress Assurance Corporation*, 76 L. J. K.B. 980; [1907] 2 K.B. 514; 13 Com. Cas. 37; 97 L. T. 785; 23 T. L. R. 700—Pickford, J.

Held, further, that the defendants were entitled to deduct from the plaintiffs' claim not merely the costs of the issue on which they succeeded in the action against the insurance broker, but whatever costs were properly attributable to the recovery of that money. *Hatch, Mansfield & Co. v. Weingott* (22 T. L. R. 366) followed. *Ib.*

Open Cover Slip—Policy of Sea Insurance—Sum or Sums Insured—Stamp.]—The plaintiffs, a marine insurance company, sued the defendant, an underwriter, on an open cover or slip issued at Lloyd's for the re-insurance of excess of insurance on goods over certain amounts by certain lines of steamships. The sum of 4,000*l.* was specified as being the limit of excess taken on any ship. And the sum of 400*l.* was initialled by the defendant as being his proportion of that limit:—*Held*, that the plaintiffs could not maintain an action on such document; for it was a contract of sea insurance, and therefore was not valid unless it was in the form of a policy; and it was not a valid policy, because it did not specify the sum or sums insured, as required by section 93, sub-section 3 of the Stamp Act, 1891. *Home Marine Insurance Co. v. Smith*, 67 L. J. Q.B. 777; [1898] 2 Q.B. 351; 78 L. T. 734; 46 W. R. 661—C.A.

(7) DISCOVERY.

Affidavit of Ship's Papers—Documents in Joint Possession of Plaintiffs and others.]—In an action on a policy of marine insurance the plaintiffs filed an affidavit of ship's papers, and informed the defendant that in addition to the documents mentioned in the schedule to the affidavit there were certain other material documents which

were the joint property of the plaintiffs and other underwriters, and which, for that reason, would not be produced by the plaintiffs. The defendant applied for an order that the plaintiffs should make a further and better affidavit of ship's papers and that the action should be stayed meanwhile:—*Held*, that the action must be stayed until the plaintiffs had satisfied the Court that they had applied to the other underwriters and had done all in their power to produce the other documents. *London and Provincial Marine and General Insurance Co. v. Chambers*, 5 Com. Cas. 241—Kennedy, J.

— **Sea and Land Transit.]**—By a policy of insurance gold was insured during transport from a mine in the Transvaal, whether in charge of the assured, or their employees, or otherwise, to the railway station in Johannesburg, thence by rail to the coast, and thence by steamer to Europe. The period covered by the risk was from the moment the gold was placed in the safe at the mine until delivery to the addressee. The policy was in the form of an ordinary Lloyd's policy, with certain alterations. In an action on the policy the defendant applied for an order that the plaintiffs should make and file an affidavit of ship's papers:—*Held*, that the defendant was not entitled to an affidavit of ship's papers, but that the plaintiffs must make an affidavit of documents in the ordinary form. *Henderson v. Underwriting and Agency Association* ([1891] 1 Q.B. 557) followed. *Village Main Reef Gold-Mining Co. v. Stearns*, 5 Com. Cas. 246—Kennedy, J.

— **Policy on Inland Transit.]**—An order for filing an affidavit of ship's papers cannot be made in an action brought for a loss under a policy of insurance on the transit of goods where the transit is an inland land transit. It is immaterial that the transit is partly by inland waters. *Schloss v. Stevens*, 10 Com. Cas. 224—C.A.

Action on Policy of Re-insurance.]—Where an underwriter of a policy of marine insurance re-insures and brings an action against the re-insurer on the policy of re-insurance, the re-insurer is entitled to an order for the production upon oath of ship's papers. *China Traders Insurance Co. v. Royal Exchange Assurance Corporation*, 67 L. J. Q.B. 736; [1898] 2 Q.B. 187; 78 L. T. 783; 46 W. R. 497; 8 Asp. M.C. 409—C.A.

Conduct of Action by Plaintiffs' Underwriters—Discovery.]—*See* DISCOVERY, col. 707.

(8) MUTUAL MARINE INSURANCE.

Company Limited by Guarantee—Liability of Member.]—A member of a mutual insurance association, limited by a guarantee under the Companies Act, 1862, may be liable to be sued, as a debtor to the company or to the other members, for his proportion of losses in respect of vessels insured, to an amount exceeding that limited by the memorandum of association as the extent of his guarantee; but he cannot be placed on the list of contributories in respect of such excess. *Lion Mutual Marine Insurance Association v. Tucker* (53 L. J. Q.B. 185; 12 Q.B. D. 176) approved and applied. *Bangor*

and *North Wales Mutual Marine Protection Association, In re; Baird's Case*, 68 L. J. Ch. 521; [1899] 2 Ch. 593; 80 L. T. 870; 47 W. R. 695; 7 Manson, 160—Wright, J.

Contributions—Insurance by Member as Agent—Undisclosed Principals—Liability of Ship-owners.—The defendants, who were shipowners, through their manager entered a ship in the plaintiff association, who issued to him a policy of insurance which incorporated the memorandum and articles of association. The plaintiffs having brought an action against the defendants to recover the amount of the contributions or premiums payable in respect of the insurance, *Held*, that, in order to get rid of their *prima facie* responsibility to pay contributions under the policy, it was necessary for the defendants to shew that the contract relieved them in unmistakable terms from liability; that the documents forming the policy did not do this; and that the plaintiffs were therefore entitled to recover. *United Kingdom Mutual Steamship Assurance Association v. Nevill* (56 L. J. Q.B. 522; 19 Q.B. D. 110) distinguished. *British Marine Mutual Insurance Association v. Jenkins*, 69 L. J. Q.B. 177; [1900] 1 Q.B. 299; 82 L. T. 297; 9 Asp. M.C. 26; 5 Com. Cas. 143—Bigham, J.

Members—Liability for Calls—Effective Policy of Insurance—Special Contributions and Claims for Losses.—The defendants by a proposal of insurance requested the plaintiffs (a mutual insurance association registered under the Companies Acts) to insure the defendants' steamship and to enter the defendants in the register of members of the association. The proposal was accepted, the defendants were entered in the register of members, and a policy was issued by the plaintiffs to the defendants. By rule 32 of the rules of the association members were liable to claims for losses and also for special contributions for deferred claims; and by rule 35 a member was liable to contribute in respect of an insurance effected by him to all claims arising out of losses happening at and after noon on the day of the commencement of the insurance. By rule 41 a ship which was "mortgaged by a member, shall not be or be considered as insured so far as his shares are concerned, and a ship insured which shall after an insurance thereon is effected be mortgaged by a member shall not continue to be or be considered as insured so far as his shares, as aforesaid, are concerned against losses which shall happen to the ship after the mortgage unless and until the mortgagee or other person to be approved by the directors guarantees the payment of all contributions which are or may become due to the company in respect of the insurance of the ship and the directors in their discretion accept such guarantee. In the event of a ship insured being mortgaged by a member after an insurance thereon is effected such member shall give notice, in writing, of the mortgage and the date thereof to the secretary, and shall be liable to contribute in respect of the insurance to all claims arising out of losses happening before noon of the day following that on which such notice as aforesaid shall be given." By rule 42 nothing in rules 35 and 41 (amongst others) was to prejudice or affect the liability of the members for the special contributions mentioned

in rule 32. At the date of the proposal the steamship was in fact mortgaged, but the plaintiffs had no knowledge of this, and never received any notice thereof, nor had they any such guarantee as that mentioned in rule 41. An action was brought for calls made by the plaintiffs on the defendants under rule 32 for claims for losses and special contributions:—*Held*, that the defendants were liable. As to the special contributions, the defendants, by their proposal and its acceptance, became members of the association, and, having regard to rule 42, there was nothing in rule 41 to take away their liability for the contributions as members. As to the claims for losses, rule 41 assumed that where a ship was mortgaged at the time the member joined the association, he would give notice thereof, and the effect of the omission to do so did not relieve him from liability, although his insurance was in suspense. *North-Eastern 100 A Steamship Insurance Association v. Red "S" Steamship Co.*, 10 Com. Cas. 245; 21 T. L. R. 665—Channell, J.

Ship Mortgaged by Member—Failure to Give Notice as required by Rules—Ship not Covered by Insurance—Liability for Calls.—A shipowner became a member of a mutual insurance association in respect of a ship which was at the time mortgaged. By the rules of the association members became liable to pay calls to cover losses to ships insured with the association, and by rule 41 a ship which was mortgaged was not to be considered as insured unless the mortgagee guaranteed the payment of all contributions due or to become due to the association. By article 2 of the articles of association every person was to be deemed to be a member of the association who insured any ship in pursuance of the rules. The association never received any notice of the mortgage, and had no such guarantee as that set out in rule 41:—*Held*, that notwithstanding the non-compliance with rule 41, and the fact that the ship was in consequence not covered by insurance, the shipowner was a member of the association, and as such was liable to contribute towards the losses. *North-Eastern 100A Steamship Insurance Association v. Red "S" Steamship Co.*, 12 Com. Cas. 26; 22 T. L. R. 692—C.A.

(9) APPORTIONMENT OF POLICY MONIES.

Separate Policies on Freight and Goods Respectively—Charterers' Own Goods Shipped.—The plaintiffs were time charterers, but for the purposes of the case were treated as owners of the steamship *Buccaneer*. By two separate policies on freight and goods respectively they were insured by the defendants for a voyage by the *Buccaneer* from London to places in Siberia. Under the goods policy the plaintiffs were interested in ninety-six packages of machinery, belonging to themselves, valued in the policy at 3,584*l.* The plaintiffs, as shipowners, had an interest in the nature of freight on the ninety-six packages, which was insured as "freight" by the freight policy, and valued at 1,228*l.* The actual value of such interest in freight was 899*l.* By a peril of the sea the *Buccaneer* was prevented from reaching her destination, and was obliged to abandon the voyage, and returned to London. The plaintiffs for-

warded the machinery to its destination at an expense of 2,025*l.*:—*Held*, that the 2,025*l.* must be apportioned between the two policies, and that the plaintiffs were entitled to recover under each policy its proper proportion, so receiving the whole 2,025*l.* and no more. *Popham v. St. Petersburg Insurance Co.* (No. 2), 10 Com. Cas. 276—Walton, J.

Mortgage of Ship together with Policies of Insurance Effected Thereon—Repairs by Mortgagee—Liability of Mortgagee—Salvage Losses—Payment by Underwriters without Authority of Assured—Liability of Underwriters.—During the currency of a time policy effected with the defendant company upon a steamship, the vessel suffered by perils insured against general and particular average losses. She also incurred salvage losses and charges which were paid on behalf of the assured by H. & Sons, and repaid to them by the defendant company. The vessel was repaired by the plaintiff company at the request of the assured. The ship had previously been mortgaged "together with the policies of insurance effected or to be effected thereon," and the defendant company's policy had been delivered to the mortgagee. The assured subsequently assigned to the plaintiff company by way of security all moneys payable under the policy, subject to the claim of the mortgagee, to whom notice was duly given. The mortgagee afterwards took possession of the vessel and sold her, but there still remained due to him under the mortgage a sum exceeding the general and particular average losses. The defendant company paid the amount of these losses into Court:—*Held*, first, that the mortgagee was entitled to the sum paid into Court and was not bound to pay the plaintiff company the cost of the repairs to the ship; secondly, as to the salvage losses, that the payment by the defendant company to H. & Sons, having been made without the authority of the assured, could not be justified, and that the company were liable to pay the amount over again to the plaintiffs. *Swan v. Maritime Insurance Co.*, 76 L. J. K.B. 160; [1907] 1 K.B. 116; 96 L. T. 839; 12 Com. Cas. 73; 23 T. L. R. 101—Channell, J.

7. GUARANTEE.

Fidelity Guarantee for Servant's Honesty—Costs of Prosecuting Servant—Order for Restitution of Property—Deducting Costs of Prosecution from Value of Property Recovered.—The defendant guaranteed the honesty of a servant of the plaintiffs up to 250*l.* The servant, while in the plaintiffs' employment, acting in concert with a confederate, from time to time stole a quantity of the plaintiffs' cigars of the value of 269*l.* The servant and the confederate were prosecuted by the plaintiffs and convicted, and an order was made for the restitution of the stolen property. Under the order 114*l.* worth of the cigars were recovered. The net costs incurred by the plaintiffs, after giving credit for the amount allowed by the county, in tracing the guilty parties and prosecuting them, amounted to 98*l.*:—*Held*, that, in the circumstances, it was a reasonable course to prosecute, so as to recover the stolen cigars, and that, therefore, the costs incurred by the plaintiffs should be

deducted from the value of the cigars recovered before giving the defendant credit for it under his guarantee. *Hatch, Mansfield & Co. v. Weingott*, 22 T. L. R. 366—Jelf, J.

Solvency—Liability of Guarantors—Distinction between Lloyd's Marine Policy and other Policies or Guarantees.—The plaintiffs agreed to discount acceptances of Gaze & Sons provided that Gaze & Sons obtained the following security—first, a policy or guarantee by which the underwriters agreed that if Gaze & Sons failed to meet the acceptances the underwriters would pay the amount, the liability of the underwriters respectively being limited to certain specified amounts; secondly, a policy from the defendants by which the defendants guaranteed the solvency of the underwriters of the first policy. The first policy was obtained for a total amount of 3,750*l.* and purported to be underwritten by five names, each for 750*l.*, but, in fact, the name of one underwriter was signed without his authority, and he, therefore, never became liable upon the policy. The second policy contained a recital that certain underwriters had signed the first policy and that the names and signature of the underwriters or their attorneys were known to the defendants. Gaze & Sons went into liquidation and failed to meet their acceptances, and the four underwriters who were liable on the first policy became insolvent. In an action against the defendants on the second policy,—*Held*—first, that, in the absence of evidence of an express agreement to that effect, the fact that one underwriter to the first policy never became liable to the plaintiffs did not discharge the remaining four from their liability upon that policy. Secondly, that evidence was not admissible to shew that it was a condition precedent to the defendants' liability upon the second policy that the fifth underwriter should be liable to the plaintiffs on the first policy, inasmuch as the recital in the second policy that the underwriters had signed the first policy was inconsistent with oral evidence that the defendants were not to be liable unless the fifth underwriter had subscribed the first policy. The difference between the rules of construction of an ordinary Lloyd's marine policy and other policies on guarantees explained. *Anglo-Californian Bank v. London and Provincial Marine and General Insurance Co.*, 10 Com. Cas. 1; 20 T. L. R. 665—Walton, J.

—Surety of—Disclosure of Material Facts.—In the case of a Lloyd's policy to guarantee the solvency of a surety for a debt, enquiry was made by the underwriters, the result of which satisfied them, with respect to the pecuniary position of the surety. No questions were asked and no disclosures made regarding the terms of the loan to the principal debtor. Both parties acquiesced in the questions submitted at the trial to the jury, and verdict and judgment were entered for the insured. The Court of Appeal ordered a new trial on the ground that other questions should have been left to the jury:—THE HOUSE, on the facts, reversed the decision of the COURT OF APPEAL (68 L. J. Q.B. 631; [1899] 1 Q.B. 782), and restored the judgment of BIGHAM, J., on the grounds that the only material fact in the transaction was the solvency of the surety, that there had been no fraud or concealment on the part of the insured, and no misdirection by the Judge. *Seaton v.*

Burnand, 69 L. J. Q.B. 409; [1900] A.C. 135; 82 L. T. 205; 5 Com. Cas. 198—H.L. (E.)

Loan—Guarantee by Underwriters of—Contract, whether of Insurance or Suretyship.—An instrument addressed to the plaintiff bank, but in respect of which the defendant syndicate paid the premium, was subscribed by underwriters at Lloyd's and handed to the bank by the syndicate as security for a loan made to the syndicate upon the personal guarantee of two of the directors of the syndicate. By the instrument it was witnessed that the underwriters agreed to "guarantee" to the bank the repayment of the loan. Default having been made in the repayment of the loan by the syndicate and the sureties, the underwriters paid to the bank the amount thereof, and brought an action in the name of the bank against the syndicate and the sureties:—*Held*, that the contract of the underwriters was one of insurance and not of suretyship; that the underwriters, having paid the loss, were thereby subrogated to the rights of their assured, and were entitled to sue in the name of the assured, and to recover from the principal debtor and the sureties the amount of the loan and interest; and that the underwriters and the sureties did not stand in the relation of co-sureties. *Parr's Bank v. Albert Mines Syndicate*, 5 Com. Cas. 116—Mathew, J.

Debt, of—Joint or Several Liability.—A policy of guarantee for 3,750*l.* was underwritten in five names for 750*l.* each. 750*l.* was written against each name separately, and a sixpenny stamp was attached opposite each signature as for five separate contracts:—*Held*, that the effect of the instrument was that each underwriter insured the whole amount, but that his liability was limited to 750*l.* *Anglo-Californian Bank v. London and Provincial Marine Insurance Co.*, 20 T. L. R. 665—Walton, J.

Interest on Debenture—Dissolution of Company.—See *FitzGeorge, In re*; *Robson, ex parte, ante*, BANKRUPTCY, col. 137.

8. OTHER INSURANCES AND MATTERS.

Capture—Assured a Foreign Corporation—Alien Enemy—Seizure by Government of Assured in Contemplation of War—Public Policy—Validity of Insurance.—The law recognises a state of peace and a state of war, but knows nothing of an intermediate state which is neither one thing nor the other; and though the effect of war is to dissolve contracts and put an end to commercial relations between the subjects of the belligerent Powers, the actual existence and not the mere imminence of war at the time of the creation of the contract is necessary to bring about such a result. It is for the State and its rulers and not for private individuals to set up a standard and to determine questions of public policy. In these matters the individual must conform to the rule and guidance of the State. *Janson v. Driefontein Consolidated Mines*, 71 L. J. K.B. 857; [1902] A.C. 484; 87 L. T. 372; 51 W. R. 142; 7 Com. Cas. 268—H.L. (E.)

A corporation constituted according to the laws of a foreign State is a subject of that State and an alien, even though most or all of its members be British subjects. *Ib.*

A British subject underwrote a policy of insurance of gold by which a limited company registered under the laws of the late South African Republic was insured, among other risks, against "arrests of all kings princes and peoples of what nation condition or quality soever." The gold was seized by order of the Transvaal Government some days before the actual outbreak of the war with this country:—*Held*, that the insurer was liable. *Ib.*

Gold in Transit—Policy—Warranty "free from capture, seizure, and detention"—Gold Lawfully Requisitioned by Government on the Eve of War—Liability of Insurers.—Gold consigned to Europe by a company registered under the laws of the late South African Republic was on the eve of war requisitioned within the territory of the Republic by the Government. No resistance was made, and a receipt was given. The gold was insured under a policy which contained a clause, "Warranted free of capture, seizure, and detention, and the consequences thereof":—*Held*, that the gold was "seized" within the meaning of the warranty, and that the insurers were not liable. *Robinson Gold-Mining Co. v. Alliance Marine and General Assurance Co.*, 73 L. J. K.B. 898; [1904] A.C. 359; 91 L. T. 202; 53 W. R. 160; 9 Com. Cas. 301; 20 T. L. R. 645—H.L. (E.)

—Alien Enemy—Seizure by Government of Assured for Purpose of Imminent War—Validity of Insurance.—A British subject underwrote a policy of insurance by which gold belonging to a limited company incorporated and registered according to the laws of the South African Republic, and working gold mines within the territory of the Republic, was insured at and from the mines of the company to the United Kingdom against (amongst other risks) "arrests of all kings princes and peoples of what nation, condition, or quality soever." At the time the policy was made no question of war between the United Kingdom and the South African Republic was in contemplation of the parties. Gold covered by the policy was seized by the Government of the South African Republic within its territory during transit from the company's mines to the United Kingdom, and totally lost to the company. The seizure was made with a view to a war between the two countries which was then imminent, but did not break out until nine days later. In an action by the company to recover the loss the underwriter pleaded that the company was a subject of the Government of the South African Republic, and the loss was by arrest of that Government made for the purpose of actual or expected hostilities against the United Kingdom, and therefore the claim of the company was for an indemnity, which was contrary to public policy:—*Held*, by A. L. SMITH, M.R., and ROMER, L.J. (VAUGHAN WILLIAMS, L.J., dissentiente), that in the circumstances existing at the date of the seizure the underwriter was not freed from liability upon the contract of insurance in respect of the seizure. *Driefontein Consolidated Mines v. Janson*, 70 L. J. K.B. 881; [1901] 2 K.B. 419; 85 L. T. 104; 49 W. R. 660; 6 Com. Cas. 198—C.A.

Products of Gold Mine Owned by British Company but Situate in Foreign State—Out-

break of War—Seizure by Enemy—Right to Recover.]—A company incorporated and registered in a British colony and owning and working a gold mine in an adjoining foreign State insured the products of the mine with an English insurer against "arrests, restraints, and detainment of all kings, princes, and people." Subsequently war broke out between Great Britain and the foreign State, and the company thereupon ceased to work the mine. During the war certain products of the mine were seized by the foreign State:—*Held*, that these products were not to be regarded as enemy's property, and that the company were not prevented from recovering their value under the policy. *Nigel Gold-Mining Co. v. Hoade*, 70 L. J. K.B. 1006; [1901] 2 K.B. 849; 85 L. T. 482; 50 W. R. 108; 6 Com. Cas. 268—Mathew, J.

Bullion—Lloyd's Policy on—Deviation Clause—Unreasonable Delay by Assured in Course of Transit—Justifiable Deviation.]—A deviation may be unjustifiable owing to unreasonable delay caused by the assured in detaining the subject-matter of insurance *en route*; and such delay may amount to a deviation not covered by the premium paid, but, so long as the deviation occurs in the course of the transit and the intention to forward has never been abandoned, a clause in an ordinary Lloyd's policy, holding the assured covered in the case of deviation or change of voyage at a premium to be thereafter arranged, operates to cover the assured in the event of loss upon payment of a reasonable additional premium. *Hyderabad (Deccan) Co. v. Willoughby*, 68 L. J. Q.B. 862; [1899] 2 Q.B. 530—Bigham, J.

Debt Due by Limited Company—Liquidation—Reconstruction—Second Liquidation—Purchase of Assets by New Company—"Final dividend on liquidation."]—Plaintiff insured certain sums deposited in the M. Bank with the defendants, who undertook to pay him interest on such deposits should default be made by the bank "until the principal was paid by the bank and (or) the undertakers; and the principal sums, less any portion of the principal previously received from the bank when the final dividend in bankruptcy or liquidation is declared." A few days after the policy was entered into the M. Bank went into liquidation. It was reconstructed, and subsequently again went into liquidation. Under this second liquidation dividends to the extent of 5s. 7d. in the pound were paid to the plaintiff. The last of such dividends did not purport to be a final dividend, but practically the assets were exhausted, and what remained had been taken over by a new company for realisation. This new company offered shares to the plaintiff in payment of the balance of his deposits, which he in accordance with the provisions of the insurance policy rejected. The plaintiff then sued the defendants for payment of the balance of the deposits. The defendants contended that they were not liable to repay until the final dividend was paid on the liquidation of the M. Bank, and that the last paid dividend was not final, and the liquidation was not yet completed:—*Held*, that they were liable. *Murdock v. Heath*, 80 L. T. 50—Bigham, J.

Contract to Pay Fixed Sum if Assured Attains Certain Age—Stamp.]—See REVENUE.

Damage to Machinery through any Latent Defect in the Machinery—Latent Defect becoming Patent—Development of Flaw—Discovery in Actions.]—See DISCOVERY.

Fraudulent Claim—Action by Underwriters to Recover Money Paid on.]—See DISCOVERY; PRACTICE (PARTIES).

Industrial Insurance—Jurisdiction of Justices.]—See FRIENDLY SOCIETY.

Law Governing.]—See INTERNATIONAL LAW.

Married Women's Property Act.]—See HUSBAND AND WIFE.

Sale of Goods c. i. f.—Warranty in Policy.]—See SALE OF GOODS.

Valued Policy—Collision—Recovery of Damages—How Fund Distributed.]—See *The Commonwealth*, 76 L. J. P. 106; *post*, SHIPPING.

INTEREST.

Implied Agreement to Pay—Debt to Tradesman—Claim for Interest—Course of Dealing—Evidence of Agreement.]—In the administration of the estate of a deceased debtor a contract to pay interest on a tradesman's bill may be implied from the acts of the debtor in his lifetime, as, for instance, where bills had been sent in from time to time shewing that interest was being charged, and the debtor had never objected to the charge and had from time to time made payments on account generally. Decision of COZENS-HARDY, J., who followed *Lloyd Edwards, In re*; *Williams v. Trench* (61 L. J. Ch. 22), reversed. *Anglesey (Marquis), In re*; *Wilmot v. Gardiner*, 70 L. J. Ch. 810; [1901] 2 Ch. 548; 85 L. T. 179; 49 W. R. 708—C.A.

Recovery of Money and Interest—Conviction—Civil Proceedings not Based on Fraud.]—Money obtained by fraud can be recovered with interest, whether the proceedings be taken in a Court of equity or in a Court of law. But the fraud must be proved in the proceedings by which the money is recovered, otherwise no interest will be allowed; and it is not sufficient that the fraud has been proved in other proceedings in a criminal Court. *Johnson v. Regem*, 73 L. J. P.C. 113; [1904] A.C. 817; 91 L. T. 234; 53 W. R. 207; 20 T. L. R. 697—P.C.

Rate—Co-surety—Contract of Indemnity—Lunacy.]—Where an estate is insolvent and is being wound up in lunacy, interest at the rate of 4 per cent. is payable to a creditor of the estate who claims as a co-surety with the lunatic under a contract of indemnity. *Hunt, In re*; *Harvey's Claim*, [1902] 2 Ch. 318n; 86 L. T. 504—Mathew, L.J.

Advances, on.]—See WILL.

Arrears of Annuity, on.]—See *Hiscoe, In re*; *Hiscoe v. Waite, post*, WILL.

Arrears of Rent, on.]—See LANDLORD AND TENANT.

Award for Compensation and Costs of Arbitration, on.]—See WATER.

Compensation-Money, on.]—See Fletcher v. Lancashire and Yorkshire Railway, 71 L. J. Ch. 590; post, MINES.

Constructive Payment of.]—See Dixon, In re, 69 L. J. Ch. 609.

Costs, on.]—See COSTS.

Covenant to Pay—Merger in Judgment.]—See MERGER.

Equitable Charge of Land.]—See LIEN.

Judgment, on.]—See Burland v. Earle, 74 L. J. P.C. 156; ante, COLONY; and Borthwick v. Elderslie Steamship Co. (No. 2), 74 L. J. K.B. 772; post, PRACTICE.

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INTERNATIONAL LAW.

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I. PUBLIC.

1. FOREIGN SOVEREIGN.

Action by—Submission to Jurisdiction—Concession Funds—Counterclaim for Moneys Due under Concession.]—A foreign sovereign who brings an action against his concessionnaires for the mere appointment of a new trustee of funds subject to the trusts of the concession does not thereby submit to the jurisdiction *quoad* a counterclaim for moneys payable under the concession, and such a counterclaim will be struck out on his application. *Held*, further,

as a matter of discretion in the particular case, that, independently of the question of jurisdiction, a counterclaim so foreign to the subject-matter of the action must be struck out under Order XIX. rule 3. *South African Republic v. Transvaal Northern Railway*, 67 L. J. Ch. 92; [1898] 1 Ch. 190; 77 L. T. 555; 46 W. R. 151—North, J.

Title to Sue—Contract made with Department of Foreign State.]—A contract entered into by a duly authorised minister of a foreign State in the name of his office, and acting expressly on behalf of his Government, is enforceable by his successor in office, and it is not necessary that the head of the State should be a party to the action. There is no difference in this respect between the law of Scotland and that of England. *Castaneda v. Clydebank Engineering and Shipbuilding Co.*, 71 L. J. P.C. 94; [1902] A.C. 524; 87 L. T. 339—H.L. (Sc.)

“Paramount chief”—Cession of Land by—Annexation of Territory—Recognition of Cession by Annexing Power.]—Where a cession of land has been made by an independent sovereign to an individual and that sovereign's territory has been ceded to another sovereign Power, there is no enforceable obligation on the latter to recognise the grant; and if there is either an express or implied bargain between the ceding Power and that to which the cession is made that private property shall be respected, it is one which can only be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure. *Secretary of State for India v. Kamachee Boye Sahaba* (13 Moore P.C. 22) followed. *Cook v. Sprigg*, 68 L. J. P.C. 144; [1899] A.C. 572; 81 L. T. 281—P.C.

Vessel being Property of Foreign Sovereign—Arrest—Appearance and Bail without Authority.]—A vessel which was the property of a foreign Sovereign was arrested in an action for damage by collision. Thereupon the local agent for the vessel in this country, without the knowledge or authority of the foreign Sovereign, instructed solicitors, who procured the release of the vessel by giving an undertaking to put in bail, and also entered an appearance in the action unconditionally. The plaintiffs, on being informed of the facts, refused to allow the action to be dismissed:—*Held*, that the action must be dismissed with costs. *The Jassy*, 75 L. J. P. 93; [1906] P. 270; 95 L. T. 363; 10 Asp. M.C. 278—Gorell Barnes, P.

2. CRIMINAL JURISDICTION.

Arrest out of British Territory—Jurisdiction.]—The ruler of an independent State in India granted to the British Government civil and criminal jurisdiction along a line of railway running through his territories:—*Held*, that this jurisdiction only extended to offences committed on the railway and to matters connected with the administration of the railway, and did not amount to a cession of territory, or justify the arrest of a person on the railway for an offence committed in another part of India in no way connected with it. *Sayad Muhammad Yusuf-ud-Din v. Reg.*, 76 L. T. 813; 18 Cox C.C. 620—P.C.

3. WAR.

Financial Obligations of Conquered State—Liability of Conquering State—Annexation—Limitation by Conqueror of Liabilities to be Taken Over—Petition of Right.]—There is no rule of international law that the contractual obligations incurred before war actually breaks out by a conquered State annexed by Great Britain pass upon annexation as a matter of course, and in default of express reservations to Great Britain, nor can such obligations be enforced by British municipal law against the Crown by petition of right. When making peace, the conquering Sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely in his option to what extent he will adopt them. It is a case in which the only law is that of military force, and it is unnecessary for the Sovereign, when making peace, to limit the obligations to be taken over. *West Rand Gold-Mining Co. v. Regem*, 74 L. J. K.B. 753; [1905] 2 K.B. 391; 93 L. T. 207; 21 T. L. R. 562—D.

4. ADMIRALTY.

Territorial Waters—Foreign Vessel—Contravention of British Statutes by Foreigner outside Three-mile Limit.]—While there is always a certain presumption against the Legislature of a country asserting or assuming the existence of a territorial jurisdiction going clearly beyond limits established by international law, that is only a presumption, and, as such, it must always give way to the language used if it is clear, and also to all counter-presumptions which may legitimately be had in view in determining, on ordinary principles, the true meaning and intent of the legislation. Express words will, of course, be conclusive, and so also will plain implication. *Mortensen v. Peters*, 8 F. (Just. Cas.) 93—Ct. of Justy.

A foreigner who, in the Moray Firth, committed a contravention of a British statute (the Herring Fishery (Scotland) Act, 1889), *held* liable to be proceeded against in the Scotch Courts, although the place where the offence was committed was at a point more than three miles from low-water mark on the adjacent coast. *Ib.*

—Fishing—Illegal Fishing—Seizure of Vessel—Evidence of Vessel's Position.]—An American vessel was seized by a Canadian cruiser for fishing on the Canadian side of Lake Erie. The Crown brought an action to have her declared forfeited. The local Judge in Admiralty came to the conclusion upon the evidence that the vessel was not in Canadian waters, and ordered her to be restored to her owners. The SUPREME COURT OF CANADA (TASCHEREAU, C.J., dissenting) reversed this judgment and condemned the vessel:—*Held*, that the judgment of the Supreme Court (reported in 34 Can. S.C.R. 673) must be reversed, and the judgment of the local Judge in Admiralty restored. *The Kitty D. v. Regem*, 22 T. L. R. 191—P.C.

II. PRIVATE.

1. PERSONS.

(a) *Alien.*

Foreign Corporation—Members being British Subjects.]—A corporation constituted according to the laws of a foreign State is a subject of that State, and an alien, even though most or all of its members are British subjects. *Janson v. Driefontein Consolidated Mines*, 71 L. J. K.B. 857; [1902] A.C. 484; 87 L. T. 372; 51 W. R. 142; 7 Com. Cas. 268—H.L. (E.)

Resident Alien—Temporary Occupation of Territory by Enemy's Forces—Alien's Duty of Allegiance—High Treason.]—The protection afforded by a State to a resident alien does not cease simply because for a time the State forces are withdrawn and the enemy is in possession and exercises the rights of an army in occupation. And when the territory so occupied reverts to the control of its rightful Sovereign, wrongs done during the foreign occupation are cognisable by the ordinary Courts, and an alien who has aided the enemy may be tried and punished for high treason. *De Jager v. Att.-Gen. of Natal*, 76 L. J. P.C. 62; [1907] A.C. 326; 96 L. T. 857; 23 T. L. R. 516—P.C.

(b) *Domicil.*

Domicil of Origin—Change of Domicil—Long Residence in England—Evidence.]—A native of the United States, who had lived twenty-seven years in England, but always described himself as an American citizen, and had bought property at Baltimore in the hope of finally making his home there, though from the state of his health a voyage across the Atlantic was impracticable, *held* on the evidence not to have abandoned his domicil of origin (LORD LINDSEY dissenting). *Winans v. Att.-Gen.*, 73 L. J. K.B. 618; [1904] A.C. 287; 90 L. T. 721; 20 T. L. R. 510—H.L. (E.)

Abandonment of Domicil of Origin—Evidence.] In the acquisition of a new domicil more is required than a mere change of residence; there must be proved a fixed intention to renounce birthright in the place of original domicil and to adopt the political and municipal *status* involved by permanent residence of choice elsewhere than in the domicil of origin. *Huntly (Marchioness) v. Gaskell* (No. 2), 75 L. J. P.C. 1; [1906] A.C. 56; 94 L. T. 33; 22 T. L. R. 144—H.L. (Sc.)

A testator who was born in England, where, for many years, to the time of his death, he had large business interests, and houses and estates, each of which he occasionally visited, who had satisfied himself by enquiries of his lawyer that he was still an Englishman, and had executed testamentary dispositions both in Scottish and English form,—*Held*, not to have abandoned his English domicil simply by reason of his having described his Scottish residence as his "home," and of having lived the greater part of each year for thirty years in Scotland. *Ib.*

Renunciation of Domicil of Origin—Acquisition of Domicil of Choice—Evidence—Presumption.]—The testator, whose domicil of origin was the United States of America, went for trade purposes to live in Russia, from which country he yearly paid visits to England. Afterwards, being advised by his doctors, on account of his bad health, not to live in Russia, he came to England, and took a house at Brighton. For a few years he paid visits to Russia, but on giving up his trade connections he ceased to do this. For the last twenty-seven years of his life he lived in Great Britain, having leases of houses in London and Brighton, and spending the shooting season in Scotland, where he rented deer forests. He also used to go for his health's sake to visit a watering-place in Germany. While living in England he bought an estate in the United States, apparently for the purpose of selling it again as a speculation, but he had no residence in America during the period for which he lived in Great Britain. He described himself in certain American documents as an American citizen sojourning in England. He was advised by his doctors that a voyage to America would be dangerous in his state of health, but he sometimes expressed an intention of returning to America in a vessel which he invented, and took out patents for, which was intended not to roll or pitch when at sea:—*Held*, upon the evidence before the Court, affirming the decision of the King's Bench Division, that there was an un rebutted presumption in favour of the testator having abandoned his domicil of origin and acquired a domicil of choice in Great Britain. *Att.-Gen. v. Winans*, 85 L. T. 508; 65 J. P. 819—C.A.

Acquisition of—Intention.]—A person having a domicil of origin in England does not lose it and acquire a Scottish domicil by having his chief residence in Scotland, unless in the circumstances his doing so shews his intention to abandon his original domicil. *Brooks v. Brooks's Trustees*, 4 F. 1014—Ct. of Sess.

A man whose domicil of origin was English had his chief residence in Scotland for thirty years prior to his death. During this time he retained his interests in England as the principal partner in a private bank at Manchester, and as proprietor of large landed estates, and continued his occupancy as tenant of a mansion-house near Manchester and of a house in London. He left large personal estate and a will in English form, made a short time before his death, in which he was designated as "of Manchester." Apart from making his home in Scotland *animo remanendi*, there was nothing in his conduct to indicate any intention of abandoning his English domicil:—*Held*, that he had not lost his English domicil. *Ib.*

Acquisition of Domicil of Choice in a Tropical Country—Scotsman Domiciled in Ceylon.]—A Scotsman who had gone to Ceylon at the age of twenty-two, remained there actively engaged in business for the rest of his life, a period of over thirty years. He was successful in business, and was interested in many enterprises in and about Colombo, and had taken the unusual course of building for himself a country residence within a few miles of Colombo, and establishing his home there. He was never

married, and died when on a visit to England. During the period of his residence in Ceylon he visited Great Britain on six occasions, mainly on business, and during these visits he never, except on one occasion, stayed in Scotland for more than three or four days. He repeatedly expressed his dislike for the climate of Scotland and for its inhabitants, and never spoke of any intention of retiring from business in Ceylon and returning to take up his abode in Scotland. His only property in Great Britain consisted of a villa in Scotland, valued at 1,400*l.*, which he had inherited from his father a few years before his death, and some shares in companies registered in London, but doing business in Ceylon. On his death the Crown claimed legacy duty on his personal estate as that of a domiciled Scotsman:—*Held*, that he had *animo et facto* abandoned his domicil of origin in Scotland, and had acquired a domicil of choice in Ceylon; and that consequently his estate was not liable for legacy duty. *Lord Advocate v. Brown's Trustees*, [1907] S. C. 333—Ct. of Sess.

Marriage According to Foreign Law of Community of Goods—Subsequent English Domicil—After-acquired Movable Property—Law of Matrimonial Domicil.]—Where a marriage is celebrated in a foreign country and the spouses subsequently become naturalised British subjects, the rights, whether constituted by the law of the land or by convention between the parties, vested in them respectively at the marriage in regard to movable property remain unaffected by the change of domicil. *Lashley v. Hog* (Robertson Sc. App. Cas. 4; 4 Paton's Sc. App. 581) explained and distinguished. *De Nicols v. Curlier* (No. 1), 69 L. J. Ch. 109; [1900] A.C. 21; 81 L. T. 733; 48 W. R. 269—H.L. (E.)

Marriage in France—Community of Goods—Change of Domicil—After-acquired Real and Leasehold Property.]—Where two French subjects marry in France without any written marriage contract, so that the law of "community of goods" applies, and they subsequently become domiciled in England, the change of domicil will not alter their rights, *inter se*, to community of goods in respect of realty and leaseholds acquired in England. *De Nicols, In re*; *De Nicols v. Curlier* (No. 2), 69 L. J. Ch. 680; [1900] 2 Ch. 410; 82 L. T. 840; 48 W. R. 602—Kekewich, J.

Committee Appointed by Foreign Court—Payment to Foreign Committee—Discretion of Court.]—A committee appointed by a foreign Court of the estate of a lunatic residing within its jurisdiction, but domiciled in England, cannot recover, as of right, personal property of a lunatic, situate in England. But the English Court has a discretion, and may exercise the discretion by paying over the property to such a committee without requiring evidence that the whole of such money is needed for the maintenance of the lunatic. *New York Trust and Securities Co. v. Keyser & Co.*, 70 L. J. Ch. 330; [1901] 1 Ch. 666; 84 L. T. 43; 49 W. R. 371—Cozens-Hardy, J.

Will—Foreign Domicil—Leasehold Property in England—"Lex loci."]—Leasehold property in England or an equitable interest in leasehold

property in England is "land" for the purposes of the rule that a will of land must be executed in accordance with the formalities required by the *lex loci*. *Freke v. Carbery (Lord)* (L.R. 16 Eq. 461); *Duncan v. Lawson* (58 L. J. Ch. 502; 41 Ch. D. 394); and *De Fogassieras v. Duport* (11 L. R. Ir. 123) approved and followed. *Pepin v. Bruyère*, 71 L. J. Ch. 39; [1902] 1 Ch. 24; 85 L. T. 461; 50 W. R. 34—C.A.

— **Execution According to Foreign Law by Foreigner Resident in England—Subsequent Marriage in England—Revocation.**—The effect of a marriage in England upon the will of a woman made before marriage must depend on the English view of the domicile of the husband at the time of the marriage. *Martin, In re; Loustalan v. Loustalan*, 69 L. J. P. 75; [1900] P. 211; 82 L. T. 806; 48 W. R. 509—C.A.

— **Domicil — Animus Manendi — Fugitive Criminal.—Limitation of Period of Proscription.**—A Frenchwoman in 1870 executed a will in England valid according to French law. In 1874 she married a Frenchman in England. He had come to England in 1868, having left France to avoid the consequences of a criminal offence of which he had been convicted in his absence. Under French law his liability for the offence ceased at the expiration of twenty years. There was no settlement made on the marriage. The husband after the marriage joined his wife in a business in London, which she was carrying on, and in 1881 and 1884 leases of the houses in which it was carried on were granted to him. The husband and wife lived together in London until 1890. They then separated. He assigned the leases of the houses to his wife and returned to France, where he had since remained. She continued to live in England till her death in 1895. By the French law, marriage does not revoke the prior wills of the spouses:—*Held (dissentiente LINDLEY, M.R.)*, that the circumstances shewed an *animus manendi* on the part of the husband, and it could not be taken that he intended his residence in England to be limited to the period of his proscription. His domicile at the time of the marriage was consequently English, and the validity of his wife's will must be determined according to English law, although he might have subsequently re-acquired a French domicile. Accordingly the will was revoked by the marriage, and ought not to be admitted to probate. *Held*, by LINDLEY, M.R., that the fact that her husband was a criminal fugitive who did not dare to go back to his country for a definite limited time, but could go back safely when that time had elapsed, prevented the inference of an abandonment of the intention to return to France when he could safely do so. His domicile was consequently French at the time of the marriage, and the validity of his wife's will depended on the French law. *Id.*

— **English Testator—Legacy to German Subject—On Her Death in Testator's Lifetime to Her "Next-of-Kin"—Persons Entitled—Half-Sister—Nephews and Niece of Whole Blood.**—The words "next-of-kin" in an English will which contains a legacy to the next-of-kin of a deceased foreign subject, must be construed according to English law, and so construed they mean—in the absence of any reference to the

Statute of Distributions—the nearest blood relations in an ascending and descending line, including those of the half-blood, subject, however, to any question of *status* that may arise. *Fergusson's Will, In re*, 71 L. J. Ch. 360; [1902] 1 Ch. 483; 50 W. R. 312—Byrne, J.

Where, therefore, a testator, a domiciled Englishman, resident in Calcutta, gave a legacy to his niece, a German subject, and declared that if she should die in his lifetime the legacy should not lapse, but should be divided amongst her next-of-kin, and she died in the testator's lifetime a widow and without leaving issue, her nearest relations at the testator's death being a half-sister and nephews and a niece of the whole blood, the half-sister is entitled to the legacy to the exclusion of the nephews and niece, notwithstanding that the latter are, according to German law, the next-of-kin. *Id.*

— **Jurisdiction of English Courts—Property in Crown Colony—Movable and Immovable—Trust—Equities.**—A British subject, domiciled in the British Crown colony of the Gold Coast, carried on in the colony a business in partnership with certain relatives. He owned certain concessions in the colony, some leasehold and some freehold, besides houses. He died in 1899 leaving a will, which was proved both in the colony and in this country, by which he appointed his wife executrix, and directed that the business should be carried on by two of his partners. In 1900 they and the widow entered into an agreement under which she assigned the business to them in consideration of their agreeing to pay her 5,000*l.*, and in pursuance of the agreement she afterwards assigned to them the testator's concessions in the colony. The agreement contained a recital that the testator had not specifically disposed of the concessions by his will, nor made provision for the remuneration of the two partners should they accept the trusts of the will. The infant children of the testator having brought an action against the widow and partners claiming a declaration that the partners took no beneficial interest in the testator's business and landed properties, and that the agreement and assignment were void as against the plaintiffs, the partners by their defence raised the objection that the Court had no jurisdiction to adjudicate on the plaintiffs' claim so far as it related to landed properties in the colony:—*Held*, that there was a trust as to so much of the property as was personalty; that, having regard to the recital in the agreement, there might be a trust as to the freeholds; that equities had therefore to be worked out; and that the action must proceed to trial without prejudice to any question relating to the immovable property, if any, the legal interest in which devolved directly on the testator's heir-at-law. *Clinton, In re; Clinton v. Clinton*, 88 L. T. 17; 51 W. R. 316—Joyce, J.

— **General Power of Appointment—Personal Property—Foreign Domicil—Unattested Will—Validity.**—Such words as "all the property which comprises my estate in England as well as in France," contained in a foreign will, which is not attested in conformity with English law, is not such an indication that the will is to be construed with reference to English law as to import section 27 of the Wills Act so as to operate as an exercise of a general power of

appointment. *D'Este Settlement Trust, In re; Poulter v. D'Este* (72 L. J. Ch. 305; [1903] 1 Ch. 898), followed. *Price, In re; Tomlin v. Latter* (69 L. J. Ch. 225; [1900] 1 Ch. 442), explained and distinguished. *Scholefield, In re; Scholefield v. St. John. Young, In re; Smith v. St. John*, 74 L. J. Ch. 610; [1905] 2 Ch. 408; 93 L. T. 122; 54 W. R. 56; 21 T. L. R. 675—Keke-wich, J.

C. having, under each of two English wills, a general power to appoint a fund by will, and being a domiciled Frenchwoman, made a will and codicils in French form, appointing her niece S. general and universal legatee of "all the property which comprises my estate in England as well as in France." The will and codicils were unattested, but valid according to French law, and were admitted to probate in England, together with other documents in the handwriting of the testatrix referring to the property and the power:—*Held*, that the will and codicils did not operate as an execution of the power. *Ib.*

Appeal compromised. *Scholefield, In re; Scholefield v. St. John*, 75 L. J. Ch. 720; 23 T. L. R. 764—C.A.

— **British Subject Permanently Residing in France—Construction and Administration.**—A British subject, born in England, lived permanently in France so as to be in fact domiciled there, though he had not acquired a legal domicile there in the manner prescribed by French law, which recognised only a legal domicile. He died in France, having made his will:—*Held*, that, both as to construction and administration, the will was governed by English law. *Boues, In re; Bates v. Wengel*, 22 T. L. R. 711—Swinfen Eady, J.

Administration — Movables — Intestacy — Nationality.—A person whose domicile of origin was Maltese acquired a domicile of choice in Baden, and died there so domiciled. According to the law of Baden, in administering movables regard is had to nationality only, but the deceased had never complied with the provisions of the law of Baden so as to change her nationality:—*Held*, that a sum of stock in an English railway company must be administered among the next-of-kin according to Maltese law. *Johnson, In re; Roberts v. Att.-Gen.*, 72 L. J. Ch. 682; [1903] 1 Ch. 821; 88 L. T. 161; 51 W. R. 444—Farwell, J.

Bona Vacantia—Intestate Domiciled Abroad—Movables in England.—*See* CROWN.

2. MARRIAGE AND DIVORCE.

Marriage—Validity—Marriage with Deceased Husband's Brother—Lex Domicilii.—A marriage with a deceased husband's brother, if valid according to the law of the country where it was celebrated and in which the parties were then domiciled, is valid in this country, although the wife was a domiciled Englishwoman at the date of her first marriage, and merely acquired a foreign domicile by reason of that marriage. *Bozzelli, In re; Husey-Hunt v. Bozzelli*, 71 L. J. Ch. 505; [1902] 1 Ch. 751; 86 L. T. 445; 50 W. R. 447—Swinfen Eady, J.

— **Consular Marriage in France—Frenchman and Englishwoman—Validity of Ceremony.**—A marriage between a Frenchman and an Englishwoman duly solemnised in France under the Consular Marriage Act, 1849 (repealed and virtually re-enacted by the Foreign Marriage Act, 1892), is valid as regards form in England, though declared invalid as regards form by a French Court. *Simonin v. Mallac* (2 Sw. & Tr. 67) followed. *Hay v. Northcote*, 69 L. J. Ch. 586; [1900] 2 Ch. 262; 82 L. T. 656; 48 W. R. 615—Farwell, J.

— **French Subjects Married at French Consulate.**—Domiciled French subjects contract a valid marriage in this country, and such marriage is held proved if it is shown that they were married at the French Consulate in London according to the forms required by French law. *Bailet v. Bailet*, 84 L. T. 272—Gorell Barnes, J.

— **Nullity of Marriage—Bigamy—Different Domicils of Parties to First Marriage—Effect of Foreign Decree of Nullity for Reason Unknown to English Law.**—Restrictions and prohibitions against marriage are decided upon by the law of the place where the marriage is celebrated. No nation can call upon another nation within whose territory a marriage is celebrated to surrender its own laws to give effect to such restrictions and prohibitions. *Ogden v. Ogden*, 76 L. J. P. 9; [1907] P. 107; 96 L. T. 505; 23 T. L. R. 158—Bargrave Deane, J. Affirmed in C.A., 77 L. J. P. 34; [1908] P. 46; 97 L. T. 827; 24 T. L. R. 94.

In the case of a marriage in England, where the marriage is valid of a British woman domiciled in England with a man domiciled in a country where in the circumstances the marriage would be invalid, the law of England, as the place where the marriage is celebrated, will prevail as the proper test, at all events in England, of the validity of the marriage. *Ib.*

A ceremony of marriage according to English form was celebrated in England between a domiciled Frenchman and a domiciled Englishwoman. This marriage was subsequently annulled in France at the suit of the man as being contrary to the law of his domicile, he having at the date of the celebration of it been under twenty-one years of age, and not having obtained his father's consent. At a later date, and while he was still living, the woman married an Englishman in England:—*Held*, that this latter ceremony was bigamous, and therefore to be annulled at the suit of the man party to it. *Sottomayer v. De Barros* (49 L. J. P. 1; 5 P. D. 94) followed. *Ib.*

— **In Argentine—Non-ordained Minister.**—A marriage between a member of the Church of England and an Episcopalian Methodist is good according to Argentine law, although only celebrated once, and at a Methodist Episcopal church, by a minister who was not an ordained minister of the Church of England. *Tightbody v. West*, 88 L. T. 484—C.A.

Jewish Marriage Abroad—Uncle and Niece—British Subjects Domiciled in England—Validity of Marriage.—The Marriage Act, 1835, which deals with capacity, applies to all

persons. The exception in favour of Quakers and Jews in the Marriage Acts, 1836 and 1840, and subsequent Acts, relates only to the formalities of marriage. Where, therefore, a Jew and his niece, both British subjects domiciled in England, went through, in 1876, at Wiesbaden, the form of civil marriage and afterwards of marriage according to the custom of the Jews, and subsequently, the niece having in the meantime been admitted a Jewess in Paris, they there went through the form of marriage according to the Jewish custom, such marriage being valid according to the law in force at Wiesbaden and the Jewish law, it was held that the marriage was not valid according to the law of England. *Lindo v. Belisario* (1 Hag. Cons. 216) and *Reg. v. Millis* (10 Cl. & F. 534) discussed and distinguished. *De Wilton, In re; De Wilton v. Montefiore*, 69 L. J. Ch. 717; [1903] 2 Ch. 481; 83 L. T. 70; 48 W. R. 645—Stirling, J.

Scotch Marriage Contract—English Husband and Scotch Wife—Life Interest—Alimentary Provision—Matrimonial Domicil—Incumbrancers on Life Interest—Public Policy.—By a marriage contract in Scotch form, made on the marriage of a domiciled Englishman with a domiciled Scotchwoman, property consisting in part of heritable bonds (which by Scotch law are treated as real or immovable property) was vested in trustees upon trust after the death of the wife to pay the income to the husband for life, with a direction that all payments to him “shall be strictly alimentary and shall not be assignable nor liable to arrestment or any other legal diligence at the instance of the creditors”—a form of limitation to which the Scotch law will give effect. The existing trustees of the settlement were English, and the trusts had always been administered in England. The husband, who continued domiciled and resided in England, created numerous incumbrances upon his life interest. On the death of the wife, *Held*, that there was sufficient evidence of intention that the marriage contract should be governed by Scotch law, and not by the law of the matrimonial domicil. *Fitzgerald, In re; Surman v. Fitzgerald*, 73 L. J. Ch. 436; [1904] 1 Ch. 573; 90 L. T. 266; 52 W. R. 432; 20 T. L. R. 332—C.A.

Held also, by VAUGHAN WILLIAMS, L.J., and COZENS-HARDY, L.J., that the Scotch law as to an alimentary life interest in all the property, movable or immovable, was not obnoxious to the general policy of English law, and ought to be enforced in England as against the husband's incumbrancers. *Held*, by STIRLING, L.J., that the moneys actually coming to the husband in England under the alimentary provision ought to be bound in equity by his assignments, and paid to his incumbrancers. *Ib.*

Judicial Separation—Jurisdiction—Residence without Domicil—Power of Court to Decree.—A wife was married in Australia to a domiciled Australian. After the marriage the parties cohabited in Australia, and afterwards for a time in Italy, where the husband was guilty of cruelty towards the wife. The wife came to England with her two children, and took up her residence with her parents. The husband

followed her to England, and made the children wards in Chancery, and took proceedings in the Chancery Division to obtain their custody. The wife then filed her petition for a judicial separation on the ground of her husband's cruelty committed in Italy, and claimed the custody of the two children. The Chancery proceedings were ordered to stand over until the determination of the proceedings in the Probate Division:—*Held*, that the temporary residence of the husband and wife in England, although their domicil was foreign and they had had no matrimonial home here, and although the cruelty had been committed abroad, was sufficient to found the jurisdiction of the Court for the purpose of judicial separation; and, being satisfied as to the facts, a decree of judicial separation was pronounced, leaving the question of the custody of the children to be dealt with in chambers. *Armystage v. Armystage*, 67 L. J. P. 90; [1898] P. 178; 78 L. T. 639—Gorell Barnes, J.

Divorce—Foreign Court—Jurisdiction—Recognition of Decree by English Courts—Domicil—Suppression of Material Fact in Foreign Court.—The Court of the country of the real existing domicil of parties married in England has jurisdiction to dissolve the marriage solemnised between those persons when domiciled in England, although on grounds upon which a divorce would not have been granted in England. The law laid down in *Harvey v. Farnie* (49 L. J. P. 33; 50 ib. 17; 52 ib. 33, 35; 5 P. D. 153; 6 ib. 35; 8 App. Cas. 43, 51) and *Le Mesurier v. Le Mesurier* (64 L. J. P.C. 97; [1895] A.C. 517) applied. The resolution of the Judges in *Ree v. Lolley* (Russ. & R. 237) must be treated as confined to the facts of that case. *Bater v. Bater*, 75 L. J. P. 60; [1906] P. 209; 94 L. T. 835; 22 T. L. R. 403—C.A.

A decree for the dissolution of marriage which alters the *status* of the parties stands on the same footing as a judgment *in rem*, and a decree of that nature pronounced by a foreign Court having jurisdiction cannot, so long as it remains unreversed, be disputed in this country. *Ib.*

A marriage took place in England in 1880 between two domiciled English people. In 1886 the husband petitioned for divorce on the ground of the wife's adultery, and she charged cruelty. Both petitions were dismissed, the wife being found guilty of adultery and the husband of cruelty. In 1889 the husband went to New York and lived there in adultery. The wife remained in England and lived in adultery there. In 1890 she went over to New York and obtained a decree from the Court there for the dissolution of her marriage. The husband was served with process, but did not appear. The divorce proceedings in England were not disclosed to the American Court, but there was no collusion between the husband and wife. At this time the husband had acquired an American domicil:—*Held*, that the wife must be taken to have adopted the husband's American domicil; that the Court of New York had jurisdiction to dissolve the marriage; and the non-disclosure of the wife's adultery did not go to the jurisdiction. The decree of the New York Court would therefore be recognised and held valid in this country. *Ib.*

— **Foreign Domicil—Foreign Divorce in Second Foreign Country—Law of the Domicil—Effect of English Law.**—English law recognises as valid in England a decree of divorce obtained by a wife against a husband before the Courts of a foreign country where the husband was not domiciled, on grounds which the law of his domicil, being that of another foreign country, would not have recognised in its own Court, where it appears from the evidence that such decree was in fact pronounced under such circumstances that the law of the domicil of the husband would recognise it as valid. *Armistage v. Att.-Gen.* (*Gillig cited*); *Gillig v. Gillig*, 75 L. J. P. 42; [1906] P. 135; 94 L. T. 614; 22 T. L. R. 306—Gorell Barnes, P.

A., who never abandoned his domicil of origin in New York State, married an Englishwoman in England. She obtained a divorce from him in the State of South Dakota, United States of America, on the ground of desertion, which is insufficient to found an absolute divorce according to the law of New York. A. appeared in the proceedings and filed (ineffectually) a cross-claim. There was evidence that the Court of New York would hold this decree valid:—*Held*, that the South Dakota divorce was valid to dissolve the married status of the spouses in England. *Ib.*

3. CONTRACTS, BY WHAT LAW GOVERNED.

Contract Made and to be Performed in Foreign Country—Validity by Foreign Law—Invalidity by English Law—Enforcement in England—Public Policy.—The English Courts will not enforce an agreement made in a foreign country which has been obtained by coercion, either physical or moral, although such agreement was to be performed in the foreign country and may be valid by the law of that country. *Kaufman v. Gerson*, 73 L. J. K.B. 320; [1904] 1 K.B. 591; 90 L. T. 608; 52 W. R. 420; 20 T. L. R. 277—C.A.

Contract made Abroad—Intention—Marine Policy—By what Law Governed.—A policy of re-insurance on a ship was executed in Sweden by a Swedish corporation, according to Swedish law. It was in the English language and in the ordinary Lloyd's form, being substantially identical with the original policy on the ship and an earlier policy of re-insurance, both of which were made in England and governed by English law. It contained a clause providing that all claims and losses should be payable in London, and that in case of any dispute under the policy the defendants should be bound in all things by the jurisdiction and decision of the English law Courts:—*Held*, that the policy must be construed by English law, as the circumstances shewed such to be the intention of the parties. *Royal Exchange Assurance Corporation v. Sjöforsäkrings Aktie-Bolaget Vega*, 71 L. J. K.B. 789; [1902] 2 K.B. 384; 87 L. T. 356; 50 W. R. 694; 7 Com. Cas. 205; 9 Asp. M.C. 329—C.A.

Arbitration Clause—Award Precedent to Cause of Action—Conflict of Laws.—A contract between parties resident in different jurisdictions is to be construed, in respect of its national character, by the intention expressed therein.

A policy of insurance executed in Jersey, and providing as a condition precedent to any action thereon an arbitration and award in accordance with the Arbitration Act, 1889, is an English contract, on which, in accordance with the principle of *Scott v. Avery* (25 L. J. Ex. 308; 7 H.L. C. 811), no action can be brought, either in Jersey or in England, until the condition is fulfilled. *Spurrier v. La Cloche*, 71 L. J. P.C. 101; [1902] A.C. 446; 86 L. T. 631; 51 W. R. 1—P.C.

Promise of Marriage—Breach—Law of Denmark—Intention of Parties—Lex Fori.—In an action for breach of promise of marriage evidence was given by the plaintiff, a Danish lady, of the oral promise in Denmark. Evidence of a Danish barrister was read at the trial to the effect that there was no remedy in that country for a breach of promise of marriage unless circumstances existed which were admittedly absent from the present case. The defendant came to this country some time before and set up in business here, subsequently turning the business into a company, which was registered and had its chief offices in this country. He was living in this country and intended to remain here. He wrote to the plaintiff in the English tongue, and the plaintiff replied in the same language. The plaintiff was an employee first of the defendant and then of the company, although she was living in Denmark. The defendant knew nothing of Denmark, except that he had visited it several times and had employed the plaintiff there, and he knew nothing of the Danish law or language. It was intended that the marriage should take place in England and that the married home was to be there:—*Held*, that the intention of the parties was that the English law should prevail; and, further, that, even if this were not so and the contract was to be governed by Danish law, there was nothing in the law of that country to shew that the contract was not a valid and binding contract, the evidence only showing that there was no remedy. That being so, it was a question of procedure, and the *lex fori* applied, and the action was maintainable in this country. *Hansen v. Dixon*, 96 L. T. 32; 23 T. L. R. 56—Bray, J.

Restrictive Covenant—"Locus solutionis."—A contract of service as brewer was entered into by the defendant, an Englishman resident at Johannesburg, with the agent at Johannesburg of an English company. The contract was in English form, but was executed according to the formalities of the Transvaal law. The company's principal place of business was at Johannesburg, but it had agencies in other parts of South Africa. In the opinion of the Court, Johannesburg was the primary place to which the contract referred, though possibly the defendant might have been required to act for the company on occasion at other places in South Africa. By the contract the defendant agreed "not to engage in any brewing business in South Africa within a period of ten years after the determination of his engagement by the company" except with consent:—*Held*, that the rights of the parties under the restrictive clause must be decided according to the Transvaal law. *South African Breweries v. King*, 69 L. J. Ch. 171; [1900] 1 Ch. 273; 82 L. T. 32; 48 W. R. 289—C.A.

Company Formed for Purpose of Trading in Foreign Country—Implied Authority to Pledge Personal Credit of Shareholders under Foreign Law—Liability in this Country of Holder of Fully Paid Shares.—An English limited company, registered under the Companies Acts, was empowered by its memorandum and articles of association to do business in a foreign country, and to do all such things as might be necessary to comply with the statutory enactments of the country. By the law of the foreign country no corporation organised outside the country was allowed to do business within it on more favourable terms than were prescribed by law for corporations organised within it. By the law of the foreign country each stockholder in a corporation was individually and personally liable for a part of the debts of the corporation proportionate to his share of its capital. The company having failed to pay a debt which after having been registered in the foreign country it had in the course of business contracted there, the creditor brought an action in England against a shareholder whose shares were fully paid up, claiming to recover from him a part of the debt proportionate to his interest in the capital:—*Held*, that there were no facts from which an authority from the shareholder to the company to pledge his personal credit could be implied, and that he was not liable. *Risdon Iron and Locomotive Works v. Furness*, 75 L. J. K.B. 88; [1906] 1 K.B. 49; 93 L. T. 687; 54 W. R. 324; 11 Com. Cas. 85; 22 T. L. R. 45—C.A.

Security for Money Lent for Gaming—Gaming in Foreign Country—English Cheque Payable in London.—The defendant, while playing baccarat at a club in Algiers, borrowed money from the plaintiff, who was the manager of the club, for the purpose of enabling him to pay his gaming losses and to continue playing, and in exchange therefor he gave the plaintiff an English cheque drawn upon a London bank. The plaintiff sued on the cheque:—*Held* (by COLLINS, M.R., and COZENS-HARDY, L.J.; FLETCHER MOULTON, L.J., *dissentiente*), that, assuming the consideration for the cheque to have been valid by the law of France prevailing in Algiers, the plaintiff could not recover. *Moulis v. Owen*, 76 L. J. K.B. 396; [1907] 1 K.B. 746; 96 L. T. 596; 23 T. L. R. 348—C.A.

Per COLLINS, M.R., and COZENS-HARDY, L.J. —The case was to be determined by the law of England, the country where the cheque was payable, and the plaintiff was precluded from maintaining the action by 9 Anne, c. 14, s. 1, as amended by the Gaming Act, 1835, s. 1. *Ib.*

Per FLETCHER MOULTON, L.J.—Though the case was to be determined by the law of England, the statutes in question did not apply to gaming in a foreign country. *Ib.* And see *Sarby v. Pullon*, 43 L. J. P. 498.

Assignment—Chose in Action—Reversionary Interest in Personality—Assignment made Abroad—Property in England—Notice to Trustees—Priority.—An Englishman executed in New York (where he was temporarily domiciled) an assignment to his wife of a reversionary interest in personality in England in the hands of trustees. By the law of New York notice to the trustees was not necessary to complete the assignee's title. He subsequently executed in

England a mortgage of the same property to the plaintiff. The plaintiff gave to the trustees notice of his mortgage before notice of the assignment was given:—*Held*, that the mortgage had priority over the assignment. *Kelly v. Selwyn*, 74 L. J. Ch. 567; [1905] 2 Ch. 117; 93 L. T. 633; 53 W. R. 649—Warrington, J.

Female Infant—Marriage Articles.—Antenuptial articles entered into according to English law by a female infant will be governed by English law, and may be affirmed by her after coming of age, though she is then domiciled in a foreign country, and the affirmance is in accordance with English law only. *Van Grutten v. Digby* (32 L. J. Ch. 179; 31 Beav. 561) followed. *Viditz v. O'Hagan*, 68 L. J. Ch. 553; [1899] 2 Ch. 569; 80 L. T. 794; 47 W. R. 571—Cozens-Hardy, J.

— **Settlement—Covenant to Settle After-acquired Property—Change of Domicil—Repudiation—Reasonable Time—Conflict of Laws.**—The rule that an infant's contract is voidable, but binding on the infant unless repudiated within a reasonable time after attaining majority, does not apply where the infant after entering into the contract acquires a foreign domicil and becomes under the law of the country of domicil incapable of validly ratifying the contract made by her. *Viditz v. O'Hagan*, 69 L. J. Ch. 507; [1900] 2 Ch. 87; 82 L. T. 480; 48 W. R. 516—C.A.

An infant executed marriage articles in 1864, and married an Austrian and became a domiciled Austrian. Under the law of Austria she had power to revoke but no power of irrevocably affirming any marriage contract made by her:—*Held*, that the marriage articles were rendered void by a repudiation by her which took place in 1893. *Van Grutten v. Digby* (32 L. J. Ch. 179; 31 Beav. 561) distinguished. *Ib.*

Marriage Settlement—Construction—Movables—Form of Deed—General Power—Appointment—Property.—A domiciled Englishwoman, on the eve of her marriage with a domiciled Frenchman, executed a settlement of her property. The trustees of the settlement were English, and the trusts were for her appointees by deed or will, and in default of appointment for her separate use absolutely, but the settlement contained no declaration that it should take effect and be construed as an English settlement. The lady (her domicil being then French) exercised the power by a testamentary appointment executed in England according to English law:—*Held*, that the proper inference was that the parties showed an intention that the settlement should be construed as an English settlement, and that the will was effective according to its tenor to pass the fund, whether regarded as an exercise of the power of appointment, or a disposition of the property to which the testatrix was entitled to her separate use. *Mégret, In re; Tweedie v. Maunier*, 70 L. J. Ch. 451; [1901] 1 Ch. 547; 84 L. T. 192—Cozens-Hardy, J.

— **Settlement Executed by Scotswoman in Contemplation of English Marriage—Subsequent Acquisition of English Domicil by Marriage—Capacity to Revoke Settlement.**—A Scotswoman in contemplation of her marriage with a domiciled Englishman executed a unilateral

deed settling her whole property. The deed was in Scots form; it contained provisions consistent only with the law of Scotland; and two out of the three trustees were Scotsmen. She subsequently married and acquired an English domicile:—*Held*, that the deed was a Scots deed, and that the question whether it was *sua natura* revocable must be decided by Scots law, and that the question whether as a married woman domiciled in England she had capacity to revoke it must be determined according to English law. *Sawrey-Cookson v. Sawrey-Cookson's Trustees*, 8 F. 157—Ct. of Sess.

— **Ratification by Wife in England of Antenuptial Scots Deed.**—A married woman, who had acquired an English domicile, executed in England a ratification of a Scots deed of settlement executed by her in Scotland before her marriage while still a domiciled Scotswoman:—*Held*, that the deed of ratification was an English deed, and that the law of England must be applied in order to discover its effect as a ratification and its nature as a revocable or irrevocable deed. *Ib.*

— **Marriage according to French Law of Community of Goods—Subsequent English Domicil—Movable Property.**—Where a domiciled Frenchman and Frenchwoman have married in France without entering into any marriage contract, and therefore according to the French law of community of goods, and have afterwards acquired an English domicile, their respective rights as to movable property will be governed by the law of the English domicile, and not by that of the matrimonial domicile. *Lashley v. Hog* (Robertson's Sc. App. Cas. 4; 4 Paton's Sc. App. 581) explained and followed. *De Nicols, In re; De Nicols v. Curlier*, 67 L. J. Ch. 419; [1898] 2 Ch. 60; 78 L. T. 541; 46 W. R. 532—C.A.

— **Marriage in Scotland with Domiciled Mauritian.**—A marriage was solemnised in Scotland in 1857 between B., a gentleman domiciled in Mauritius, and K., a domiciled Scotchwoman. Before the marriage a settlement was made in Scotch form of the money brought into settlement by the wife, and another settlement was made in English form of the property settled by the husband. Each settlement contained a provision that the law of Mauritius should not apply so far as it was or might be at variance or inconsistent with the provisions, clauses, and agreements contained in the settlements. In the English settlement there was a limitation on the death of the husband and remarriage of the wife to the persons who would have been entitled to the husband's estate if he had died without issue and unmarried under the English Statutes of Distribution. The husband, by the law of Scotland, had a testamentary power to revoke this limitation if that law applied:—*Held*, that the law of Scotland applied. *Muspratt-Williams, In re; Muspratt-Williams v. Howe*, 84 L. T. 191—Cozens-Hardy, J.

— **Marriage of Englishwoman with Foreigner—Restraint on Anticipation—Covenant to Settle After-acquired Property—Constiuction—Legacy—Property in England—Domicil—Decree of Foreign Court for Separation.**—By a settlement

in English form executed in 1878 in contemplation of a marriage between a domiciled Italian and an Englishwoman, it was agreed that the trustee should hold a sum of money secured upon an English mortgage upon trust to invest in English securities and to hold the same upon trusts for the benefit of the wife and husband and their issue. The settlement contained a covenant to settle after-acquired property of the wife. The marriage took place in Italy, where the husband and wife continued to reside. In 1898 a decree for the voluntary separation of the husband and wife was made by the Italian Court, and they had since lived apart from each other. In 1881 the wife's father died, having by his will bequeathed to the wife certain legacies subject to his widow's life interest therein. The will contained a declaration that all money payable to any female should during coverture be paid to her for her separate use without power of anticipation. The widow died in 1899:—*Held*, that, assuming English law to be applicable, the restraint on anticipation lasted only until the date of payment—namely, the death of the widow—and that the legacies were therefore bound by the covenant. *Boun, In re; O'Halloran v. King* (58 L. J. Ch. 831; 27 Ch. D. 411), and *Holmes, In re; Hallows v. Holmes* (57 L. T. 335), followed. *Currey, In re; Gibson v. Way* (55 L. J. Ch. 906; 32 Ch. D. 361), distinguished. *Banks, In re; Reynolds v. Ellis*, 71 L. J. Ch. 708; [1902] 2 Ch. 333; 87 L. T. 432; 50 W. R. 663—Buckley, J.

Held, also, that, inasmuch as the decree of the Italian Court for separation did not, like an English decree for judicial separation, affect the rights of property of the parties, *Davenport v. Marshall* (71 L. J. Ch. 29; [1902] 1 Ch. 82) did not apply, and the covenant to settle after-acquired property was still binding. *Ib.*

Held, further, upon the facts, that the settlement was governed by English law. *Viditz v. O'Hagan* (69 L. J. Ch. 507; [1900] 2 Ch. 87) distinguished. *Ib.*

— **Scotch Settlement—English Husband and Scotch Wife—Life Interest—Alimentary Provision—Repugnance to English Law—Matrimonial Domicil—Incumbrancers on Life Interest—Immovables by Scotch Law.**—Under the provisions of a Scotch settlement, made on the marriage of a domiciled Englishman with a domiciled Scotchwoman, various funds, comprising, *inter alia*, heritable bonds which were treated as real estate by the law of Scotland, were vested in trustees upon trust, after the death of the wife, to pay the income to the husband for his life, with a direction that all payments to him "shall be strictly alimentary and shall not be assignable, nor liable to arrestment, or any other legal diligence at the instance of the creditors." The existing trustees of the settlement were English, and the trusts had always been administered in England. The husband created numerous incumbrances upon his life interest. On the death of the wife,—*Held*, that the validity and operation of the contract with respect to the income of the trust funds must be determined by the law of England, and that, as the prohibition against alienation contained in the alimentary provision was inoperative according to English law,

the incumbancers of the husband were entitled to receive payment of the income from the trustees of the settlement. *Fitzgerald, In re; Surman v. Fitzgerald*, 72 L. J. Ch. 430; [1903] 1 Ch. 933; 88 L. T. 326; 51 W. R. 586—Joyce, J.

4. TORTS.

Tort Committed in Foreign Country—Authorisation by Foreign Government—Decision of Foreign Court.—No action will lie in respect of a wrong, which, though actionable if committed in this country, is justifiable by the law of the place where it was committed. The respondents, who were British subjects, shipped on a British ship ammunition for delivery at a port in Persia or "optional Muscat." The Sultan of Muscat, who was an independent potentate, issued a proclamation to the effect that the importation of munitions of war into Persia or India was unlawful, and that by agreement with the Persian and British Governments ships of war of those countries were authorised by him to search British and Persian vessels in Muscat waters, and to confiscate all munitions of war found on board and intended for Indian or Persian ports. The appellant, who was in command of a British ship of war, seized the respondents' ammunition on its arrival in Muscat waters. The Sultan appointed a Court to enquire into the circumstances, and that Court found that the ammunition was intended for a Persian port and was lawfully seized, and this decision was formally approved by the Sultan:—*Held*, that no action could be maintained in this country for the alleged unlawful seizure. *Carr v. Francis, Times & Co.*, 71 L. J. K.B. 361; [1902] A.C. 176; 85 L. T. 144; 50 W. R. 257—H.L. (E.)

5. FOREIGN JUDGMENTS.

Judgment Debt—Action—Judgment in Foreign Court for Less Sum—Satisfaction.—Judgment and satisfaction thereof in a foreign country on a cause of action is a bar to any further action in England on the same cause of action. *Taylor v. Holland*, 71 L. J. K.B. 278; [1902] 1 K.B. 676; 86 L. T. 228; 50 W. R. 558—Jelf, J.

Recognition by English Courts—Court of Competent Jurisdiction—Irregularity in Process—Invalidity of Foreign Judgment.—If a judgment is pronounced by a foreign Court over persons within its jurisdiction, and in a matter with which it is competent to deal, the English Courts will not investigate the propriety of the proceedings in the foreign Court unless they offend against English views of substantial justice. The jurisdiction which alone is important in such a matter is the competence of the Court in an international sense—that is, its territorial competence over the subject-matter and over the defendant. *Pemberton v. Hughes*, 68 L. J. Ch. 281; [1899] 1 Ch. 781; 80 L. T. 369; 47 W. R. 354—C.A.

Accordingly, the judgment of such a Court cannot be impeached in English Courts for a mere error of procedure, even by third parties in collateral proceedings, although such error, if it occurred, was such as to make the judg-

ment of the foreign Court void by the law of the country where it was pronounced. Such a matter ought not to be enquired into by the English Courts. The principles laid down in *Vanquelin v. Boucard* (83 L. J. C.P. 78; 15 C. B. (N.S.) 341), *Castrique v. Imrie* (89 L. J. C.P. 350; L. R. 4 H.L. 414), and *Dogliotti v. Crispin* (35 L. J. P. & M. 129; L. R. 1 H.L. 301) applied. *Id.*

Foreign Judgment by Default—Res Judicata—Proceedings on the Judgment in another Foreign Country—Effect of giving Bail and Opposing.—After a collision between a French vessel *D.* and a British vessel *C.*, the *C.* proceeded to a Belgian port. The owners of the *D.*, intending to bring an action in France against the owners of the *C.* in respect of the collision, took proceedings in Belgium to arrest the *C.* (as permitted by Belgian law) to answer the judgment which they might obtain in their action in France, and which might become enforceable in Belgium. The agents of the owners of the *C.*, to prevent arrest, gave bail in the Belgian proceedings. Subsequently, the owners of the *D.* brought their intended action in France, and served notice of it upon the owners of the *C.* in the United Kingdom, but the owners of the *C.* did not appear, and judgment went against them by default. Then the owners of the *D.* took further proceedings in Belgium to obtain a decree to make the French judgment enforceable there. In these proceedings the owners of the *C.* appeared and opposed the making of the decree, which was nevertheless made, but without any enquiry by the Court into the merits of the collision:—*Held*, that the conduct of the owners of the *C.* in the Belgian proceedings did not amount to a submission to the jurisdiction of the French Court, and that the rights of the parties in respect of the collision were not *res judicata*, so as to bar an action in this country by the owners of the *C.* against the owners of the *D.* in respect of the collision. *The Challenge and the Duc d'Aumale* (No. 1), 73 L. J. P. 2; [1904] P. 41; 89 L. T. 481; 9 Asp. M.C. 497—Gorell Barnes, J.

Property Abroad—Judgment in rem—Sale of Property by Foreign Court—Right of Judgment Creditor to Retain Proceeds as against Liquidator.—The master of a ship owned by an English joint-stock company, limited, which was loading cargo at Bombay for Hamburg, was induced by a fraud perpetrated upon him to sign bills of lading for goods which in fact were never put on board. The defendants, whose registered place of business was in England, became the indorsees of the bills of lading for value and without notice of the fraud. Before the arrival of the ship at Hamburg a petition for winding up the plaintiff company was filed, upon which a winding-up order was subsequently made. The defendants had notice of the winding-up proceedings. By German law a claim for non-delivery of cargo confers a legal lien upon the ship. Upon the arrival of the ship at Hamburg she was arrested under proceedings taken against her in Germany on behalf of the defendants to enforce this lien. The German Court ordered the ship to be sold, declared that the defendants had a lien upon her in priority to all creditors except those claiming for necessities and wages, and ordered the lien to be satisfied out of the proceeds of

the sale. Neither the plaintiff company nor the liquidator were parties to the proceedings in the German Court. In an action by the liquidator in the name of the company to recover from the defendants the moneys paid to them in satisfaction of their lien by order of the German Court as moneys received to the use of the company,—*Held*, that the proceedings in the German Court being proceedings *in rem*, the judgment was binding upon all persons, whether parties to the proceedings or not, and consequently the defendants were entitled to retain as against the company or the liquidator the moneys paid to them under the judgment. *Oriental Inland Steam Co., In re; Scinde Railway, ex parte* (43 L. J. Ch. 699; L. R. 9 Ch. 557), distinguished. "*Minna Craig*" *Steamship Co. v. Chartered Mercantile Bank of India*, 66 L. J. Q.B. 339; [1897] 1 Q.B. 460; 76 L. T. 310; 45 W. R. 338; 8 Asp. M.C. 241—C.A.

Foreign Judgment in rem—Jurisdiction—Validity.—In November, 1897, F. T. & Co. caused to be shipped upon the steamship *B.* arms and ammunition to Bahrein, *via* Bushire, in P., and to enable them to get the best market they were marked "optional Muscat." Since 1881 there had been a nominal prohibition against the importation of arms, &c., into P., but it had never been enforced. In January, 1898, after the sailing of the *B.*, the Sultan of M., an independent sovereign, proclaimed that all arms and ammunition found within the territorial waters of M., belonging to British, Persian, or Muscat subjects, and intended for Indian or Persian ports, would be confiscated, and British and Persian men-of-war were authorised to search and seize. In pursuance of this proclamation the defendant, who commanded *H.M.S. L.*, seized the goods in question within the territorial waters of M. Proceedings were taken in the Court of M., and it was adjudged that the arms and ammunition were intended for Persian ports, and that they were lawfully seized. At the trial the jury found that the goods in question were not liable to seizure under the proclamation, as the goods were intended for M., and not for any Persian port:—*Held*, that the proclamation had the force and authority of a fully constituted sovereign Power, and that it could be relied upon by the defendant as a defence if his seizure was contrary to English law, and that the judgment of the Court of M. had the jurisdiction to deliver a judgment *in rem*; and that, as the plaintiffs had not proved that they had no notice and no opportunity of appearing before the Court, they were bound by such judgment. *Fracis v. Carr*, 81 L. T. 50—Grantham, J.

Agreement to Refer to Foreign Jurisdiction—Jurisdiction of Foreign Court.—A contract between a British subject and a foreigner, by which it is agreed (among other terms) that all disputes arising thereunder shall be referred to the jurisdiction of the country of which the foreigner is a subject, gives jurisdiction in such disputes to the competent tribunal of the foreign country. *Copin v. Adamson* (43 L. J. Ex. 161; 45 L. J. Ex. 15; L. R. 9 Ex. 345; 1 Ex. D. 17) and *dictum* of Fry, J., in *Rousillon v. Rousillon* (49 L. J. Ch. 338; 14 Ch. D. 351) followed. *Feyerick v. Hubbard*, 71 L. J. K.B. 509; 86 L. T. 829; 50 W. R. 557—Walton, J.

Partnership for Working Mine in Foreign Country—Implied Agreement to Submit Partnership Disputes to Jurisdiction of Foreign Court.—The defendant and certain others (who were subsequently represented by the plaintiffs) verbally entered into a partnership at will for the working of a gold mine in Western Australia. The defendant was then resident in that colony, but some time afterwards he left and came to reside in England. After he had left the colony, the plaintiffs instituted proceedings against him in the colonial Court asking for a dissolution of the partnership, an order for the sale of the mine and for the taking of the partnership accounts. The writ in that action was served upon the defendant in England, but he did not enter an appearance or take any part in the proceedings, although he was kept informed from time to time regarding the action. A decree having been made and the accounts taken, by which it was ascertained that the defendant was liable to the extent of 1,281*l.* 4*s.* 11*d.* in respect of the partnership liabilities, the plaintiffs sued him in England for that sum upon the judgment of the colonial Court:—*Held*, that by joining the partnership for working the mine in Western Australia the defendant had impliedly agreed that partnership disputes, whether arising during the continuance or on the termination of the partnership, should be settled in the Courts of Western Australia, and that, having thus submitted to their jurisdiction, he was bound by the judgment. *Copin v. Adamson* (43 L. J. Ex. 161; 45 L. J. Ex. 15; L. R. 9 Ex. 345; 1 Ex. D. 17) applied. *Emanuel v. Symon*, 76 L. J. K.B. 147; [1907] 1 K.B. 235; 96 L. T. 231; 23 T. L. R. 94—Channell, J. Reversed in C.A., 77 L. J. K.B. 180; [1908] 1 K.B. 302; 24 T. L. R. 85.

Authority of American Judgment Creditor to Sue in English Court—Californian Code.—Where an American Court had made an order authorising a person who had recovered judgment in that Court against an American company to bring actions against an English company "in any and all proper Courts, in his own name, or in the name of the said American company,"—*Held*, that the jurisdiction of the American Court was limited to the exact scope of the Californian Code conferring it, and that, in an action brought by the said person in an English Court, he was not properly authorised to sue, and could not sue, in the name of the said American company. *Barber v. Mexican Land and Colonisation Co.*, 48 W. R. 235—Stirling, J.

Foreign Order—Person of Unsound Mind Domiciled Abroad—Right to Recover Property in England.—If a curator has been duly appointed by the Courts of the country where the person of unsound mind is residing, with authority to sue for and give a good discharge for his property, the Courts of this country have no discretion, but are bound to recognise that authority, and if the title of the plaintiff is clear to make an order for the recovery of the property. *Didisheim v. London and Westminster Bank*, 69 L. J. Ch. 443; [1900] 2 Ch. 15; 82 L. T. 738; 48 W. R. 501—C.A.

G. PROPERTY.

Stolen Cheque—Indorsement—Transfer Valid by Law of Foreign Country—Conversion of Cheque

in England.]—The rule that the validity of the transfer of chattels must be governed by the law of the country where the transfer takes place applies to the transfer of bills and cheques, and applies where the transfer is by indorsement. *Embiricos v. Anglo-Austrian Bank*, 74 L. J. K.B. 326; [1905] 1 K.B. 677; 92 L. T. 305; 53 W. R. 306; 10 Com. Cas. 99; 21 T. L. R. 268—C.A.

Section 24 of the Bills of Exchange Act, 1882, has no application to the case of an indorsement abroad. *Ib.*

A cheque on a London bank was drawn abroad payable to the order of the plaintiffs. The plaintiffs indorsed the cheque to G. & Co., in London, and inclosed it in a letter to them. It was stolen from the letter, and the indorsement of G. & Co. was forged, and the cheque was cashed at a bank in Vienna, which took it in good faith and without negligence. The Vienna bank indorsed the cheque to the defendants in London, and they cashed it at the bank on which it was drawn. Under the Austrian law the Vienna bank acquired a good title to the cheque. The plaintiffs brought the action against the defendants for wrongful conversion of the cheque:—*Held*, that the validity of the indorsement and the transfer of the cheque must be governed by Austrian law, and the defendants were not liable, as they had acquired a good title to the cheque as against the plaintiffs through the Vienna bank. *Alcock v. Smith* (61 F. J. Ch. 161; [1892] 1 Ch. 238) applied. *Ib.*

Semble, per VAUGHAN WILLIAMS, L.J.—The defendants would, under the circumstances, have a good title to the cheque as against the drawers as well as against the payees. *Ib.*

Fund in Court in England—Payment out—“Prodigue”—“Conseil judiciaire.”—The appointment in France of a *conseil judiciaire* to a *prodigue* under the provisions of the Code Civil (Liv. I., tit. xi., chaps. ii. and iii., ss. 502, 513, 514, and 515) does not effect a change in the *prodigue's status*; and the fetter thus imposed on the free action of the *prodigue* by section 513 will be altogether disregarded in an English Court of law. The *prodigue*, accordingly, though unable in France to mortgage his property, or to give a valid receipt for capital money, without the assistance of his *conseil judiciaire*, is able to perform both these acts independently in England. *Worms v. De Valdor* (49 L. J. Ch. 261) considered and followed. *Selol's Trust, In re*, 71 L. J. Ch. 192; [1902] 1 Ch. 488—Farwell, J.

Chose in Action—Reversionary Interest in Personality—Assignment made Abroad—Property in England—Notice to Trustees—Priority.—An Englishman executed in New York (where he was temporarily domiciled) an assignment to his wife of a reversionary interest in personality in England in the hands of trustees. By the law of New York notice to the trustees was not necessary to complete the assignee's title. He subsequently executed in England a mortgage of the same property to the plaintiff. The plaintiff gave to the trustees notice of his mortgage before notice of the assignment was given:—*Held*, that the mortgage had priority over the assignment. *Kelly v. Selwyn*, 74 L. J.

Ch. 567; [1905] 2 Ch. 117; 93 L. T. 633; 53 W. R. 649—Warrington, J.

General Power of Appointment and Exercise by Foreign Will.—See POWERS.

7. SHIPPING.

Collision—Both to Blame—Rule of Division of Loss—Seamen Drowned—Payments to their Relatives—Spanish Accidents Act, 1900—Claim against other Ship for Half the Payments.—Some seamen on board a Spanish ship were drowned in a collision with another ship, and the Spanish shipowners were compelled by the Spanish Accidents Act, 1900, without proof of any negligence, to make payments to the relatives of these seamen. The action arising out of the collision was settled on the basis of both ships being to blame. Under the Admiralty rule of division of loss, the Spanish shipowners claimed to recover from the owners of the other ship half the amount of these payments:—*Held*, that the claim must be rejected—first, because it was in respect not of damages at all, but of an accident payment not recognised by English law, but arising out of a foreign statute; and secondly, because it was not such a claim for damages as could be made under Admiralty jurisdiction, or could have been taken into consideration in the Admiralty Court, and therefore the Admiralty rule of division of loss could not apply to it. *The Circe*, 74 L. J. P. 106; [1906] P. 1; 93 L. T. 640; 10 Asp. M.C. 149; 21 T. L. R. 526—Gorell Barnes, P.

Carriage of Contraband—Refusal of Seaman to Proceed—Wages.—See *Sibery v. Connelly*, 96 L. T. 140; *post*, SHIPPING.

INTERPLEADER.

Jurisdiction—Estoppel—Right to set up Jus Tertii.—The Court has jurisdiction under Order LVII. to grant relief by interpleader, notwithstanding the existence of an estoppel between the applicant and one of the adverse claimants. *Mersey Docks and Harbour Board, Ex parte*, 68 L. J. Q.B. 540; [1899] 1 Q.B. 546; 80 L. T. 143; 47 W. R. 306—C.A.

Interpleader Summons—Leave to Issue and Serve out of the Jurisdiction.—The Court has power to, and will in a proper case give leave to issue and serve an interpleader summons out of the jurisdiction, although no writ has been sued out against the applicant in relation to the subject-matter of the proposed interpleader proceedings. *City of Dublin Steam Packet Co. v. Cooper*, [1899] 2 Ir. R. 381—Q.B. D.

Execution on Goods of Third Person—Substantial Grievance—Damages against High Bailiff.—Damages are recoverable on an interpleader summons against a high bailiff of a County Court for the seizure of the goods of third persons, the claimants, by way of execution on the premises of the debtor, where the claimants have suffered a substantial grievance, although the seizure was *bona fide* and there was no misconduct. *London, Chatham, and Dover Railway v. Cable*, 80 L. T. 119—1).

Goods Seized by Sheriff Under Fi. Fa.—Claim by Third Person—Part of Goods Sold under Interpleader Order—Money Paid into Court—Form of Issue.]—The sheriff seized all the goods in a house under writs of *fi. fa.* at the suit of T. and other creditors. The claimant claimed all the goods, and, the other creditors having abandoned their executions, an order was made upon an interpleader summons that the sheriff should sell a sufficient quantity of the goods to satisfy T.'s execution, and should pay the proceeds into Court to abide the event of an issue between the claimant and T. The sheriff sold goods sufficient to satisfy T.'s execution, and paid the proceeds into Court. There then remained a large quantity of goods unsold:—*Held*, that the proper form of issue was whether the goods seized and sold by the sheriff, or some part thereof, were the property of the claimant as against T. *Tebb v. Powell*, 98 L. T. 463—C.A.

Seizure of Goods—Payment into Court to Abide Result of Issue—Release of Goods—Seizure of Same Goods on Behalf of Another Creditor—Rights of Original Claimant.]—Where goods have been seized in execution to satisfy a judgment, and the sheriff withdraws from possession upon payment into Court by a claimant of a sum which is to abide the event of an interpleader issue, the claimant by payment of that sum into Court does not acquire any property in the goods, but such goods are free goods in the hands of the execution debtor, so that if they are again seized in execution to satisfy a judgment obtained by another creditor, the claimant if he again claims the goods is liable as a condition for an interpleader issue to an order for the payment into Court of the full value of the goods seized. *Kotchie v. Golden Sovereigns, Lim.*, 67 L. J. Q.B. 722; [1898] 2 Q.B. 164; 78 L. T. 409; 46 W. R. 616—C.A.

Stakeholder—Agreement by Stakeholder to Pay Winner Amount of Stakes—Action on Agreement.]—In pursuance of a written agreement the two competitors in a trotting match deposited money with a stakeholder who, by a clause in the agreement, agreed with each of them that, in consideration of a commission on the total amount deposited, he would pay over to the winner a sum of money equal to the amount of the stakes actually deposited with him, after deducting commission:—*Held*, that under this clause, whether taken by itself or in conjunction with the other clauses of the agreement, no personal liability to pay was undertaken by the stakeholder beyond the liability ordinarily undertaken by a stakeholder:—*Held*, therefore, that an interpleader issue was rightly ordered in an action by one of the competitors who claimed payment from the stakeholder as winner of the match, when the other competitor also claimed to be winner. *Dowson v. Macfurlane*, 81 L. T. 67—C.A.

Goods Seized in Execution—Claim under Absolute Bill of Sale—Order for Sale of the Goods—Jurisdiction.]—Where a person claims as absolute owner goods which have been seized in execution, and the sheriff interpleads, the Court or a Judge has jurisdiction to order a sale of the goods and payment of the proceeds into Court, if it seems just, and reasonable to make that order. *Paquin v. Robinson*, 85 L. T. 5—C.A.

Claim under Bill of Sale—Sale.]—Where goods subject to a bill of sale have been seized by the sheriff at the instance of an execution creditor, and it is doubtful whether the security is sufficient, the Court will not interfere with the rights of the bill of sale holder, and will not order a sale under Order LVII. rule 12, unless the execution creditor guarantees him against loss. *Stern v. Tegner*, 66 L. J. Q.B. 859; [1898] 1 Q.B. 37; 77 L. T. 347; 46 W. R. 82; 4 Manson, 328—C.A.

Where a trustee in bankruptcy has not called upon the sheriff under section 11 (1) of the Bankruptcy Act, 1890, to deliver to him goods taken in execution which are subject to a bill of sale, the execution is not at an end, and the jurisdiction given by Order LVII. rule 12 to order a sale still continues. *Id.*

Appeal from Judge in Chambers—Summary Decision under Order LVII. rule 9.]—Where in an interpleader proceeding the question is one of law and the facts are not in dispute, and the Judge decides the question at chambers under Order LVII. rule 9, without directing the trial of an issue or ordering a Special Case to be stated, then on the true construction of Order LVII. rule 11, and of section 16 of the Common Law Procedure Act, 1860, no appeal will lie from his decision, even though he gives leave to appeal. *Van Laun v. Baring*, 72 L. J. K.B. 756; [1903] 2 K.B. 277; 89 L. T. 120; 52 W. R. 59—C.A.

Value of Subject-matter in Dispute over 50l.—Summary Decision—Appeal.]—The jurisdiction under Order LVII. rule 8, to dispose of an interpleader matter in a summary manner, is not limited by any rule of practice to cases in which the value of the subject-matter in dispute does not exceed 50l. *Harbottle v. Roberts*, 74 L. J. K.B. 310; [1905] 1 K.B. 572; 92 L. T. 723; 53 W. R. 291; 21 T. L. R. 273—C.A.

INTERROGATORIES.

See DISCOVERY.

INTESTACY.

See CROWN.

INTOXICATING LIQUORS.

1. *Statutes*, 1109.
2. *Justices*, 1109.
 - (a) *Jurisdiction*, 1109.
 - (b) *Disqualification*, 1112.
 - (c) *General Annual Licensing Meeting*, 1112.
3. *The Licence*, 1113.
 - (a) *Application for*, 1113.
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4. *Beerhouses*, 1180.
5. *Conduct of Licensed Premises*, 1181.
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 - (c) *Miscellaneous Offences*, 1141.
 - (d) *Maintaining Order*, 1144.
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7. *Other Matters*, 1145.

1. STATUTES.

Inebriates.—61 & 62 Vict. c. 60 is the *Inebriates Act*, 1898.

Licensing.—2 Edw. 7 c. 28 is the *Licensing Act*, 1902.

— 4 Edw. 7 c. 23 is the *Licensing Act*, 1904.

Sale to Children.—1 Edw. 7 c. 27 is the *Intoxicating Liquors (Sale to Children) Act*, 1901.

2. JUSTICES.

(a) *Jurisdiction of.*

Part of County Transferred to Another County.]

—Where part of a county is transferred to another county under section 2 of the County Police Act, 1840, the licensing jurisdiction over the part transferred does not pass from the Justices of the former county to those of the latter. *Reg. v. Worcestershire Justices*; *Reg. v. Warwickshire Justices*, 68 L. J. Q.B. 109; [1899] 1 Q.B. 59; 79 L. T. 393; 47 W. R. 134; 62 J. P. 836; 19 Cox C.C. 198—C.A.

Refusal to Renew Licence Subject to Compensation—County Borough—Compensation Authority

—“Whole body of justices acting in and for the borough”—**Minority of Justices Acting.**—Where the whole body of Justices as the compensation authority for a county borough under the Licensing Act, 1904, do not delegate their powers to a committee, and where there are no rules fixing a quorum, at least a majority of the whole body of Justices who are qualified must attend and act at the meetings of the compensation authority. Whether the whole body must not attend, *quere*. *Re v. Leeds Justices*; *Binns, Ex parte*, 76 L. J. K.B. 111; 95 L. T. 916; 70 J. P. 517; 23 T. L. R. 48—D. [see now 6 Edw. 7 c. 42].

Committee of Quarter Sessions—Power to State Case.]

—Where the question of the renewal of an existing on-license is referred to quarter sessions by the licensing Justices under section 1, sub-section 2 of the Licensing Act, 1904, and is dealt with by a committee of the quarter sessions appointed under section 5, sub-section 2 of the Act, the proceedings before the committee are judicial proceedings, and the committee have power to state a Case for the opinion of the High Court. *Re v. Southampton Justices*; *Cardy, Ex parte*, 75 L. J. K.B. 295; [1906] 1 K.B. 446; 94 L. T. 437; 54 W. R. 484; 70 J. P. 175; 22 T. L. R. 236—D.

Committee Appointed by Licensing Justices—Report of Committee—Reference to Quarter Sessions—Cross-examination as to Conduct of Houses

not Referred.]—Where licensing Justices, on the consideration of an application for the renewal of an on-license, refer the matter under section 1, sub-section 2 of the Licensing Act, 1904, to quarter sessions, together with their report thereon, the committee of the quarter sessions appointed under section 5, sub-section 2, are not entitled, upon the hearing, to disallow questions put to witnesses in cross-examination by counsel for the licence-holder merely on the ground that they relate to houses the question of the renewal of the licences for which has not been referred to quarter sessions. *Morgan v. Aylesford Justices*, 75 L. J. K.B. 266; [1906] 1 K.B. 437; 94 L. T. 483; 70 J. P. 155; 22 T. L. R. 229—D.

Objection by Licensing Justices—Power to Adjourn—Notices.]

—There is nothing in section 42 of the Licensing Act, 1872, which precludes Justices at the general annual licensing meeting from starting on their own motion an objection to the renewal of a licence, and thereupon adjourning the case for hearing at the adjourned licensing meeting. Notice on their behalf to the applicant for the renewal of the licence to attend such adjourned meeting is sufficient without stating the grounds of objection to be brought forward, if a notice is given by other persons stating such objections; this is so at all events where the applicant attends the adjourned meeting and takes part in the proceedings. *Baxter v. Leche*, 79 L. T. 138; 62 J. P. 630—D.

Confirmation of Licences—Objection to Confirmation—Notice—Security for Costs—Rules made by Justices—Ultra Vires.]

—A rule made by Justices to the effect that objections to licences may not be raised before a confirmation committee unless the objector has given certain specified notices and has also given security for costs is *ultra vires* and bad. *Reg. v. London Justices*; *Needes, Ex parte*, 67 L. J. Q.B. 618; [1898] 2 Q.B. 340; 79 L. T. 156; 46 W. R. 528; 62 J. P. 422—D.

Alterations of Premises—To Order—Order to Close Back Entrance—“That part of the premises where intoxicating liquor is sold.”]

—Upon an application for the renewal of a licence for the sale by retail of intoxicating liquors to be sold on the premises, the licensing Justices under section 11, sub-section 4 of the Licensing Act, 1902, ordered a back entrance to the licensed premises to be closed by a locked gate and not to be used for customers. There was no evidence that any intoxicating liquor was sold or consumed at or in or near to the back entrance or the passage leading thereto:—*Held*, that the order was within the jurisdiction conferred on the licensing Justices by the provision of the sub-section empowering them to direct that “such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises where intoxicating liquor is sold or consumed.” *Busshell v. Hammond*, 73 L. J. K. B. 1005; [1904] 2 K.B. 563; 91 L. T. 1; 52 W. R. 453; 68 J. P. 370; 20 T. L. R. 413—C.A.

Previous Enquiry by Justices into Condition, Position, and Circumstances of Licensed House—Objection by Justices—Bias.]—The attention of the Justices of a petty sessional division hav-

ing been called to the large number of licences for the sale of intoxicating liquors in a certain district in proportion to the population, the Justices appointed a committee to enquire into the condition, position, and circumstances of each licensed house in the district. The committee made the enquiry by addressing questions to the persons interested in the licences and by personal inspection of the houses, and, in reporting the result, recommended that the only fair way of dealing with the question was to cause objections to be served to the renewal of all the licences. At the general annual licensing meeting the chairman, on behalf of the Justices, made objection to the renewal of the forty-five licences in the district; and the Justices' clerk, under their instructions, served formal notice of objection in each case, requiring the licensees to attend in person, upon the general ground of objection that the houses were not required, and also upon special grounds. At the adjourned meeting evidence on oath was given in support of the objections, and questions were put by the chairman based on the facts collected by the committee. The renewal of nine of the licences having been refused, rules *nisi* were obtained for writs of *mandamus* to the Justices to hold a further adjournment of the meeting and to hear and determine the applications for renewal according to law:—*Held*, first, that the practice that licensing Justices may themselves make or cause to be made an objection to the renewal of a licence is well founded, and that consequently the standard to be applied in considering the question of bias on the part of the Justices must be one which admits the right of the Justices to be at one and the same time objectors and judges, in the sense in which they are judges in hearing an application for the renewal of a licence; secondly, that, as the licensing Justices do not sit as a Court, and such an application is not a *lis* to which there are parties, the standard to be applied in considering whether the Justices have disqualified themselves from dealing with it is not that applicable to Judges dealing with litigation; and that, as what was done by the Justices was honestly done to enable them to secure a full investigation of the matter, they were not debarred thereby from sitting and deciding upon the question of the renewals. *Re v. Howard or Furnham Justices*, 71 L. J. K.B. 754; [1902] 2 K.B. 363; 86 L. T. 839; 51 W. R. 21; 66 J. P. 579—C.A.

Objections by Justices—No Objection taken at Meeting—Adjournment—Refusal of Renewal—Mandamus—Form of.—Where no notice of objection has been served not less than seven clear days before the commencement of the general annual licensing meeting, any objection then made under section 42 (2) of the Licensing Act, 1872, must be made in open Court before the adjournment, otherwise when the Justices deal with the renewal upon the adjournment they will have no jurisdiction except to renew the licence. An objection can be made under section 42 (2) at the general annual licensing meeting by the Justices themselves, but such objection must be made in open Court. The Court will not by *mandamus* order a judicial tribunal to act in a particular way, unless it is quite plain that what it has to do is purely ministerial and not judicial. Therefore, a *mandamus* will not be

granted to Justices to hold a further adjournment of the general annual licensing meeting and at such further adjournment grant a renewal of a licence, but it will merely order the Justices to hear and determine according to law. *Re v. Kingston Justices*, 86 L. T. 589; 66 J. P. 547—D.

Licence to Sell Beer by Retail—“Real resident holder and occupier”—**Certificate of Justices—Certiorari.**—Licensing Justices have no jurisdiction to grant a certificate under section 2 of the Beerhouse Act, 1840, that a person applying to be licensed to sell beer by retail is “the real resident holder and occupier” of the house in which he applies to be licensed unless he sleeps upon the premises. *Re v. Manchester Justices*, 68 L. J. Q.B. 558; [1899] 1 Q.B. 571; 80 L. T. 531; 47 W. R. 410; 63 J. P. 360—D.

Where such a certificate has been granted and confirmed, *certiorari* will lie to the confirming authority for the purpose of bringing up the certificate to be quashed. *Reg. v. Sharman* (67 L. J. Q.B. 460; [1898] 1 Q.B. 578) distinguished. *Ib.*

Mandamus to Licensing Justices—Costs of Party Opposing.—Upon the argument of a rule *nisi* for a *mandamus* to licensing Justices, the Court has jurisdiction to grant costs to a person who successfully opposes the rule being made absolute notwithstanding the decision of the House of Lords in *Boulter v. Kent Justices* (66 L. J. Q.B. 787; [1897] A.C. 556), that licensing Justices are not a Court of summary jurisdiction. *Reg. v. Yorkshire (W.R.) Justices*; *Shaw, ex parte*, 67 L. J. Q.B. 279; [1898] 1 Q.B. 503; 78 L. T. 47; 46 W. R. 334; 62 J. P. 197—D.

(b) Disqualification.

Shareholder in Brewery Company—Penalty.—A fine of 10*l.* and costs was imposed on a Justice, who was a shareholder in a brewery company in the licensing district, for taking part in the hearing of an application for the confirmation of the grant of a new licence. *Att.-Gen. v. Ball*, 66 J. P. 553—Phillimore, J. And see *Re v. Tempest, post*, JUSTICE OF THE PEACE.

Reference by Licensing Justices to Quarter Sessions—Licensing Justice Appointed to Act on Committee at Quarter Sessions—Refusal of Renewal.—Where the Justices of a licensing district refer the question of the renewal of a licence to quarter sessions under the provisions of section 1, sub-section 2 of the Licensing Act, 1904, a Justice who has been appointed by them, under section 5, sub-section 5, to act on the committee appointed by quarter sessions under section 5, sub-section 2, is not precluded from sitting and adjudicating upon the question of the renewal by reason of his having been one of the Justices who heard the original application. *Re v. Cheshire Justices*; *Kay's Atlas Brewery Co., Ex parte*, 75 L. J. K.B. 290; [1906] 1 K.B. 362; 94 L. T. 412; 54 W. R. 482; 70 J. P. 172; 22 T. L. R. 238—D.

(c) General Annual Licensing Meeting.

Jurisdiction to Hold Adjourned Meeting—Writ of Certiorari—Person Aggrieved.—Upon an

application for an alehouse licence under the Alehouse Act, 1828, there is no power in the Justices to hold an adjourned meeting in the month of October. A trade rival has a sufficient interest in the decision upon such an application to constitute him a "person aggrieved" if an objection to the jurisdiction of the Justices taken by him is overruled and the application is granted and confirmed by them, and therefore, in a proper case, he is entitled to a writ of *certiorari* to remove into the High Court the confirming order of the Justices. *Rea v. Groom*, 70 L. J. K.B. 636; [1901] 2 K.B. 157; 84 L. T. 534; 49 W. R. 484; 65 J. P. 452—D.

Statutory Adjournment within One Month—Further Adjourned Meeting for Undisposed-of Business—Jurisdiction of Justices at Further Adjourned Meeting to Entertain New Business.—Section 14, sub-section 1 of the Licensing Act, 1902, provides that every adjournment of the general annual licensing meeting "shall be held within one month of the date of the general annual licensing meeting":—*Held*, that if licensing Justices, who are unable to dispose of the licensing business at the general annual licensing meeting or the statutory adjournment thereof within one month afterwards, hold a further adjourned meeting for the purpose of disposing of the business then before them but remaining undisposed of, they have no jurisdiction at such further adjourned meeting to hear or dispose of new business or new applications which were not made and were not before them at the general annual licensing meeting or the adjournment thereof one month afterwards; and therefore they are not bound to hear an application for the renewal of a licence to a new tenant of a licensed house, whose tenancy began after the date of the statutory adjournment, and whose application consequently was not before them at the general annual licensing meeting or at the statutory adjournment thereof. *Rea v. Bristol Justices*, 89 L. T. 474; 67 J. P. 375—D.

3. THE LICENCE.

(a) Application for.

Notice of Wine Licence.—A notice of application for a wine licence given by the secretary of a limited company is not necessarily bad, because in the notice it is not expressly stated that such secretary is giving the notice on behalf of the company. *Reg. v. Lyon; Skinner, Ex parte*, 62 J. P. 357—C.A.

Fees Payable to Clerk to the Justices—Court Fees—Right of Clerk to Fees for Administering the Oath to Persons Objecting to Grant.—Section 15 of the Alehouse Act, 1828, is exhaustive as to the fees which may be taken by a clerk to the Justices on an application for the grant of a licence at a general licensing meeting or at any special sessions held under the Act, and therefore a clerk to the Justices is not entitled to demand a fee for administering the oath to a person who appears and objects to the grant of a licence. *Whitlock v. Withy*, 76 L. J. K.B. 773; [1907] 2 K.B. 526; 96 L. T. 912; 71 J. P. 317; 23 T. L. R. 458—D.

Service of Notice of Intended Application for

Excise Licence—"Next resident Magistrate"—Residence.—A place of business where a magistrate ordinarily transacts his commercial business, and where he is to be found during the working hours of the day, is a residence within the meaning of section 2 of 3 & 4 Will. 4, c. 68, which requires service of notice upon the two next resident magistrates. *Reg. v. Tyrone Justices*, [1901] 2 Ir. R. 497—C.A.

Application by Owner—Forfeiture of Licence—Jurisdiction of Justices—Discretion as to Refusal.—Upon an application at petty sessions by owners of premises, licensed before 1869, for authority under section 15 of the Licensing Act, 1874, to carry on the business till the next special sessions for licensing purposes, Justices are not entitled to exercise their discretion at large as to granting or refusing the application, and their power to refuse it is restricted to the four grounds mentioned in section 8 of the Wine and Beer House Act, 1869. *Flinn & Sons, Ex parte* (No. 2), 68 L. J. Q.B. 1025; [1899] 2 Q.B. 607; 81 L. T. 221; 48 W. R. 29; 63 J. P. 740—D.

Licence to Sell Beer by Retail—"Real resident holder and occupier"—Question of Fact—Payment of Profits on Sale of Beer to Brewers.—The question whether an applicant for a licence to sell beer by retail is the "real resident holder or occupier of the dwelling-house in which he shall apply to be licensed," as provided by section 1 of the Beerhouse Act, 1840, is a question of fact and not of law. *Nix v. Nottingham Justices*, 68 L. J. Q.B. 854; [1899] 2 Q.B. 294; 81 L. T. 41; 47 W. R. 628; 63 J. P. 628—C.A.

The mere fact that a person receives a salary as manager to a brewery company, and pays over to them the profits made on the sale of their beer, does not in law prevent him from being the "real resident holder and occupier" within the meaning of section 1 of the Beerhouse Act, 1840, of a house of which he is in fact the real resident holder and occupier. *Id.*

Off Beer and Cider Licence—Clerical Error in Notice of Application.—An application was made to licensing Justices for an "off" beer and cider licence. All the notices required to be given of the intended application properly described the character of the licence to be applied for as an "off" licence except that served on the superintendent of police, in which by a clerical error it was stated that an "on" licence would be applied for:—*Held*, that the justices had jurisdiction, notwithstanding such clerical error, to hear the application and to grant the licence, especially as it appeared that the superintendent of police was not misled by the mistake. *Clayton, Ex parte*, 63 J. P. 788—D.

Licensed Premises Pulled down for Public Purpose—Application for Licence in Respect of other Premises—Notices of Application.—Upon an application under section 14 of the Alehouse Act, 1828, where licensed premises are being pulled down for a public purpose, for a licence in respect of other premises, it is sufficient if notices of the application are served in the manner provided by that section. The express provisions of the section as to the manner in which notices of the application are to be

served are not repealed by section 40 of the Licensing Act, 1872. *Reg. v. Nicholson*, 68 L. J. Q.B. 1034; [1899] 2 Q.B. 455; 81 L. T. 257; 48 W. R. 52; 64 J. P. 388—C.A.

(b) *Grant of.*

Provisional Licence for Building in Course of Erection—Licence for Seven Years—When Licence Commences.]—Under section 22 of the Licensing Act, 1874, and section 4, sub-section 3 of the Licensing Act, 1904, a licence for the sale of intoxicating liquors may be granted for seven years. Such a licence only becomes operative from the date when it has been declared to be final by an order of the licensing Justices, and it may commence to run from a date other than April 5. *Reg. v. Johnstone; Cobbold, Ex parte*, 75 L. J. K.B. 229; [1906] 1 K.B. 228; 94 L. T. 377; 54 W. R. 347; 70 J. P. 118; 22 T. L. R. 226—D.

Provisional Grant—Confirmation—Certiorari.]—A writ of *certiorari* will lie to bring up an order of the confirming authority under the Licensing Acts which confirms the grant of a provisional licence made by the licensing committee. *Reg. v. Sunderland Justices*, 70 L. J. K.B. 946; [1901] 2 K.B. 357; 85 L. T. 183; 65 J. P. 599—C.A.

For Term of Years—Condition that Premises shall only be Open during Hours Specified Therein—Power to Grant Occasional Licence.]—Where a licence for a term of years has been granted under section 4, sub-section 3 of the Licensing Act, 1904, and one of the conditions imposed in such licence is that the licensed premises shall only remain open for the sale of intoxicating liquors during certain hours therein specified, Justices have nevertheless power to grant an occasional licence in respect of the same premises, exempting the licensee from penalties for remaining open during hours set out in such occasional licence and other than those specified in the first-mentioned licence. *Groh v. Heskestad*, 76 L. J. K.B. 787; [1907] 2 K.B. 232; 97 L. T. 179; 71 J. P. 339; 23 T. L. R. 501—D. Affirmed, 77 L. J. K.B. 481; [1908] 1 K.B. 654; 72 J. P. 114—C.A.

Not a Judicial Order.]—The granting of a licence by Justices at a licensing meeting is not a judicial order, and therefore a writ of *certiorari* to quash such an order will not lie. *Reg. v. Sharman; Denton, Ex parte*, 67 L. J. Q.B. 460; [1898] 1 Q.B. 578; 78 L. T. 320; 46 W. R. 367; 62 J. P. 296—D.

(c) *New Licence.*

Application for—Adjournment of Hearing—Right of Objector at Adjourned Hearing.]—At the general licensing meeting an application was made for a provisional licence for a new hotel. The Justices, after hearing evidence on behalf of the applicant, stated that they were inclined to grant the licence if certain alterations were made in the plans; they further stated that they desired to take time to consider the question of what amount should be paid by the applicant in respect of monopoly

value under section 4, sub-section 2 of the Licensing Act, 1904; they accordingly adjourned the general annual licensing meeting for a month. Prior to the adjourned meeting two persons who, by inadvertence had not appeared at the first meeting, gave notice that they intended to oppose the application, and at the adjourned meeting they appeared and claimed to be heard, but the Justices refused to hear them:—*Held*, that the Justices were right in so refusing. *Fearn and Boucher, Ex parte*, 69 J. P. 177—C.A.

Surrender of Old Licence—Removal Order.]—Where the occupier of one set of licensed premises of which he is tenant applies for a licence in respect of other premises, and the Justices in the exercise of their discretion grant a new licence in respect of the latter premises on the condition, accepted by the applicant, that he abandons the licence of the former premises, the proceedings do not amount to an application for a removal order, and in granting the new licence the Justices are acting within their discretion. *Lacey v. Lacon*, 68 L. J. Q.B. 480; [1899] A.C. 222; 80 L. T. 473; 47 W. R. 497; 63 J. P. 371—H.L. (E.)

Grant—Confirming Authority—Monopoly Value—Report of Surveyor—Evidence not on Oath—Order of Confirming Authority.]—Upon an application for a new on-licence, the licensing Justices made a grant fixing the monopoly value at 2,250*l.* The confirming authority, upon the report of their valuer, not upon oath, fixed the monopoly value at 5,000*l.*, and made an order that the licence should be confirmed, and that the conditions attached to the licence under section 4 of the Licensing Act, 1904, should, with the consent of the licensing Justices, be varied by fixing the monopoly value at 5,000*l.* The licensing Justices refused to consent. The applicant applied for a *mandamus* to the confirming authority to deliver a certificate of confirmation of the licence, or for a *mandamus* to hear and determine the application for confirmation. The Divisional Court held that the meaning of the order of the confirming authority was that the confirmation should be conditional upon the licensing Justices consenting to the monopoly value being increased to 5,000*l.*, and they refused a *mandamus* to deliver a certificate of confirmation, but they held that the confirming authority were not entitled to act upon the report of their valuer not upon oath; and they granted a *mandamus* to hear and determine the application. The applicant appealed from the refusal to grant a *mandamus* to deliver a certificate of confirmation of the licence: *Held* (affirming the decision of the Divisional Court), that the confirmation was conditional upon the consent of the licensing Justices to the increase of monopoly value. *Reg. v. Jackson*, 96 L. T. 77; 71 J. P. 25; 23 T. L. R. 128—C.A.

Condition Annexed—Sum Paid by Grantee for Public Purposes.]—Justices cannot annex a condition to the grant of a public-house licence that the grantee shall pay a sum of money into their hands, to be applied by them towards reduction of rates or similar public purposes. *Reg. v. Bowman; Patton, Ex parte*, 67 L. J. Q.B. 463; [1898] 1 Q. B. 663; 78 L. T. 230; 62 J. P. 374—D.

Certiorari. Mandamus.]—Where a grantee has accepted such a condition, and the licence has been granted, in the face of the opposition of inhabitants and ratepayers, the remedy of the opponents to the licence is by *mandamus* to the Justices to hold an adjourned meeting, and to hear and determine the application according to law, and—upon the authority of *Reg. v. Sharman, infra*—not by *certiorari* to bring up and quash the licence. *Ib.*

Refusal of Justices to Hear Statements of Fact except upon Oath—Discretion of Justices.]—The Justices at a licensing meeting have a discretion as to what evidence they will receive and as to the admission of unsworn evidence. Where, therefore, on the hearing of an application for a new licence for a hotel, witnesses had given evidence upon oath in opposition to the granting of the licence, and another person appeared in opposition and proposed to make statements of fact, but refused to be sworn.—*Held*, that the Justices were acting within their jurisdiction in declining to hear him, although the local public ought, within reasonable limits, to be allowed to express their views at licensing meetings. *Reg. v. Sharman; Denton, Ex parte, infra.*

(d) *Renewal of Licence.*

Notice of Objection—Sufficiency of—Report of Head Constable—Request that Renewal be Withheld till Adjourned Meeting—Report Treated as Objection.]—Where at a general annual licensing meeting a head constable's report asking that the renewal of a beerhouse on-licence may be withheld until the adjourned meeting, is read to the Justices in open Court, and the Justices (as well as the constable) treat the report as an objection, and accordingly adjourn the application, and subsequently require the applicant to attend in person at the adjourned meeting, the report constitutes an objection to the renewal within the meaning of section 42, sub-section 2 of the Licensing Act, 1872. *Hawkins v. Bridgwater Justices*, 69 L. J. Q.B. 663; [1900] 2 Q.B. 382; 82 L. T. 847; 48 W. R. 587; 64 J. P. 631—D.

— **No Notice Served on Subsequent Transferee—Application by Transferee.]**—At the general annual licensing meeting, held on February 12, 1906, the Justices in open Court objected to the renewal of the licence of a public-house held by R., and thereupon R.'s application for the renewal was adjourned to the adjourned licensing meeting fixed for March 12, 1906. On February 22 notice of objection to the renewal of the licence was served upon R. by the direction of the Justices. On February 25 R. quitted the premises in question, and a temporary authority to sell intoxicating liquors under the licence was on February 26 granted to L., who continued to carry on the business of a licensed victualler upon the premises under the powers conferred upon him by the temporary authority and the licence. On March 12, before the hearing of the application for the renewal, the licence was duly transferred to L. under the provisions of sections 4 and 14 of the Alehouse Act, 1828, and after that transfer had been granted L. then and there applied for the renewal of the licence to him, and, notwithstanding

standing that no notice of objection had been served upon him under section 42 of the Licensing Act, 1872, the Justices heard evidence in opposition to the renewal and in support of the objection contained in the notice of objection which had been served upon R., and refused the renewal.—*Held*, that the notice of objection which had been served upon R. was not valid as regards L., that the Justices were wrong in the course they took, and that a renewal of the licence must be granted to L. *Blencowe v. Staffordshire Justices*, 96 L. T. 817; 71 J.P. 210—D.

Report by Justices to Quarter Sessions—Service of Notice upon Applicant—Manner in which Hearing of Application is to be Conducted.]—Where Justices are about to consider whether the renewal of a licence should be referred to quarter sessions under the Licensing Act, 1904, s. 1, sub-s. 2,—*Held*—first, the Justices ought not to make a report respecting any house without giving notice to the licensed holder and giving him an opportunity of attending and, if he desires, of tendering evidence; secondly, the opinion of the Justices as to whether the renewal of a licence requires consideration by the quarter sessions in accordance with the Licensing Act, 1904, s. 1, sub-s. 2, must be based upon evidence, which must be taken on oath, and liberty must be given to the holder of the licence to call evidence in favour of his application; thirdly, the Justices need not have detailed evidence with regard to the differentiation between different public-houses; and, while they need not exclude their own knowledge of the locality and needs of the neighbourhood, in so far as their opinion is founded upon facts with regard to a particular house, those facts should be proved on oath so as to give the licence-holder an opportunity of testing them. *Held*, also, that, where the Justices have acted in accordance with this view of the law, it is not necessary for them to go further and enquire into matters which it might be necessary for the quarter sessions to consider when deciding whether the licence should be renewed or not. *Rees v. Polhurst; Farrell, Ex parte. Rees v. Cox; West, Ex parte*, 74 L. J. K.B. 652; [1905] 2 K.B. 478; 93 L. T. 76; 53 W. R. 619; 69 J. P. 308; 21 T. L. R. 533—D.

— **Provisional Renewal—Renewal of Licence Refused—Compensation—Contribution to Compensation Fund—"Existing on-licence renewed"—Provisional Renewal not an Ordinary Renewal—Holder of Provisional Licence not Liable for Contribution to Compensation Fund.]**—The provisional renewal, by the Justices of a licensing district under rule 41 of the Licensing Rules, 1904, of an on-licence existing at the date of the passing of the Licensing Act, 1904, the renewal of which has been referred with a report to quarter sessions for the purposes of compensation, is not a renewal within the meaning of section 1, sub-section 1 of the Licensing Act, 1904, and therefore the holder of such a provisional renewal is not liable to pay the charges imposed by the quarter sessions in respect of all existing on-licences renewed within their area, for the purpose of establishing a compensation fund. *Malikin v. Regem*, 75 L. J. K.B. 884; [1906] 2 K.B. 886; 95 L. T. 448; 70 J. P. 506; 22 T. L. R. 807—Walton, J.

Requirements of the Neighbourhood—Notice of Intention to Oppose—Notice by Licensing Justices—Evidence.]—The mere facts, first, that a public-house is one of a number too great for the requirements of the neighbourhood; and secondly, that the licensing Justices have given notice of an intention to oppose the renewal of the licence of that particular public-house, but not of any other in the neighbourhood, on the ground that it is not required for the wants of the neighbourhood, are no evidence on which a Court of quarter sessions can find that the licence of the particular house is not required for the wants of the neighbourhood. (KENNEDY, J., dissenting.) *Raven v. Southampton Justices*, 73 L. J. K.B. 282; [1904] 1 K.B. 430; 90 L. T. 94; 52 W. R. 574; 68 J. P. 68; 20 T. L. R. 146—D.

— **Evidence—Compensation Authority.]**—An objection to the renewal of an on-licence stated that a fully licensed house was not required at the place where the licensed house was situated, and that having regard to the character and necessities of the neighbourhood and the number of licensed houses, the licence was unnecessary. The licensing Justices referred the matter to the whole body of Justices as the compensation authority under section 1, sub-section 2 of the Licensing Act, 1904, and the compensation authority, after hearing evidence as to the condition of the house and its business, and that the public would not suffer any inconvenience if it were closed, refused the renewal, subject to the payment of compensation:—*Held*, that, assuming the compensation authority, when acting under section 1, sub-section 2 of the Act, were sitting as a Court in a judicial capacity, there was evidence upon which they could refuse the renewal of the licence, there being evidence to shew that the licensed house objected to was the superfluous house. *Rev v. Drinkwater*; *Conway, Ex parte*, 70 J. P. 1; 22 T. L. R. 12—C.A.

Provisional Licence—Report to Compensation Authority—Bias of Licensing Justices—Certiorari Mandamus.]—It is competent to licensing Justices in the honest exercise of their discretion to grant licences to persons who are not “keeping” or “being about to keep” the premises in respect of which the application is made as an inn, alehouse, or victualling house under the Alehouse Act, 1828, and who are not “the real resident holders and occupiers” of the premises under the Beerhouse Act, 1840. *Leeds Corporation v. Ryder*, 76 L. J. K.B. 1032; [1907] A.C. 420; 97 L. T. 261; 71 J. P. 484; 23 T. L. R. 721—H.L. (E.)

It is lawful for licensing Justices to grant provisional licences under section 6 of the Licensing Act, 1904, to the nominees of a corporation who do not intend to carry on business, for the purpose of obtaining compensation under the Act in respect of licensed premises about to be suppressed under an improvement scheme. *Ib.*

Refusal to Renew by Compensation Authority—Evidence of Differentiation.]—The compensation authority to whom the question of the renewal of a beerhouse licence had been referred under the Licensing Act, 1904, had evidence before them upon oath that the particular house

had small accommodation, that the public rooms were small, that the takings were only about 1l. per day, and that there were fifteen other licensed houses within a radius of two hundred yards:—*Held*, that, upon this evidence differentiating the house in question from others in the locality, the compensation authority were entitled to act in refusing the renewal of the licence. *Rev v. Johnson*; *Whitmore, Ex parte*, 71 J. P. 59—D.

Grant of Provisional Licence—Report to Compensation Authority—Prejudice or Bias of Justices—Certiorari—Mandamus.]—The granting or refusing of a licence by a licensing committee of Justices at a general annual licensing meeting is a judicial act, and a writ of *certiorari* will lie to bring up a provisional licence and a reference and report to the compensation authority granted and made by a licensing committee of Justices under section 1 of the Licensing Act, 1904, and rule 41 of the Licensing Rules, 1904. *Reg. v. Sharman*; *Denton, Ex parte* (87 L. J. Q.B. 460; [1898] 1 Q.B. 578), not followed. *Rev v. Woodhouse*, 75 L. J. K. B. 745; [1906] 2 K.B. 501; 95 L. T. 367, 399; 70 J. P. 485; 22 T. L. R. 603—C.A.

By virtue of section 1 of the Licensing Act, 1904, Justices at a general annual licensing meeting are bound to hear and determine objections to renewal of licences *bona fide* made upon grounds (*inter alia*) connected with the character or fitness of the proposed holder of the licence, or the ground that the renewal would be void. Where, therefore, Justices referred to the compensation authority, with their report thereon, the question of the renewal of certain licences, and granted provisional licences in the meantime in pursuance of an arrangement previously made, and without considering objections *bona fide* made, upon grounds connected with the character and fitness of the proposed licensees and upon the ground that the renewal would be void,—*Held*, that a writ of *certiorari* should go to quash the provisional licence and the reference and report to the compensation authority, and that a *mandamus* should go directing the Justices to hear and determine the objections according to law. *Ib.*

Semble, per VAUGHAN WILLIAMS, L.J., and STIRLING, L.J. (FLETCHER MOUTON, L.J., dissenting), that the questions—first, whether an applicant for a licence under the Alehouse Act, 1828, is a person keeping, or being about to keep, an inn, alehouse, or victualling-house within the meaning of section 1 of that Act; and secondly, whether an applicant for a licence under the Beerhouse Act, 1840, is the real resident holder and occupier of the house within the meaning of section 1 of that Act, are matters left to the decision of the licensing Justices, and their adjudication upon those questions will not be quashed, on the ground that it is erroneous, by a *certiorari*. *Ib.*

Control of Justices over Structure of Licensed Premises—Passage giving Second Entrance to Bar—Jurisdiction to Order Passage to be Closed.]—The power conferred on licensing Justices by section 11 of the Licensing Act, 1902, to refuse to renew a licence unless “such alterations as they think reasonably necessary to secure the

proper conduct of the premises shall be made in that part of the premises where intoxicating liquor is sold or consumed" applies to any part of the licensed premises to which customers have access. Therefore an order closing a passage which led to the bars and formed a second entrance to the licensed premises, the evidence being that, although no liquor was sold or consumed at the back entrance or in the passage, it was frequently used by customers entering and leaving the premises, was one that the Justices had jurisdiction to make. *Bushell v. Hammond*, 51 W. R. 695; 67 J. P. 409—D.

Direction for Alteration in Premises—Non-structural Alteration—Keeping Door Locked.]—Section 11, subsection 4 of the Licensing Act, 1902, only empowers the licensing Justices, on renewing a licence, to direct such alterations in the part of the premises where intoxicating liquors are sold as are of a structural character. Consequently the sub-section does not authorise the Justices, with a view to confining the sale of intoxicating liquor to one of two separate entrances to parts of licensed premises where such liquor is sold, to make an order directing that the door of the other entrance shall be kept locked and not used except for domestic or private purposes, and the key kept by the licensee. *Bushell v. Hammond* (73 L. J. K.B. 1005; [1904] 2 K.B. 563) considered and distinguished. *Smith v. Portsmouth Justices*, 75 L. J. K.B. 851; [1906] 2 K.B. 229; 95 L. T. 5; 54 W. R. 598; 70 J. P. 497; 22 T. L. R. 650—C.A.

Existing On-Licence—Power of Licensing Justices to Require Undertaking.]—Licensing Justices have no power since the Licensing Act, 1904, to refuse the renewal of an existing on-licence unless the applicant consents to give an undertaking to observe certain conditions as to the conduct and management of the business, such conditions not being conditions covered by any of the grounds of refusal specified in section 1, sub-section 1 of the Act, or, in the case of beerhouses licensed prior to May 1, 1869, specified in section 8 of the Wine and Beerhouse Act, 1869. So held by COLLINS, M.R., and COZENS-HARDY, L.J. (MATHEW, L.J., dissenting). *Rex v. Dodds*, 74 L. J. K.B. 599; [1905] 2 K.B. 40; 93 L. T. 319; 53 W. R. 559; 69 J. P. 210; 21 T. L. R. 391—C.A.

Where licensing Justices renew licences, but with a condition which they have no power to impose, *mandamus* will lie to compel them to deliver the renewal licences without the condition. *Id.*

—Reference to Quarter Sessions—Report of Licensing Justices—Evidence of Matters not Mentioned in Report.]—Upon an application for the renewal of an existing on-licence, the licensing Justices were of opinion that the licence was not required, and referred the matter under section 1 of the Licensing Act, 1904, to quarter sessions, together with their report thereon. Upon the hearing before the committee of the quarter sessions it was proved that there were a large number of other licensed houses in the immediate vicinity, one of which was being rebuilt in accordance with plans approved by the renewal authority. Evidence was also re-

ceived as to the structural condition and state of repair of the applicant's premises for the purpose of differentiating them from some of the other licensed houses. No complaint was made in the report as to the structure or state of repair of the applicant's premises:—*Held*, that the committee were entitled to go into evidence as to material matters, although they were not referred to in the report, and that therefore the evidence was properly received. *Howe v. Newington Licensing Justices*, 76 L. J. K.B. 718; [1907] 2 K.B. 340; 96 L. T. 700; 71 J. P. 242; 23 T. L. R. 474—D. Affirmed in C.A. 72 J. P. 12; 24 T. L. R. 174; 77 L. J. K.B. 263; [1908] 1 K.B. 260; 98 L. T. 79.

New or Renewed Licence—Premises Rebuilt.]—Premises for which a tenant held a licence were during the year for which it was current demolished and rebuilt by the owner, but the tenant during the reconstruction continued to carry on his business as a publican in the premises without interruption. The internal arrangement of the reconstructed building was different from that of the old building, the floor area was increased, and the outside measurements were slightly altered. An application for a certificate applicable to the reconstructed building and for the succeeding year was refused by the magistrates, but granted on appeal by the quarter sessions:—*Held*, that, as the identity of the premises was not changed by their reconstruction, or the existing licence brought to an end, the tenant's application was not for a new licence, and that accordingly the quarter sessions had jurisdiction to entertain the appeal. *Stevenson v. Hunter*, 5 F. 761—Ct. of Sess.

Disorderly House—Previous Transfer, notwithstanding same Objection—Estoppel.]—Where an application for a transfer of a licence for the sale of beer by retail to be consumed on or off the premises has been granted at the transfer sessions, notwithstanding an objection that the licensed house is a disorderly house, the Justices at the next annual licensing sessions are not estopped from refusing a renewal of the licence upon the same objection being taken on the same facts. *Smith v. Shann*, 67 L. J. Q.B. 819; [1898] 2 Q.B. 347; 79 L. T. 77—D.

Beerhouse — Annual Value — Continuity of Licence.]—Premises to which, at the time of the passing of the Licensing Act, 1872, a licence was attached are qualified under section 45 to receive a licence without regard to the conditions of annual value prescribed by that Act, even though there has been a subsequent breach of continuity in the licence. *Igoe v. Shann*, 72 L. J. K.B. 693; [1903] A.C. 320; 89 L. T. 105; 52 W. R. 111; 67 J. P. 333—H.L. (Tl.)

Change of Occupancy—Removal — Expiration of Licence before Removal.]—Section 14 of the Alehouse Act, 1828, which provides that if, amongst other contingencies, a duly licensed person "shall remove from or yield up the possession of the house specified in such licence" the Justices at a special session may grant a renewal of the licence to any new tenant or occupier of the house, does not give the Justices jurisdiction to grant a renewal of the licence where the outgoing occupier has not removed until after the expiration of his licence.

Simpkin v. Birmingham Justices (41 L. J. M.C. 102; L. R. 7 Q.B. 482) approved. *Rea v. London County Justices*, 72 L. J. K.B. 647; [1903] 2 K.B. 19; 88 L. T. 673; 51 W. R. 629; 67 J. P. 277—C.A.

Removal of Licence—Attaching Conditions—Jurisdiction of Justices.—Upon an application for the removal of an existing on-licence, the licensing Justices are not entitled to impose the conditions which they are empowered by section 4, sub-section 2 of the Licensing Act, 1904, to impose in the case of the grant of a new on-licence. *Rea v. Drinkwater; Wincott, Ex parte*, 74 L. J. K.B. 722; [1905] 2 K.B. 469; 93 L. T. 165; 54 W. R. 95; 69 J. P. 300; 21 T. L. R. 514—D.

—Notice to Owner of Premises—Appeal to Court of Appeal—Appearance of Justices—Costs.—The provisions of section 50 of the Licensing Act, 1872, with regard to the notice to be given to the owner of licensed premises apply to any order of Justices which in effect, even though not in form, is a removal order; and Justices at licensing sessions have no jurisdiction to make any order which has the effect of a removal order unless such notice has been given and the consent of the owner obtained. Justices ought not to appear by counsel in the Court of Appeal in appeals from Justices; if they do so their costs will be disallowed. *Reg. v. Thornton*, 67 L. J. Q.B. 249; [1898] 1 Q.B. 334; 78 L. T. 95; 46 W. R. 241; 62 J. P. 196—C.A.

Refusal—Appeal to Quarter Sessions—Onus of Proof—No Appearance by Licensing Justices.—Upon an appeal to quarter sessions under section 27 of the Alehouse Act, 1828, against a refusal by Justices sitting at the general annual licensing meeting to renew a licence, the quarter sessions cannot without hearing any evidence refuse to renew the licence. *Evans v. Conway Justices*, 69 L. J. Q.B. 636; [1900] 2 Q.B. 224; 82 L. T. 704; 48 W. R. 577; 64 J. P. 467—C.A.

Reference to Quarter Sessions—Report of District Justices—Necessity for Independent Evidence before Quarter Sessions.—The report made by the Justices of a licensing district to quarter sessions under section 1, sub-section 2 of the Licensing Act, 1904, does not amount to evidence on which the quarter sessions may rely in determining the question of the renewal of the licence to which the report relates. *Dartford Brewery Co. v. County of London Quarter Sessions*, 75 L. J. K.B. 597; [1906] 1 K.B. 695; 94 L. T. 782; 70 J. P. 197; 22 T. L. R. 491—D.

Refusal to Renew—Appeal—Taxation of Costs.—See *APPEAL*, *infra*, col. 1128.

(e) Compensation for Non-renewal.

Principles of Assessment.—In assessing the amount of compensation payable under section 2 of the Licensing Act, 1904, on the non-renewal of an existing on-licence, the tribunal has to find the price of the licensed premises in the open market, add to that amount the depreciation (if any) of the trade fixtures, and

deduct from the total sum so arrived at the price which the premises would fetch in the open market if unlicensed. *Ashby's Cobham Brewery Co. (Crown, Cobham), Ex parte; Ashby's Staines Brewery Co. (Hand and Spear, Woking), Ex parte*, 75 L. J. K.B. 983; [1906] 2 K.B. 754; 95 L. T. 260; 70 J. P. 372; 22 T. L. R. 725—Kennedy, J.

In ascertaining the price the licensed premises would fetch in the open market evidence is admissible of the amount and quality of the liquors supplied to the house over such a period of time as will serve to exclude the risk of erroneous inference due to the influence of purely temporary or accidental circumstances; such evidence, however, must be evidence of the profit which would be made ordinarily and normally, not of profit arising from causes purely personal to the tenant, or from other peculiar advantages. Evidence is also admissible of the position and structural condition of the premises and of the condition and probable future of the district in which they are. To the estimate of the annual profit has to be added, in order to get a basis for the calculation of the market value of the premises, the rent which may be obtained from the tenant—that is, the rack rent if the premises are let at a rack rent, or, if the house is a tied house, the annual sum the tenant would be willing to pay in anticipation of the profits likely to be derived from the sale of liquors supplied to him by the brewers. The annual rent and annual profit having been ascertained, each of these has to be capitalised, but the number of years' purchase will vary with the character of the premises, the circumstances of the locality, the prospects of the improvement of the business done in the particular premises, the general state of the liquor trade, and the competition in the market for the acquisition of this class of property; and the assessing tribunal must in each case of dispute decide according to the weight of the evidence of competent witnesses. To the amount of compensation so arrived at no sum can be added in respect of the tenant's interest in the premises. *Ib.*

Compensation Charges—Year for which Levied.—The charges payable under section 3, sub-section 1 of the Licensing Act, 1904, to constitute a fund to compensate persons the renewal of whose licences has been refused by quarter sessions, are paid in respect of the year from April 5 to April 5—that being the period during which a licence is in operation as a licence. *Horton v. Penn*, 76 L. J. K.B. 340; [1907] 1 K.B. 561; 96 L. T. 228; 71 J. P. 115; 23 T. L. R. 290—D.

Division of Amount among Parties Interested—Principle Applicable.—In dividing the sum awarded as compensation for the non-renewal of a licence between the reversioners and the lessees, regard must be had to their contractual relations with respect to that which such sum represents. *Liverpool Corporation v. Walker*, 77 L. J. K.B. 46; [1908] 1 K.B. 28; 71 J. P. 524; 97 L. T. 764—D.

In a case where the property is not of a wasting nature the present value of the respective interests of the parties is a matter of

actuarial calculation at such rate of interest as is the usual rate in this country for money lent where the security is ample and no part of the interest is required for insurance against risk, and the principle upon which such rate is to be determined is a question of law. *Ib.*

Determination by County Court—Appeal from.]—Where the question of such dividend had been referred by quarter sessions to the County Court, an appeal on questions of law lies therefrom to the High Court. *Ib.*

Compensation Fund—Exemption from Chargeability—Hotel—Portion of Premises used as Public-House—Annual Value Exceeding 25*l.*—Premises used for Purpose to which Holding of Licence “merely auxiliary.”]—Where a portion of the premises of an hotel is set apart and used as an ordinary public-house, and the annual value of such portion exceeds 25*l.*, the hotel does not come within the words “licensed premises . . . used . . . for any other purpose to which the holding of a licence is merely auxiliary” in the note to Schedule I. of the Licensing Act, 1904, and is therefore not entitled to any exemption from the scale of maximum charges in respect of the compensation fund. *Rea v. Carter*, 76 L. J. K.B. 137; [1907] 1 K.B. 298; 95 L. T. 910; 71 J. P. 60; 23 T. L. R. 25—D.

Refusal to Renew Licence Subject to Compensation—County Borough—Compensation Authority—“Whole body of Justices acting in and for the borough”—Minority of Justices Acting.]—Where the whole body of Justices as the compensation authority for a county borough under the Licensing Act, 1904, do not delegate their powers to a committee, and where there are no rules fixing a quorum, at least a majority of the whole body of Justices who are qualified must attend and act at the meetings of the compensation authority. Whether the whole body must not attend, *quare*. *Rea v. Leeds Justices; Binns, Ex parte*, 76 L. J. K.B. 111; 95 L. T. 916; 70 J. P. 517; 23 T. L. R. 48—D. [See now 6 Edw. 7, c. 42.]

Compensation Fund—Deduction from Rent—Incidence of Charge.]—See *Smith, In re; Smith v. Dodsworth*, 75 L. J. Ch. 442; *post*, WILL.

Deduction of Contribution from Rent of House—Landlord's Property Tax.]—See REVENUE.

Investment of Compensation Moneys—Debtors Trust Deed.]—See *Noakes v. Noakes & Co.* and *Dawson v. Braime's Tadcaster Breweries, ante*, COMPANY, col. 423.

Rating of Licensed Premises—Deduction of Amount Paid.]—See *Waddle v. Sunderland Union*, 76 L. J. K.B. 16; *post*, POOR LAW.

Refusal to Renew by Compensation Authority.] See RENEWAL, *supra*.

• (f) *Transfer of Licence.*

“Licensed premises” — Alterations.] — C. obtained an assignment of certain licensed

premises and the licence attached thereto, and applied for a transfer of the licence. The assignment contained a reservation, in favour of the former owner and licensee, of the room occupied by him. The Justices refused to grant a transfer, on the ground that “the whole of the licensed premises” had not been assigned to the applicant:—*Held*, that the true test was not this, but whether the licensed premises as assigned were substantially the same as before. *Reg. v. Donegal Justices*, [1898] 2 Ir. R. 652—Q.B. D.

Death of Tenant—Transfer to New Tenant of House so becoming Unoccupied.]—In August, 1896, a full licence was granted to M. E. for the M. Inn, D. In November, 1896, she died intestate, and the landlord took possession of the premises. The appellant was admitted into possession of the premises by the landlord. A beer merchant realised all the effects on the premises and applied the proceeds to pay a debt owing to him, and the licence was handed over to the appellant for a consideration. On February 24, 1897, an application was made at petty sessions on behalf of the appellant for the transfer of the grant of a licence under 9 Geo. 4, c. 61, s. 14, until the expiration of the current licensing year, but that was refused. The appellant then appealed to quarter sessions, but the Court held that they had no power to hear the case because it did not come within 9 Geo. 4, c. 61, s. 14. By section 14 of that Act, if any person duly licensed under the Act shall die, and in certain other contingencies whereby the licensed premises become unoccupied, the Justices shall have power to grant a licence to the heirs or administrators of the person so dying, or to the tenant or occupier of a house having become so unoccupied:—*Held*, that such a case as the present came within the Act, and the Justices at quarter sessions had jurisdiction to hear it. *Davies v. Evans*, 77 L. T. 688; 62 J. P. 120—D.

“Person duly licensed.”]—Upon an application under section 14 of the Alcoholic Act, 1823, by a person whose house has been pulled down, for the grant of a licence to sell excisable liquors by retail to be drunk or consumed in some other fit and convenient house, the applicant must shew that at the time the house was pulled down he was keeping it as an inn, and that he was then a person duly licensed under the Act. *Reg. v. Yorkshire (W.R.) Justices; Shaw, ex parte*, 67 L. J. Q.B. 279; [1898] 1 Q.B. 503; 78 L. T. 47; 46 W. R. 334; 62 J. P. 197—D.

Inn “theretofore kept by persons being about to remove” therefrom—Licence-holder Prohibited from Selling—Power of Justices to Transfer Licence.]—W. applied for the transfer of a licence of an inn, the licence-holder having become bankrupt. W. had received the key of the premises, had placed furniture in the house, and had given directions for the painting of the premises. He had also let rooms in the house for the meetings of certain clubs, but had never slept on the premises, nor occupied them as a dwelling-house or as licensed premises. The application was refused by the licensing Justices, but on appeal the quarter sessions granted it, intimating, however, that W. was not a fit and proper person to hold the licence; and

that it was granted to him as a temporary arrangement on the understanding that he would not sell liquors under the licence, and that at the earliest moment an application should be made to transfer it to some one else. An application was accordingly made for a transfer to one S., who had signed an agreement for the tenancy of the house and entered into possession. The application was refused by the Justices on the ground that they had no jurisdiction to grant it, but on appeal the quarter sessions granted the transfer:—*Held*, that the question whether the house had been “theretofore kept” by W. as an inn within the meaning of section 4 of the Alehouse Act, 1828, was to a great extent one of fact, that upon the evidence the quarter sessions were not wrong in holding that it had been so kept, and that they had therefore jurisdiction to grant the transfer to S. *Reg. v. Cotham* (67 L. J. Q.B. 632; [1898] 1 Q.B. 802) distinguished. *Wilson v. Creve Justices*, 74 L. J. K.B. 394; [1905] 1 K.B. 491; 92 L. T. 164; 53 W. R. 382; 69 J. P. 111; 21 T. L. R. 233—D.

Condition on Original Grant—Licence to be given up on Applicant Leaving—Discretion.]—A licence was granted by Justices subject to the condition that it should be given up upon the original holder leaving or ceasing to carry on business upon the premises:—*Held*, that this condition was not a bar to the Justices granting a transfer of the licence upon the original holder leaving or ceasing to carry on business on the premises. *Oldham Justices v. Gee*, 86 L. T. 389; 50 W. R. 394; 66 J. P. 341—D.

Temporary Transfer—Sale without Licence—Conviction for Second Offence—Forfeiture of Licence—Jurisdiction of Justices.]—Where a licensed person has been convicted of a second offence of selling by retail spirits without being duly authorised to sell the same, and in consequence has had his licence forfeited under section 3 of the Licensing Act, 1872, Justices sitting at petty sessions have jurisdiction to entertain an application by the owner of the premises under section 15 of the Licensing Act, 1874, for authority to carry on the business until the next special sessions for licensing purposes, inasmuch as section 15 of the Act of 1874 contemplates the happening for the first time of the compound event of a conviction for selling spirits without a licence, and, in consequence of such conviction, forfeiture of the licence. *Flinn & Sons (No. 1), Ex parte*, 68 L. J. Q.B. 777; [1899] 2 Q.B. 154; 81 L. T. 27; 47 W. R. 697; 63 J. P. 660; 19 Cox C.C. 375—D.

Appeal against Refusal to Transfer—Costs of Successful Appeal—Certiorari.]—On the licensing Justices refusing to transfer a licence there was an appeal to quarter sessions, which was allowed. The quarter sessions further ordered the Justices to pay the appellant's costs, and the treasurer of the County Council of London to refund such funds to the Justices, and also the solicitor and client costs of the Justices themselves:—*Held*, that there was no jurisdiction under sections 27 and 29 of the Alehouse Act, 1828, to make the order. *Reg. v. London Justices; London County Council, ex parte*, 78 L. T. 559; 46 W. R. 558; 62 J. P. 517—D.

Consideration of Extraneous Matters by Justices—Mandamus to Hear and Determine.]—In a case where it is manifest that licensing Justices, in granting a transfer of a licence, have taken into consideration matters extraneous to the statutes giving them jurisdiction, the Court will grant a *mandamus* to the Justices to hear and determine according to law. *Reg. v. Cotham*, 67 L. J. Q.B. 632; [1898] 1 Q.B. 802; 78 L. T. 468; 46 W. R. 512; 62 J. P. 435—D.

(g) *Appeal*.

Appeal to Quarter Sessions—Licensing Justices Appearing as Respondents—Right to Indemnity Costs.]—Licensing Justices who, being served with notice of appeal to quarter sessions against their refusal to renew a licence for the sale of intoxicating liquors, appear as respondents and successfully oppose the appeal, are entitled to indemnity costs under section 29 of the Alehouse Act, 1828. *Reg. v. Worcestershire Justices*, 69 L. J. Q.B. 826; [1900] 2 Q.B. 576; 63 L. T. 272; 49 W. R. 89; 64 J. P. 707—C.A.

— Licensing Justices Appearing on Appeal—Jurisdiction to give Costs against Justices.]—Upon an appeal from a refusal by licensing Justices to renew a licence, the Court of quarter sessions has no jurisdiction, if the appeal is allowed, to order the licensing Justices to pay costs, although the Justices appear by counsel and call evidence in opposition to the renewal. *Reg. v. Staffordshire Justices*, 67 L. J. Q.B. 931; [1898] 2 Q.B. 231; 79 L. T. 142; 62 J. P. 741—D.

— Order as to Costs—Borough having no Court of Quarter Sessions—Liability of County for Payment of Costs.]—The word “place” in section 29 of the Alehouse Act, 1828, means a place having a separate Court of quarter sessions. A county borough had a separate commission of the peace, but no separate Court of quarter sessions. An appeal from a refusal by the borough Justices to renew a licence having been successfully brought to the Court of quarter sessions for the county, an order was made by the quarter sessions upon the borough treasurer for payment of the costs of the borough Justices:—*Held*, that the borough was not a “place” within the meaning of section 29 of the Alehouse Act, 1828, that the Justices had acted for the county, and that the order for payment of their costs should have been made upon the county treasurer. *Reg. v. Warwickshire Justices*, 71 L. J. K.B. 505; [1902] 2 K.B. 101; 86 L. T. 568; 66 J. P. 549—D.

— Unsuccessful Opposition by Justices—Order of Quarter Sessions for Payment of Costs to Clerk of Justices—Taxation out of Sessions—Validity of Order.]—An order of quarter sessions, purporting to have been made under section 29 of the Alehouse Act, 1828, directed the treasurer of a borough to pay to W., who was the clerk of the borough Justices, a certain sum for the reasonable costs, charges, and expenses which he had been put to and had incurred in supporting a decision of the Justices refusing an alehouse licence. The sum, for which a blank had originally been left in the order, had been ascertained on taxation and inserted in the order by the clerk of the peace between the date of the

sessions at which the order had been made and a subsequent date to which they had been adjourned. Neither the treasurer nor the corporation of the borough had been a party to the proceedings or had received notice of or was represented at the taxation. W. had been directed by a resolution of the Justices to have the case fully represented at quarter sessions, and to incur such costs as the circumstances demanded, and was afterwards authorised, but only by a majority of these Justices, to receive the sum mentioned in the order:—*Held*, that the order was invalid, inasmuch as the Court in making it had not exercised the jurisdiction conferred upon it by the above section, which is to order payment of such sum as shall in the opinion of the Court be sufficient to indemnify the Justices. *Held*, further, per RIDLEY, J., that the order was not invalid in directing the sum to be paid to W., because he had been appointed within the meaning of the section by the Justices to receive it; per BRIGHAM, J., that it was invalid in directing the sum to be paid to W., because he had not been so appointed. *Reg. v. Winder*, 69 L. J. Q.B. 729; [1900] 2 Q.B. 666; 83 L. T. 171; 48 W. R. 605; 64 J. P. 741—D.

Order Directing Alterations in Licensed Premises — Appeal — Jurisdiction of Recorder.—An appeal against an order of licensing Justices under section 11, sub-section 4 of the Licensing Act, 1902, directing alterations on the licensed premises, may be entertained by the recorder of the city in which the premises are situated. (KENNEDY, J., dissenting.) *Rea v. Bath (Recorder)*, 73 L. J. K.B. 848; [1904] 2 K.B. 570; 91 L. T. 383; 68 J. P. 438; 53 W. R. 252; 20 T. L. R. 526—D.

Refusal to Renew Subject to Payment of Compensation — County Borough — Appeal from Whole Body of Justices to Quarter Sessions.—No appeal lies to quarter sessions from the determination of the whole body of Justices acting in and for a county borough who, on a reference to them by the borough licensing committee, have refused to renew a licence subject to the payment of compensation under the Licensing Act, 1904. *Rea v. Southampton Justices*; *Fuller, Smith & Turner, Ex parte*, 75 L. J. K.B. 322; [1906] 1 K.B. 505; 94 L. T. 442; 54 W. R. 530; 70 J. P. 137; 22 T. L. R. 345—D.

Power to State Case.—*Semble* (per DARLING, J.).—On such a matter the whole body of Justices for a county borough have power to state a Case. *Ib.*

Employment of County Solicitor — Costs of Solicitor Retained by Licensing Justices.—Where upon an appeal to the Court of quarter sessions from the refusal of licensing Justices to renew a licence the licensing Justices appear, the Court of quarter sessions has no jurisdiction to compel the licensing Justices to employ a particular solicitor to act for them; and an order disallowing the profit charges of the solicitor actually employed by the licensing Justices is bad, and will be quashed by the High Court on motion for *certiorari*. *Rea v. Yorkshire (West Riding) Justices*, 73 L. J. K.B. 224; [1904] 1 K.B. 545; 90 L. T. 381; 52 W. R. 540; 68 J. P. 167; 20 T. L. R. 211—D.

4. BEERHOUSES.

Old Beerhouse — Alterations — Jurisdiction of Justices to Refuse Renewal.—Where it is found as a fact by Justices that a beerhouse, licensed before and continuously since May 1, 1869, has since the last renewal of the licence been so altered as that the character of the premises is substantially different, the Justices in the exercise of their judicial discretion are not limited to the four grounds of objection mentioned in the Wine and Beer House Act, 1869, s. 8, but may take other matters into their consideration, including the requirements of the neighbourhood. *Reg. v. Sheffield Justices*, 63 J. P. 595—C.A.

No Trade done on Premises for Years — Refusal Confined to Four Grounds.—The renewal of a beerhouse certificate which was in force on May 1, 1869, and has been annually renewed from that time onwards, can only be refused to a new resident occupier of the premises on one or more of the four grounds specified in section 8 of the Wine and Beer House Act, 1869, notwithstanding that no use has been made of it, no beer having been sold for many years, and that the needs of the neighbourhood do not require it. *Mackrell v. Brentford Justices*, 69 L. J. Q.B. 748; [1900] 2 Q.B. 387; 83 L. T. 31; 48 W. R. 648; 64 J. P. 663—D.

Conviction for Sale of Spirits without Licence — Forfeiture of Licence — Application by Owner for Authority to Carry on Business — Justices' Licence not in Existence at Time of Application — Refusal not Confined to Four Grounds.—The tenant of a beerhouse, the licence of which for the sale of beer by retail had been continuously renewed since May 1, 1869, until the year 1903, was convicted in July, 1903, under the Excise Licences Act, 1825, of having sold spirits without a spirit licence. The beerhouse was then closed for the sale of beer and wine, and was not again opened until after the hearing of an appeal in October, 1903. In September the owners of the beerhouse applied under section 15 of the Licensing Act, 1874, to the special licensing sessions for the grant of a licence for the sale of beer and wine in respect of such premises to their nominee, who was then the real resident holder and occupier of the premises. The grant was refused upon grounds other than one of the four grounds specified in section 8 of the Wine and Beer House Act, 1869, but on appeal the quarter sessions in October decided in favour of the owners' contention that the jurisdiction of the licensing Justices to refuse the grant was limited to one or more of the four specified grounds, and allowed the appeal subject to a Special Case:—*Held* (reversing the decision of the Divisional Court, which affirmed the quarter sessions), that, the Excise licence having been forfeited by virtue of section 7 of the Beerhouse Act, 1840, the effect of that forfeiture was to put an end to the Justices' licence, so that it had ceased to be in force. *Held* also, that, the Justices' licence not being in force at the date of the application by the owners for the grant of a licence under section 14 of the Alchouse Act, 1828, as applied to the case by section 15 of the Licensing Act, 1874, the Justices at special sessions were not limited under section 19 of

the Wine and Beerhouse Act, 1869, to one of the four grounds of refusal specified in section 8 of the Act of 1869. *Freer v. Murray* (63 L. J. M.C. 242; [1894] A.C. 576) followed. *Flinn & Sons, Ex parte* (No. 2) (68 L. J. Q.B. 1025; [1899] 2 Q.B. 607) disapproved. *Tower Justices v. Chambers*, 73 L. J. K.B. 951; [1904] 2 K.B. 903; 91 L. T. 643; 68 J. P. 581; 20 T. L. R. 784—C.A. Reversing, 52 W. R. 541—D.

5. CONDUCT OF LICENSED PREMISES.

(a) Hours.

Extension of Time during which Public-house may be Kept Open—Jurisdiction of Justices—Writ of Certiorari.—An order of Justices under section 26 of the Licensing Act, 1872, extending the hours during which a licensed house may be kept open for the sale of intoxicating liquors is in the nature of a judicial order, and may be brought up on *certiorari*. *Rea v. Johnson*, 74 L. J. K.B. 585; [1905] 2 K.B. 59; 92 L. T. 654; 53 W. R. 655; 69 J. P. 236; 21 T. L. R. 423—D.

(b) Sale of Liquors.

Liability of Publican to Supply Reasonable Refreshment to All Comers.—Whether there is a liability on the part of a licensed publican to supply reasonable refreshment to all comers, *quære*. *Reg. v. Antrim Justices*, [1900] 2 Ir. R. 492—Gibson, J.

Selling Intoxicating Liquor without Licence—House of Commons Bar—Sale by Servant—Liability.—A servant of the House of Commons who, while serving at a bar within the precincts of the House, sells intoxicating liquor to a person who is not a member of the House, is not liable to be convicted under section 3 of the Licensing Act, 1872, of selling by retail intoxicating liquor without being duly licensed. But *semble* that the Licensing Acts are applicable to the Houses of Parliament. *Williamson v. Norris*, 68 L. J. Q.B. 31; [1899] 1 Q.B. 7; 79 L. T. 415; 47 W. R. 94; 62 J. P. 790; 19 Cox C.C. 203—D.

— **Sale by Unlicensed Person not the Agent or Servant of Licensee under Cover of Licence.**—The mere fact of there being an existing licence and an existing licensee living in the licensed house does not authorise any person other than the licensee, his agent or servant, to sell intoxicating liquor in that house under cover of the licence; and if a person who is neither the licensee nor the agent or servant of the licensee under cover of the licence sells in the licensed house liquor, which is his own and which he is selling for his own benefit, he may be convicted under section 3 of the Licensing Act, 1872, of selling without a licence, notwithstanding that there is an existing licence and an existing licensee living in the licensed premises, and the licensee may also be convicted of aiding and abetting such sale. *Peckover v. Defries*, 95 L. T. 883; 71 J. P. 38; 23 T. L. R. 20; 21 Cox C.C. 323—D.

— **Sale by Servant—Manager Licensed—Owner not Licensed held Liable.**—Where intoxicating liquor is sold on behalf of the owner by

a manager who holds a licence, the owner must also hold a licence, inasmuch as the selling by the manager constitutes a selling by the owner within the meaning of section 3 of the Licensing Act, 1872. *Dumping v. Owen*, 76 L. J. K.B. 796; [1907] 2 K.B. 237; 97 L. T. 241; 71 J. P. 383; 23 T. L. R. 494—D.

A., who was not licensed to sell intoxicating liquors, entered into a contract to supply refreshments, including intoxicating liquors, at a certain exhibition, and arranged with B., who held a licence to sell intoxicating liquors at another place, that he should obtain an occasional licence to sell intoxicating liquor at the exhibition. The beer was sold by B. and by barmaids employed by B. in his own business, but who were paid by A. while at the exhibition. The beer was sent to the exhibition by order of A., who afterwards paid for it. The proceeds of sale were put into a till and taken away by a person in the employ of A. The bar and staff were under the control of B., who was not remunerated for his services, and did not take any share of the profits. A., although he was present, did not sell any beer himself and did not interfere with or control the sale:—*Held*, that the sale was a sale by A., and that therefore he was guilty of an offence against section 3 of the Licensing Act, 1872, in selling intoxicating liquor without a licence, the fact that A.'s agent B., who actually sold the liquor, held a licence being immaterial. *Ib*.

— **Assignment of Premises—Interim Order—Transfer Refused—Re-assignment to Original Licensee.**—A held a publican's licence for the period of twelve months from October 10, 1902, in respect of certain premises which he held under lease for a term of years subject to a mortgage. In February, 1903, A. and the mortgagees executed a deed assigning the premises, licence, and goodwill to B., who executed a fresh mortgage to the same mortgagees. A. also purported to assign the licence to B. by indorsement. A. gave up possession to B., who obtained the usual interim order at petty sessions, to remain in force until the next (April) quarter sessions, and B. proceeded to carry on the trade of a publican upon the premises. In April, 1903, shortly before the quarter sessions, B. was convicted of an offence against the licensing laws. At the April quarter sessions the police opposed the transfer of the licence to B., and the Justices refused to grant it, on the grounds of the unsuitability of the premises and the character of the applicant. B. then conveyed all his interest in the premises, licence, and goodwill to the mortgagees, who subsequently, on May 16, 1903, let the premises to A. for six months. A. went back into possession, and resumed his trade as a publican. He was summoned for having sold on May 26, 1903, intoxicating liquors without being duly licensed:—*Held*, that he was not liable to be convicted of the offence charged. *Dumigan v. Walsh*, [1904] 2 Ir. R. 298—K.B.D.

— **Temporary Transfer—Conviction for Second Offence—Forfeiture of Licence—Jurisdiction of Justices.**—Where a licensed person has been convicted of a second offence of selling by retail spirits without being duly authorised to sell the same, and in consequence has had his licence forfeited under section 3 of the Licensing Act, 1872, Justices sitting at petty

sessions have jurisdiction to entertain an application by the owner of the premises under section 15 of the Licensing Act, 1874, for authority to carry on the business until the next special sessions for licensing purposes, inasmuch as section 15 of the Act of 1874 contemplates the happening for the first time of the compound event of a conviction for selling spirits without a licence, and, in consequence of such conviction, forfeiture of the licence. *Flinn & Sons (No. 1), Ex parte*, 68 L. J. Q.B. 777; [1899] 2 Q.B. 154; 81 L. T. 27; 47 W. R. 697; 63 J. P. 660—D.

— **Licensee Leaving Premises during Currency of Licence—Abandonment of Licence—Return to Premises.**—A licensee, during the currency of his licence, in consequence of a disagreement with his father, who was the owner of the premises, left the premises for some months and took no part in their management. Thereafter, but still during the currency of the licence, he returned and re-took possession of the premises, having in the meantime sought to transfer the licence to another person. On his return and resuming possession he was summoned and convicted for selling intoxicating liquor without a licence, the Justices holding that he had abandoned the licence:—*Held*, that the conviction must be quashed, as the Justices were not entitled to hold that in the circumstances the licence had been abandoned. *Lawrence v. O'Hara*, 67 J. P. 369—D.

Selling without Licence—Offence of Trifling Nature.—See *Barnard v. Barton*, *post*, JUSTICE OF THE PEACE, col. 1152.

Sale off the Licensed Premises—Order Given to Traveller—Appropriation of Goods to Order.—An order for twelve bottles of beer was given by a customer at her own house to the traveller employed by the holder of a retail off-licence. The order was taken to the licensed premises, where it was accepted by the licensee, by whom the twelve bottles were appropriated to the order of the customer and afterwards delivered to the customer at the latter's house, where payment for the same was received:—*Held*, that the sale, within the meaning of the Licensing Act, had taken place on the licensed premises, and not at the house of the customer. *Walker v. Walker*, 90 L. T. 88; 67 J. P. 452; 20 Cox C.C. 594—D.

By a verbal standing order between R., a carter of a firm of brewers, and a customer beer was delivered at the latter's house every fortnight. On R. leaving the employment of that firm and entering that of another, the customer agreed with R. to continue the standing order to any brewers by whom R. might be employed. The order was in each case taken to the brewers at the licensed premises where the order was accepted. The beer was paid for on delivery:—*Held*, that the sale was carried out at the licensed premises and not at the customer's house. *Hewitt v. Servis*, 68 J. P. 54—D.

Sale at Unlicensed Place—Traveller—Order—Appropriation.—The respondent, a brewer, carrying on business in W. Road, L., held a wholesale licence besides a retail licence in respect of those premises enabling him to sell

beer for consumption off the premises. On July 10 his traveller called at the house of M. A. B., K. Terrace, H., and obtained an order for six bottles of beer. He entered the order in a memorandum book he had with him. Nothing more was done at this house by the traveller, and the goods were delivered by the respondent's carter on July 14. On delivering the bottles, which were not marked in any way indicating any appropriation, the carter took the bottles from a box which was constructed to contain twelve, but which only contained the six ordered by M. A. B. There was no address or label on the boxes, and the beer was paid for on delivery, and the appellant contended the sale took place at K. Terrace. It was proved that the practice was for each traveller to enter his orders in an order book at the licensed premises. The respondent himself entered all these orders in a private general order book, and contended that he accepted or rejected each order as he considered fit. He then entered them in the general delivery book:—*Held*, that there had been a sale of beer at K. Terrace, and that no sale and appropriation took place at the licensed premises. *Cocker v. McMullen*, 81 L. T. 784; 64 J. P. 245; 19 Cox C.C. 429—D.

— **Evidence—Wine Supplied to Customer at Unlicensed Restaurant—Purchase by Waiter with Customer's Money at Licensed Premises in Vicinity—Restaurant-Keeper Interested in Business Carried on at Licensed Premises.**—The appellant was the proprietor of an unlicensed restaurant, and he also carried on in partnership with another person the business of a wine-dealer at premises in the vicinity, in respect of which his partner held a licence as a dealer in foreign wine. A customer at the restaurant having ordered a meal, the waiter showed him a list of wines and prices, from which the customer selected a pint bottle of claret at 1s. 6d. The waiter asked the customer to pay for the wine, and the customer gave him 1s. 6d. The waiter then went to the licensed premises, purchased a pint bottle of claret, for which he paid, though there was no evidence as to the price, and returned with the wine, which he served to the customer, who consumed it. On an information against the appellant for selling the wine at the restaurant without a licence, the magistrate found that there had been a sale at the restaurant, and convicted the appellant:—*Held*, that the evidence justified the finding, and that the conviction was right. *Pasquier v. Neale*, 71 L. J. K.B. 835; [1902] 2 K.B. 287; 87 L. T. 230; 51 W. R. 92; 67 J. P. 49; 20 Cox C.C. 350—D.

— **Office for Receiving Orders—Orders Transmitted to Licensed Place.**—Brewers having a retail off-licence for the sale of beer in respect of premises in P. Street, Cardiff, occupied an office in M. Street, Cardiff, for which they held no licence and at which no beer was kept. This office was opened merely for the purpose of receiving orders, which were then sent on to the licensed premises in P. Street, where they were accepted or rejected. No orders were accepted and no payments were made at this office, and there was no appropriation of the beer there, but the orders were simply forwarded to the licensed premises, where, if the order were accepted, the beer was appropriated to the purchaser, and the beer so

appropriated was afterwards delivered at the purchaser's residence, where payment was made:—*Held*, that what took place in the office in M. Street, where the orders were merely received and forwarded, was not a sale of the beer at that place within the meaning of section 37 of the Excise Act, 1860, and that the brewers could not be convicted under that section of selling the beer "at any other house or place than the house or place specified in their licence." *Per CHANNELL, J.*—To bring a case within the section it is not necessary that there should be an actual sale and the passing of the property in the liquor sold; it is sufficient if there be a binding executory contract for a sale to be carried out at a future time, though no property passes at the time. *Stephenson v. Rogers*, 80 L. T. 193; 63 J. P. 230—D.

— **Canvasser Employed to take Orders at Customers' Houses—Acceptance of Order and Appropriation at Licensed Premises.**—The appellant, a brewer who was licensed for the sale by retail of liquors at his licensed premises, employed one C. to obtain orders for the appellant's beer from persons in a certain district, and subsequently to deliver the beer so ordered at the houses of the persons ordering the same. In obtaining the orders and delivering the beer, C. was required to observe certain rules to the effect that no beer was to be delivered unless the same had been previously ordered and the order had been entered in an order-book and sent to the licensed premises the day before the order was to be executed, and no money was to be taken for the beer by the person taking the order until the goods were delivered. These rules were not known by or communicated to customers. Postcards were also given to C. for the use of customers upon which they could send their orders; but these were not always given to persons on whom he called. In accordance with his usual course of business, C. called at a customer's house and received an order for a jar of beer. He entered the order in his order-book, which on the next day was sent on to the appellant at his licensed premises, where the order was accepted and the jar was appropriated to the customer at the licensed premises. The jar was placed on the appellant's cart and was delivered to the customer at his house, where it was paid for on delivery:—*Held*, that what took place at the customer's house was merely the taking of an order to be forwarded on to the licensed premises, to be there dealt with by the appellant, and that therefore there was no evidence of any contract, whether executory or otherwise, for the sale of the beer made at the customer's house, and that the appellant could not be convicted under section 3 of the Licensing Act, 1872, of selling the beer at a place where he was not authorised to do so by his licence. *Strickland v. Whittaker*, 90 L. T. 445; 52 W. R. 538; 68 J. P. 235; 20 Cox C.C. 610; 20 T. L. R. 224—D.

— **Sale by Servant—Scope of Employment—Liability of Master.**—The respondent held a licence to sell beer by retail at the premises of a brewery company of which he was secretary and also receiver and manager. He gave orders to the drayman not to deliver beer unless an order for it had been previously received by the company at their office, and he took every

care to prevent any infringement of this order. The beer was sold for cash on delivery, and the draymen were authorised to receive payment from the customers and were required to bring back to the brewery all beer undelivered. There was no appropriation by identifying marks of any of the bottles or crates of beer loaded on the vans to any particular customer. One of the draymen, being upon his round in charge of a van containing crates of beer, sold beer in the street to persons who had sent no order to the company's premises, and received payment for it. Upon a summons under section 3 of the Licensing Act, 1872, charging the respondent with having sold intoxicating liquor at a place where he was not authorised to sell it,—*Held*, that the respondent was not liable, as the sale was not within the general scope of the drayman's employment. *Boyle v. Smith*, 75 L. J. K.B. 282; [1906] 1 K. B. 432; 94 L. T. 30; 54 W. R. 519; 70 J. P. 115; 21 Cox C.C. 84; 22 T. L. R. 200—D.

— **"Keeping open for sale" of Intoxicating Liquors after Closing Hours.**—To constitute the offence aimed at by section 9 of the Licensing Act, 1874, of keeping open licensed premises for sale of intoxicating liquors after closing hours, it is not enough to prove that persons, being within the premises when they were closed at the proper hour, were subsequently served with drink and later on let out through a back door. *Jeffrey v. Weaver*, 68 L. J. Q.B. 817; [1899] 2 Q.B. 449; 81 L. T. 193; 47 W. R. 638; 63 J. P. 663; 19 Cox C.C. 386—D.

Eleven being the closing hour in B., after that hour five men were in the bar of an inn with glasses, some of which were not empty. No drink had been drawn, and no person had entered the house after eleven, but both doors of the inn were open:—*Held*, that the premises were not kept open for the sale of intoxicating liquors within section 9 of the Licensing Act, 1874. *Lloyd v. Barnett*, 82 L. T. 804; 64 J. P. 708; 19 Cox C.C. 540—D.

— **Selling Intoxicating Liquor during Closing Hours—Proprietor of Theatre—Liability.**—The exemption in favour of theatre proprietors in section 72 of the Licensing Act, 1872, does not relieve the proprietor of a theatre from complying with the provisions of the Licensing Acts as to closing hours; and where a theatre bar is kept open for the sale of intoxicating liquors during the time at which licensed premises are directed to be closed, the proprietor is liable to be convicted under section 9 of the Licensing Act, 1874. *Gallagher v. Rudd*, 67 L. J. Q.B. 65; [1898] 1 Q.B. 114; 77 L. T. 367; 46 W. R. 108; 61 J. P. 789; 18 Cox C.C. 654—D.

— **Keeping Open Premises during Prohibited Hours—Beer Ordered on Saturday to be Delivered during Closing Hours on Sunday—Appropriation of Beer to Purchaser on Saturday.**—A man went to a public-house on Saturday evening and asked the publican if he could have half a gallon of beer and if it could be delivered to him on the Sunday morning. The publican agreed to this, whereupon the man paid for the beer. On the Saturday evening before closing time half a gallon of beer was

drawn and put into a bottle belonging to the publican, corked, and put aside for the customer, and delivered to him on the Sunday morning during prohibited hours:—*Held*, upon these facts, that there was no sufficient evidence of an appropriation of the beer to the customer on the Saturday. *Noblett v. Hopkinson*, 74 L. J. K.B. 544; [1905] 2 K.B. 214; 92 L. T. 462; 53 W. R. 637; 69 J. P. 269; 21 T. L. R. 448—D.

Per LORD ALVERSTONE, C.J., and KENNEDY, J. (RIDLEY, J., dissenting).—A person who delivers during prohibited hours intoxicating liquors which have been ordered and paid for previously, and whether specifically appropriated to the buyer then or not, is liable to be convicted under section 9 of the Licensing Act, 1874, if it was a term of the contract between him and the buyer that delivery should take place during prohibited hours. *Id.*

In order to constitute the offence of keeping open licensed premises for the sale of intoxicating liquors during prohibited hours under section 9 of the Licensing Act, 1874, the premises must be kept open in the sense that persons can get in or out of them. Where, therefore, the outer doors of licensed premises are closed at the closing time, the fact that customers remain there and that the landlord intends that intoxicating liquor shall be sold to them does not amount to a keeping open of the premises for the sale of intoxicating liquors within the meaning of the section. *Metropolitan Police Commissioner v. Roberts*, 73 L. J. K.B. 231; [1904] 1 K.B. 369; 52 W. R. 560; 68 J. P. 39; 20 T. L. R. 105—D.

Delivery during Prohibited Hours.—A person opens his premises for the sale of intoxicating liquors within section 9 of the Licensing Act, 1874, when he opens them for the carrying out of any material part of the transaction of sale. Therefore where a person delivers during prohibited hours intoxicating liquors which have been ordered and paid for, but not specifically appropriated to the buyer previously, he is liable to be convicted under section 9 of the Act mentioned. *Saunders v. Thorney*, 78 L. T. 627; 62 J. P. 404—D.

Sale during Prohibited Hours—Opening for Sale during Prohibited Hours—Two Convictions in Respect of same Transaction.—A person convicted of selling intoxicating liquor during prohibited hours cannot also be convicted of opening for sale during prohibited hours, the selling and opening being part of the same transaction on one and the same occasion. *Dorrian v. M'Hugh*, [1907] 2 Ir. R. 564—K.B. D.

Traveller—Intoxicating Liquor Obtained during Prohibited Hours—Travelling for Drink.—A person who obtains intoxicating liquor at a railway station during the hours of closing licensed premises cannot be convicted under section 25 of the Licensing Act, 1872, of obtaining such liquor by falsely representing himself to be a traveller, if at the time he obtains the liquor he intends to depart from such station by railroad, and in pursuance of such intention in fact so departs, even though his only motive in so travelling is to obtain drink. *Williams v.*

McDonald, 68 L. J. Q.B. 678; [1899] 2 Q.B. 308; 80 L. T. 758; 47 W. R. 701; 63 J. P. 501; 19 Cox C.C. 339—D.

"Bona fide travellers."—Four men went out for a walk on a Sunday, and were supplied with liquor at a hotel two miles in a direct line from the place where they lived, but somewhat longer by the way they had come. They did not go out with the intention of getting liquor. They were all known to the hotel-keeper:—*Held*, that these men were not *bona fide* travellers, and that the hotel-keeper was properly convicted. *Graham v. M'Dougall*, 6 F. (Just. Cas.) 57—Ct. of Justy.

Sale to Children—Corked and Sealed Vessel—Belief that Vessel was Sealed—"Mens rea."—The holder of a licence to sell intoxicating liquors who knowingly sells intoxicating liquor to a child under the age of fourteen years, is guilty of an offence under section 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, notwithstanding that the liquor is sold in a quantity not less than one reputed pint for consumption off the premises only, and in a vessel corked and believed by him to be, but not in fact, sealed as required by the Act. *Brooks v. Mason*, 72 L. J. K.B. 19; [1902] 2 K.B. 743; 88 L. T. 24; 67 J. P. 47; 20 Cox C.C. 464; 51 W. R. 224—D.

Sale of Liquor to Child—Bottle Corked and "Sealed"—Gummed Paper Label Placed over Stopper—Removability of Label without Destruction.—The appellant, a licensed beer retailer, sold and delivered at her shop to a child under the age of fourteen years, for consumption off the premises, a pint bottle of beer having a screw stopper, over which was placed a gummed paper label which was continued about an inch down opposite sides of the neck of the bottle, and which was quite dry and adhered firmly to the neck. A police sergeant proved that he had withdrawn and replaced the label and stopper of a bottle identical with that sold to the child without destroying the label or showing signs of removal in three or four minutes by damping the label with his tongue, and in presence of the Justices he removed the label and stopper of a similar bottle in the same manner in six or seven minutes without destroying or injuring the label, and afterwards replaced them in their former position. The Justices held that the bottle was not "sealed" within the meaning of section 5 of the Intoxicating Liquors (Sale to Children) Act, 1901, and convicted the appellant of an offence against the Act:—*Held*, that the conviction must be upheld. *Mitchell v. Crawshaw*, 72 L. J. K.B. 389; [1903] 1 K.B. 701; 88 L. T. 463; 67 J. P. 179; 20 Cox C.C. 395—D.

— Bottle Capable of being Corked and Sealed.—Upon an information under section 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, against the respondent, charging that he knowingly sent a boy under the age of fourteen to a place where intoxicating liquors were sold for the purpose of obtaining beer not in a corked or sealed bottle, it was proved that the respondent sent the boy to an inn with a pint bottle, which was capable of being corked and sealed, for the purpose of obtaining half a pint of beer for consumption off the premises, and

that the boy came away with the pint bottle containing half a pint of beer, the bottle being corked but not sealed. The Justices dismissed the information:—*Held*, that the Case must go back to the Justices to be heard and determined—*per* LORD ALVERSTONE, C.J., on the ground that it was doubtful, under the circumstances, whether there was any evidence that the boy was sent by the respondent for the purpose of obtaining the beer in a corked and sealed bottle, and, further, that the quantity sent for was less than a pint; *per* DARLING, J., and A. T. LAWRENCE, J., on the ground that section 2 makes it unlawful to send a child under fourteen to a place where intoxicating liquors are sold, except for such liquors as are sold in corked and sealed vessels in quantities not less than a pint. *Farndale v. Dillon*, 76 L. J. K.B. 922; [1907] 2 K.B. 513; 97 L. T. 284; 71 J. P. 374—D.

— **Bottle with Screw Stopper and Label—No Evidence that Label could be Removed without Destruction—Sufficiency of Label as a "Sealing."**—The appellant sold to a child under the age of fourteen years, for consumption off the premises, a pint of beer in a bottle corked by means of a screw stopper and having an adhesive paper label fastened to the top of the stopper and to the sides of the neck of the bottle. Upon an information under section 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, the magistrate was of opinion that the label could be removed in several ways without destruction, as by steam or by a penknife, and the stopper withdrawn and the label afterwards refastened to the bottle, and he held that the bottle was not "sealed" in compliance with the section, and convicted the appellant. There was no evidence that the stopper had been removed or could be removed without destroying the label:—*Held*, that there was no evidence before the magistrate on which he could properly find that the label could be removed without destruction or that the bottle was not "sealed" in compliance with the section, and that the conviction therefore could not be supported. *Macey v. McKenzie*, 88 L. T. 631; 67 J. P. 251; 20 Cox C.C. 449—D.

— **Licence-holder Knowingly Allowing Person to Sell—Sale by Barman—Knowledge of Licence-holder.**—The holder of a licence for the sale of intoxicating liquors, who has not delegated the charge or control of the licensed house or of the business carried on therein, is not liable under section 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, for the act of his servant who, without his knowledge or connivance, sells to a child under the age of fourteen years intoxicating liquor in a bottle which is neither corked nor sealed. *Emery v. Nolloth*, 72 L. J. K.B. 620; [1903] 2 K.B. 264; 89 L. T. 100; 52 W. R. 107; 67 J. P. 354; 20 Cox C.C. 507—D.

— **Sale by Barman to Child without Knowledge and Contrary to Orders of Licence-holder.**—M., a publican, was charged with having allowed his barman knowingly to sell and deliver intoxicating liquor to a girl under fourteen for consumption off the premises, the same not being in a corked or sealed vessel. M. had given orders to his assistants not to supply liquor to children in contravention of the

statute. The liquor in the present case was sold by M.'s barman, M. himself not being in the shop at the time, though his foreman was. The magistrate found that the sale to the child was knowingly effected by the barman, but without the knowledge, actual or constructive, or the wilful connivance of M. or his foreman, and he dismissed the summons:—*Held*, that M. had not knowingly allowed the intoxicating liquor to be sold within the meaning of the Intoxicating Liquors (Sale to Children) Act, 1901, and that the summons was properly dismissed. *Conlon v. Muldowney*, [1904] 2 Ir. R. 498—K.B. D.

— **Information for "knowingly" Selling—Sale by Barman—No Knowledge on Part either of Barman or Licence-holder—Liability of Licence-holder.**—A licence-holder cannot be convicted under section 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, for "knowingly selling" intoxicating liquor to a person under the age of fourteen years, when he himself has no knowledge of the sale and when the barman who sells the liquor has no knowledge that the person to whom he sells is under the age of fourteen years, but honestly believes that he has attained that age. The section does not create an absolute prohibition against the sale of intoxicating liquor to any person under the age of fourteen years, except in corked and sealed vessels, and where there is no knowledge on the part of the licence-holder or the barman who sells the licence-holder cannot be convicted. *Groom v. Grimes*, 89 L. T. 129; 67 J. P. 345; 20 Cox C.C. 515—D.

— **Sale to Child under Fourteen against Express Orders of Licensee.**—A publican had given express instructions to his servants that no child under fourteen was to be served with intoxicating liquor in an uncorked and unsealed bottle. Contrary to such express instruction, one of the publican's barmaids sold intoxicating liquor to a child under the age of fourteen. The Justices found that the publican, although absent from the bar at the time of such sale, had not delegated the charge and control of the bar to the barmaid:—*Held*, that the Justices were right in dismissing a summons taken out against the publican for having knowingly allowed the barmaid to sell intoxicating liquor contrary to the Intoxicating Liquors (Sale to Children) Act, 1901. *McKenna v. Harding*, 69 J. P. 354—D. S.P. *Allchorn v. Hopkins*, 69 J. P. 355—D.

— **Proprietary Club—Company Proprietor—Sale to Members—Licence whether Required.**—The members of a club were formed into a joint-stock company incorporated under the Companies Acts for the purpose of carrying on the club. There was no rule in the memorandum or articles of association or constitution of the club which prevented other than members of the club from holding shares in the company, and in time, owing to the deaths of some members and the resignation of others who were shareholders, a few shares became the property of persons who were not members. The company, in carrying on the club, among other things, sold by retail intoxicating liquors and tobacco to members of the club:—*Held*, that the company was a separate legal entity from the members of the club, and the sale of

the intoxicating liquors and tobacco to members was not in law or in fact a distribution of the common property of the members among themselves, but the sale by retail of these articles by the company to the members, and therefore constituted breaches of section 17 of the Beer-house Act, 1834, and section 19 of the Refreshment Houses Act, 1860. *National Sporting Club v. Cope*, 82 L. T. 352; 48 W. R. 446; 64 J. P. 310; 19 Cox C.C. 485—D.

Bona fide Club—Obtaining Liquor at Club for Consumption off the Premises—Right of Member to Act by an Agent.—A member of a *bona fide* club may, by an agent as well as personally, obtain intoxicating liquor at the club for consumption by him off the club premises. Therefore the transfer of liquor to a duly authorised agent of a member of such club is not a sale by retail of intoxicating liquor within the meaning of section 3 of the Licensing Act, 1872. *Davies v. Burnett*, 71 L. J. K.B. 355; [1902] 1 K.B. 666; 86 L. T. 565; 50 W. R. 391; 66 J. P. 406—D.

Sale by Measure not According to Standard—"Schooner" of Beer.—A "schooner" is a glass tumbler capable of holding about one-third of a quart, imperial measure, of beer. A man entered a public-house and ordered "a schooner of beer," and he was supplied with same, for which he paid 2d.—*Held*, that in supplying the "schooner" of beer the publican had committed a contravention of the Scotch Licensing Act, 9 Geo. 4, c. 58, s. 15, which corresponds to section 8 of the Licensing Act, 1872. *Riddell v. Neilson*, 5 F. (Just. Cas.) 57—Ct. of Justy.

Delivery and Removal of Spirits over One Gallon.—In 1897 one J. B. gave the respondent, who was licensed to sell beer only and had no spirit licence, an order, to forward to his brother, who had such a licence, for two gallons of rum. The rum was delivered by a carman at the respondent's house and sent to J. B. by his potman. The spirits were not accompanied by any permit or certificate:—*Held*, that the respondent was guilty of sending out, delivering, and removing spirits within the Spirits Act, 1880, s. 105. *Leese v. Jennings*, 79 L. T. 300; 62 J. P. 771; 19 Cox C.C. 174—D.

(c) *Miscellaneous Offences.*

Suffering Gaming on Licensed Premises—Game of Skill and Chance Played for Prizes.—It is not an offence under section 17 of the Licensing Act, 1872, for a licensed person to suffer a game of skill and chance, not being an unlawful game in itself and not being played for stakes, to be played on the licensed premises. *Lockwood v. Cooper*, 72 L. J. K.B. 690; [1903] 2 K.B. 428; 89 L. T. 306; 52 W. R. 48; 67 J. P. 307; 20 Cox C.C. 539—D.

Game of Skill Played for Money.—The respondent, a licensed person, suffered the game of "pool" to be played for small money stakes on a billiard-table in his licensed premises:—*Held*, that he had committed the offence of suffering gaming on the licensed premises. *Craig v. Boyan*, [1901] 2 Ir. R. 429—K.B. D.

Serving Reputed Prostitutes—Reasonable Time

for Refreshments—Affirmative Evidence of Offence alone will Support Conviction.—M. was convicted under section 14 of the Licensing Act, 1872, of having permitted a reputed prostitute to remain on licensed premises longer than a reasonable time for the woman to take refreshments:—*Held*, that the conviction must be quashed, because the evidence of the offence having been committed given by the prosecution was in fact circumstantial; and before a publican could be convicted affirmative evidence in every case must be given by the prosecution. *Held*, also, that under the Summary Jurisdiction Act, 1879, s. 39, the onus of proving the offence rests on the prosecutor, and that the defendant was right in not calling evidence to rebut the charge. *Miller v. Dudley Justices*, 46 W. R. 606—D.

Knowingly Permitting Drunkenness on Licensed Premises—Onus of Proof.—A licensed person was charged with knowingly permitting drunkenness on his licensed premises in breach of certificate, by allowing R. S. to remain in the premises when in a state of intoxication. It was proved that the accused and R. S., who were friends, were both found in the licensed premises at 3 A.M. asleep and intoxicated:—*Held* (*dubitante* LORD KINCARTNEY), that the accused had failed to discharge the onus imposed on him by section 93 of the Licensing (Scotland) Act, 1903 (corresponding to section 4 of the Licensing Act, 1902), and consequently that he had rightly been convicted. *Kessack v. Smith*, 7 F. (Just. Cas.) 75—Ct. of Justy.

Drunkenness—Offence Involving—Summary Conviction—Jurisdiction to Order Notice of Conviction to be Sent to Police Authority—Condition Precedent—Consent of Offender to be Dealt with Summarily.—A Court of summary jurisdiction cannot make an order under section 6, sub-section 1 of the Licensing Act, 1902 (providing that notice of the conviction shall be sent to the police authority), unless the person charged has consented to be dealt with summarily under section 2, sub-section 1 of the Inebriates Act, 1898. *Metropolitan Police Commissioner v. Donovan*, 72 L. J. K.B. 545; [1903] 1 K.B. 895; 88 L. T. 555; 52 W. R. 14; 67 J. P. 147; 20 Cox C.C. 435—D.

Inebriate—Pleading Guilty to Primary Offence but not Admitting Habitual Drunkenness—Power to Swear Jury to Try Charge of Habitual Drunkenness.—Section 1 of the Inebriates Act, 1898, is not confined to cases where the offender is convicted by a jury of an offence such as mentioned in the section. It applies also where the offender pleads guilty to such offence, and in such a case if he does not admit that he is an habitual drunkard a jury may be sworn to enquire as to this. *New v. Alveham*, [1905] 2 Ir. R. 577—C.C.R.

Evidence—Depositions.—In such a case the evidence necessary to satisfy the Court that the offence charged was committed under the influence of drink may consist of the depositions taken before the magistrates when the accused was committed for trial. (*PALES, C.B. dissenting.*) *Id.*

Permitting Drinking after Closing Hour.—The manager of a public-house, after being an

evening off duty, returned to the public-house as it was closing, with a friend whom he had met at the theatre. When in the public-house he, after it had been closed, gave half a glass of sherry to his friend from the public-house stock. Neither he nor his friend paid anything for the sherry:—*Held*, that this did not constitute keeping open house and permitting and suffering drinking in breach of the publican's certificate. *White v. Neilson*, 6 F. (Just. Cas.) 51—Ct. of Justy.

Hawking Spirits.—On a Sunday A., a member of a club in which excisable liquors were sold to members on Sundays, having received some money from a friend who was not a member, went into the club premises and shortly afterwards returned with a bottle of whisky, which he handed to his friend:—*Held*, that this did not amount to hawking spirits. *Dewart v. Neilson*, 2 F. (Just. Cas.) 57—Ct. of Justy.

A member of a club which supplied excisable liquors to its members on Sunday, received money in a street from a man on a Sunday, went to and entered the club, and returned with a bottle of whisky, which he handed to the man from whom he had received the money. He procured whisky in this way for three different persons on the same Sunday, none of these persons being members of the club, and at least one of them was previously unknown to the defendant. The defendant made a profit of threepence on each transaction:—*Held*, that these facts warranted a conviction against the defendant hawking excisable liquor. *Dewart v. Neilson* (*supra*) commented on. *Neilson v. Dunsmore*, 3 F. (Just. Cas.) 6—Ct. of Justy.

— **Responsibility of Master for Acts of Servant.**—A vanman in the employ of, and in charge of a van belonging to, a licensed grocer sold and delivered a pint of whisky from the van to A. on a public road. A. had not ordered the whisky previously. It was part of certain excisable liquors which the vanman had taken from his master's licensed premises in the morning. The master was not present when the whisky was sold to A. The vanman was in the habit of keeping a book in which the liquor taken out by him in the morning was noted. Liquor taken out by him was frequently returned by him as being unsold or undelivered. The master occasionally examined the vanman's book, and the vanman's actings were known to him:—*Held*, that the master as well as the vanman had rightly been convicted of hawking excisable liquors in respect of the sale to A. *Hogg v. Davidson*, 3 F. (Just. Cas.) 49—Ct. of Justy.

Executor of Deceased Licensee—"Licensed person"—Liability for Breaches of Public Order.—The executor of a deceased licensee of a licensed house is, during the period which must necessarily elapse between the date of death and the next special sessions for licensing purposes, a person holding a licence, as defined by the Licensing Act, 1872, and liable, during that period, to the penalties imposed by the Act in respect of any breaches of public order which may occur on the premises. *McDonald v. Hughes*, 71 L. J. K.B. 43; [1902] 1 K.B. 94; 85 L. T. 727; 50 W. R. 318; 66 J. P. 86; 20 Cox C.C. 131—D.

Third Conviction—Forfeiture of Licence.—It is not necessary to cause a forfeiture of a licence that the three convictions mentioned in section 30 of the Licensing Act, 1872, should be made within the same licensing year. *Rev. v. Wearford Justices*, [1904] 2 Ir. R. 51—C.A.

Sale of Liquor to Children.—See col. 1138.

(d) *Maintaining Order.*

Landlord's Right to Require Person to Leave Licensed Premises—Fully Licensed House as Distinguished from Inn.—The landlord of a fully licensed house—as distinguished from an inn—has the right to require a person who is not a traveller, even though he be neither drunken, violent, quarrelsome, nor disorderly within the meaning of section 18 of the Licensing Act, 1872, to leave the house, and, upon refusal, to eject him, for such right does not depend upon the provisions of that section. *Sealey v. Tandy*, 71 L. J. K.B. 41; [1902] 1 K.B. 296; 85 L. T. 459; 50 W. R. 347; 66 J. P. 19; 20 Cox C.C. 57—D.

Refusal to Quit Licensed Premises—Person not Drunken, Violent, Quarrelsome, or Disorderly.—A person cannot be convicted under the Licensing Act, 1872, s. 18, for refusing to quit licensed premises, if he is not drunken, violent, quarrelsome, or disorderly, although he may have been requested by the landlord to leave. *Dallimore v. Tutton*, 78 L. T. 469; 62 J. P. 423; 19 Cox C.C. 31—D.

6. CLUBS.

Club—Whether Bona Fide.—A club was started in 1892 under a president, treasurer, manager, and a committee. The manager (the defendant) was the owner of the house in which the club met, certain rooms therein being let by him by parol to the club. Subsequently, the club not prospering, the members at their annual meeting passed a formal resolution, which was entered in the minute book, that the future control of the club be placed in the hands of the manager conditionally that he received the profits as remuneration for his services if he conformed to the requirements of members and paid all expenses, rent, attendance, gas, &c. No minutes were afterwards kept; the club was carried on by the manager "at his own risk"; he received the entrance fees and subscriptions for membership and the profits; he also issued the cards of membership, and generally controlled the club. Intoxicating liquors were supplied by him "at the club tariff." On these facts it was held that there was no evidence that this was a *bona fide* club, and that the defendant had committed the offence of selling intoxicating liquor without a licence. *Lynam v. O'Reilly*, [1895] 2 Ir. R. 48—Q.B. D.

Registering Club—Returns—Liability of Retired Secretary.—The appellant was in 1903 the secretary of a registered club, and no return was made during January, 1904. During January, 1904, the appellant resigned the secretaryship, and his successor was appointed. On February 1 the appellant called at the office of

the clerk to the Justices for the necessary forms, and a return was made by the appellant's successor on February 4:—*Held*, that the appellant had committed no offence in not making the return in proper time, as at the end of January, 1904, he was not the secretary, nor was he performing secretarial duties on February 1. *Booth v. Weightman*, 91 L. T. 532; 68 J. P. 467; 20 Cox C.C. 724; 20 T. L. R. 651—D.

Proprietary Club—Company Proprietor—Sale to Members—Licence whether Required.—The members of a club were formed into a joint-stock company incorporated under the Companies Acts for the purpose of carrying on the club. There was no rule in the memorandum or articles of association or constitution of the club which prevented other than members of the club from holding shares in the company, and in time, owing to the deaths of some members and the resignation of others who were shareholders, a few shares became the property of persons who were not members. The company in carrying on the club, among other things, sold by retail intoxicating liquors and tobacco to members of the club:—*Held*, that the company was a separate legal entity from the members of the club, and the sale of the intoxicating liquors and tobacco to members was not in law or in fact a distribution of the common property of the members among themselves, but the sale by retail of these articles by the company to the members, and therefore constituted breaches of section 17 of the Beerhouse Act, 1834, and section 19 of the Refreshment Houses Act, 1860. *National Sporting Club v. Cope*, 82 L. T. 352; 48 W. R. 446; 64 J. P. 310—D.

Bona Fide Club—Obtaining Liquor at Club for Consumption off the Premises—Right of Member to Act by an Agent.—A member of a bona fide club may, by an agent as well as personally, obtain intoxicating liquor at the club for consumption by him off the club premises. Therefore the transfer of liquor to a duly authorised agent of a member of such club is not a sale by retail of intoxicating liquor within the meaning of section 3 of the Licensing Act, 1872. *Davies v. Burnett*, 71 L. J. K.B. 355; [1902] 1 K.B. 666; 86 L. T. 565; 50 W. R. 391; 66 J. P. 406; 20 Cox C.C. 193—D.

7. OTHER MATTERS.

Beerhouse — Brewer's Support in Obtaining Licence—Tied House—Payment of Costs.—See *Savill v. Langman*, *ante*, CONTRACT, col. 523.

Bias of Justices — Disqualification.—See JUSTICE OF THE PEACE.

Covenant to "keep and conduct" Licensed Premises in Proper Manner—Breach.—See *Palethorpe v. Home Brewery*, *post*, LANDLORD AND TENANT, col. 1228.

Covenants in Leases Relating to Licensed Premises.—See LANDLORD AND TENANT, col. 1226.

Debenture Trust Deed.—See *Noakes v. Noakes & Co.*, *ante*, COMPANY, col. 423.

Excise Licence.—See REVENUE.

Habitual Drunkard.—See HUSBAND AND WIFE.

Licence in Jeopardy—Ejectment—Appointment of Receiver.—See PRACTICE.

Mortgage — Apportionment.—See *Law Guarantee and Trust Society v. Mitcham and Cheam Brewery Co.*, 75 L. J. Ch. 556; *post*, MORTGAGE.

— **Goodwill.**—See *Bennett, In re; Clarke v. White*, 68 L. J. Ch. 104; *post*, MORTGAGE.

Rating of Licensed Premises.—See *White v. Bradford-on-Avon*, 67 L. J. Q.B. 643, and *Waddle v. Sunderland Union*, 76 L. J. K.B. 16; *post*, POOR LAW.

Tied House — Validity — Payment off.—See *Rice v. Noakes*, 69 L. J. Ch. 635; *post*, MORTGAGE.

INVENTION.

See PATENT.

INVOICE.

See SALE OF GOODS.

IRELAND.

1. Statutes, 1146.
2. Divorce, 1148.
3. Local Government, 1148.

1. STATUTES.

Agriculture and Technical Instruction.—62 & 63 Vict. c. 50 is the *Agriculture and Technical Instruction (Ireland) Act*, 1899.

— 2 Edw. 7 c. 3 and c. 33 are the *Agricultural and Technical Instruction (Ireland) Acts*, 1902.

Bank Holidays.—3 Edw. 7 c. 1 is the *Bank Holiday (Ireland) Act*, 1903.

Census.—63 & 64 Vict. c. 6 is the *Census (Ireland) Act*, 1900.

Charitable Loan Societies.—63 & 64 Vict. c. 25 is the *Charitable Loan Societies (Ireland) Act*, 1900.

Congested Districts.—62 & 63 Vict. c. 18 is the *Congested Districts Board (Ireland) Act*, 1899.

— 1 Edw. 7 c. 34 is the *Congested Districts Board (Ireland) Act*, 1901.

County Surveyors.—63 & 64 Vict. c. 18 is the *County Surveyors (Ireland) Act*, 1900.

Development.—3 Edw. 7 c. 23 is the *Ireland Development Act*, 1903.

Evicted Tenants.—7 Edw. 7 c. 56 is the *Evicted Tenants (Ireland) Act*, 1907.

Fisheries.—61 & 62 Vict. c. 28 is the *Mussels, Periwinkle, and Cockles (Ireland) Act*, 1898.

General Dealers.—3 Edw. 7 c. 44 is the *General Dealers (Ireland) Act*, 1903.

Imprisonment for Non-Payment of Fines.]—*Sec 62 & 63 Vict. c. 11.*

Intermediate Education.]—63 & 64 Vict. c. 43 is the *Intermediate Education (Ireland) Act, 1900.*

Intoxicating Liquors.]—2 Edw. 7 c. 18 is the *Licensing (Ireland) Act, 1902.*

Kingstown Township.]—61 & 62 Vict. c. 52 is the *Kingstown Township (Transfer of Harbour Roads) Act, 1898.*

Labourers.]—6 Edw. 7 c. 37 is the *Labourers (Ireland) Act, 1906.*

Land.]—3 Edw. 7 c. 37 is the *Irish Land Act, 1903.*

— 4 Edw. 7 c. 34 is the *Irish Land Act, 1904.*

— 7 Edw. 7 c. 38 is the *Irish Land Act, 1907.*

Licensing Law.]—63 & 64 Vict. c. 30 is the *Beer Retailers' and Spirit Grocers' Retail Licences (Ireland) Act, 1900.*

— 5 Edw. 7 c. 3 is the *Licensing (Ireland) Act, 1905.*

Light Locomotives.]—3 Edw. 7 c. 2 is the *Light Locomotives (Ireland) Act, 1903.*

Local Government.]—61 & 62 Vict. c. 37 is the *Local Government (Ireland) Act, 1898.*

— 63 & 64 Vict. c. 41 is the *Local Government (Ireland) (No. 2) Act, 1900, and 63 & 64 Vict. c. 63 is the Local Government (Ireland) Act, 1900.*

— 1 Edw. 7 c. 28 is the *Local Government (Ireland) Act, 1901.*

— 2 Edw. 7 c. 38 is the *Local Government (Ireland) Act, 1902.*

— 6 Edw. 7 c. 31 is the *Local Government (Ireland) Act, 1898, Amendment Act, 1906.*

Loan Societies.]—6 Edw. 7 c. 23 is the *Charitable Loan Societies (Ireland) Act, 1906.*

Lunacy.]—1 Edw. 7 c. 17 is the *Lunacy (Ireland) Act, 1901.*

Outdoor Relief.]—61 & 62 Vict. c. 51 is the *Outdoor Relief (Ireland) Act, 1898.*

Partridge Shooting.]—62 & 63 Vict. c. 1 is the *Partridge Shooting (Ireland) Act, 1899.*

Pauper Children.]—61 & 62 Vict. c. 30 is the *Pauper Children (Ireland) Act, 1898.*

— 2 Edw. 7 c. 16 is the *Pauper Children (Ireland) Act, 1902.*

Petty Sessions.]—7 Edw. 7 c. 22 is the *Petty Sessions Clerk (Ireland) Amendment Act, 1907.*

Poor Relief.]—63 & 64 Vict. c. 45 is the *Poor Relief (Ireland) Act, 1900.*

Prisons.]—7 Edw. 7 c. 19 is the *Prisons (Ireland) Act, 1907.*

Public Health.]—63 & 64 Vict. c. 10 is the *Public Health (Ireland) Act, 1900.*

Public Libraries.]—2 Edw. 7 c. 20 is the *Public Libraries (Ireland) Act, 1902.*

Public Offices.]—3 Edw. 7 c. 16, is the *Public Offices Site (Dublin) Act, 1903.*

Purchase of Land.]—1 Edw. 7 c. 3 is the *Purchase of Land (Ireland) Act, 1901; and c. 30 is the Purchase of Land (Ireland) (No. 2) Act 1901.*

Registration.]—61 & 62 Vict. c. 2 is the *Registration (Ireland) Act, 1898.*

Registration of Clubs.]—4 Edw. 7 c. 9 is the *Registration of Clubs (Ireland) Act, 1904.*

Seed Potatoes.]—6 Edw. 7 c. 3 is the *Seed Potatoes Supply (Ireland) Act, 1906.*

Seed Supply.]—61 & 62 Vict. c. 50 is the *Seed Supply and Potato Spraying (Ireland) Act, 1898.*

Solicitor.]—61 & 62 Vict. c. 17 is the *Solicitors (Ireland) Act, 1898.*

Steam Trawling.]—1 Edw. 7 c. 38 is the *Fisheries (Ireland) Act, 1901.*

Supreme Court.]—7 Edw. 7 c. 44 is the *Supreme Court of Judicature (Ireland) Act, 1907.*

Tithe Rentcharge.]—63 & 64 Vict. c. 58 is the *Tithe Rentcharge (Ireland) Act, 1900.*

Tobacco.]—7 Edw. 7 c. 3 is the *Irish Tobacco Act, 1907.*

Tramways.]—63 & 64 Vict. c. 60 is the *Tramways (Ireland) Act, 1900.*

Valuation.]—1 Edw. 7 c. 37 is the *Valuation (Ireland) Act, 1901.*

2. DIVORCE.

Divorce Bill—Access to Children—Practice.]—The House of Lords will approve of a clause in a Divorce Bill giving the custody of the children of the marriage to the innocent party, but will refuse to order that a provision shall be inserted in the clause giving the guilty party access to the children. Any such provision must be left for arrangement between the parties. *Killery's Divorce Bill, [1907] A.C. 306—H.L. (Ir.)*

Decree Nisi in England—Doubt as to Operation in Ireland—Domicil.]—Where there are doubts as to the operation in Ireland of a decree under the English Divorce Acts for the dissolution of the marriage of a domiciled Irishman, the proper course is to apply for an Act of Parliament confirming the decree and removing doubts. *Malone's Divorce Bill, In re, [1905] A.C. 314—H.L. (Ir.)*

3. LOCAL GOVERNMENT.

Poor-rate Collector—Transfer of Existing Officers to County Council—Remuneration—Scheme.]—Section 115, sub-section 18 of the *Local Government (Ireland) Act, 1898*, does not apply to rate-collectors transferred to a county council. The remuneration of such officers falls to be regulated under a scheme provided in accordance with section 118, sub-sections 10–16. *Local Government Board for Ireland v. Regem, 72 L. J. P.C. 101; [1903] A.C. 402; 89 L. T. 277—H.L. (Ir.)*

And see for the decisions of the Irish Courts the various headings.

ISLE OF MAN.

Customs.—61 & 62 Vict. c. 27 is the *Isle of Man (Customs) Act*, 1898.

— 62 & 63 Vict. c. 39 is the *Isle of Man (Customs) Act*, 1899.

— 63 & 64 Vict. c. 31 is the *Isle of Man (Customs) Act*, 1900.

— 1 Edw. 7 c. 32 is the *Isle of Man (Customs) Act*, 1901.

— 2 Edw. 7 c. 23 is the *Isle of Man (Customs) Act*, 1902.

— 3 Edw. 7 c. 35 is the *Isle of Man (Customs) Act*, 1903.

— 4 Edw. 7 c. 25 is the *Isle of Man (Customs) Act*, 1904.

— 5 Edw. 7 c. 16 is the *Isle of Man (Customs) Act*, 1905.

— 6 Edw. 7 c. 18 is the *Isle of Man (Customs) Act*, 1906.

— 7 Edw. 7 c. 26 is the *Isle of Man (Customs) Act*, 1907.

School Teachers.—63 & 64 Vict. c. 38 is the *Elementary School Teachers' Superannuation (Isle of Man) Act*, 1900.

ISSUE.

Interpleader.—See INTERPLEADER.

Other Issues.—See PRACTICE.

JESUITS.

Discretion to Issue Summons against.—See *Re v. Kennedy*, post, JUSTICE OF THE PEACE, col. 1166.

JOINT STOCK COMPANY.

See COMPANY.

JOINT TENANCY.

See ESTATE; LANDLORD AND TENANT; WILL.

JOINTURE.

See POWERS.

JUDGMENT.

Estoppel by.—See ESTOPPEL.

Execution on.—See EXECUTION.

Final Judgment.—See BANKRUPTCY, col. 80.

Foreign Judgment, Enforcing.—See INTERNATIONAL LAW, col. 1101.

Interest on.—See INTEREST.

Merger of Debt in.—See MERGER.

Setting Aside—Perjury—Fraud.—See PRACTICE.

JUDICIAL SEPARATION.

See HUSBAND AND WIFE.

JURY.

See PRACTICE.

JUSTICE OF THE PEACE.

1. *Statutes*, 1150.
2. *Jurisdiction*, 1150.
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 - (a) *Assault*, 1157.
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9. *Stating Special Case*, 1171.
10. *Appeal*, 1174.
11. *Clerk to Justices*, 1177.

1. STATUTES.

62 & 63 Vict. c. 22 is the *Summary Jurisdiction Act*, 1899.

6 Edw. 7 c. 16 is the *Justices of the Peace Act*, 1906.

2. JURISDICTION.

Liability of Magistrate for Excess of Jurisdiction.—A magistrate is liable in an action of damages to a person who has suffered imprisonment under a sentence pronounced by him in excess of jurisdiction, and in such an action it

is not necessary to aver malice or want of probable cause. *M'Creadle v. Thomson*, [1907] S.C. 1176—Ct. of Sess.

Discharge of Accused without Punishment—Trifling Offence—Previous Conviction.—The powers of a Justice of the peace, under section 16 of the Summary Jurisdiction Act, 1879, to dismiss an information for an offence punishable on summary conviction, where in his opinion the charge though proved is in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, is not limited to a first offence, but may be exercised, notwithstanding proof of previous conviction be tendered. *Vinters v. Freedman*, 71 L. J. K.B. 48; 85 L. T. 628; 66 J. P. 135; 20 Cox C.C. 98—D.

Order Binding Over—Absence of Formal Charge—No Statement as to Bodily Fear—Validity of Order.—Justices have power on their own initiative to make an order binding over a person who is before them if they are satisfied that he has used threats calculated to produce a breach of the peace, although no formal charge has been made against him. *Rex v. Wilkins; John, Ex parte*, 76 L. J. K.B. 722; [1907] 2 K.B. 380; 96 L. T. 721; 71 J. P. 327—D.

Such an order is not bad merely because it does not state that the person threatened goes in fear of bodily injury. *Ib.*

Ouster of Jurisdiction—Assault—Title to Interest in Land.—Where an assault is committed by one commoner upon another commoner for an alleged improper use of the common by the latter, and no question of title to the common or to any interest therein is in dispute between the parties, the jurisdiction of the Justices to hear and determine summarily the charge of assault is not ousted by the proviso in section 46 of the Offences Against the Person Act, 1861. *Rex v. French; Roberts, Ex parte*, 71 L. J. K.B. 382; [1902] 1 K.B. 637; 86 L. T. 587; 50 W. R. 555; 66 J. P. 487; 20 Cox C.C. 200—D.

The word "title" in the proviso governs not only the words "lands, tenements, or hereditaments," but also the words "any interest therein or accruing therefrom." *Ib.*

Petty Sessions—Publication Tending to Prejudice Fair Trial—Jurisdiction of High Court.—The High Court has jurisdiction to attach for contempt of Court a person who publishes comments which tend to prejudice the fair trial of a prisoner who in the regular course of things must be tried at assizes, notwithstanding that the comments are published during the preliminary proceedings at petty sessions, and before the prisoner has been committed for trial to the assizes. *Rex v. Parke; Dougal, ex parte*, 72 L. J. K.B. 839; [1903] 2 K.B. 432; 89 L. T. 489; 67 J. P. 421—D.

Whether the High Court has a general jurisdiction to punish by attachment for contempt any interference with the administration of justice by an inferior Court, *quære. Ib.*

Power to Adjourn Case for more than Eight

Days—Summons for Libel—Probability of Settlement by Apology.—Section 21 of the Indictable Offences Act, 1848, does not preclude magistrates from adjourning the hearing of a summons for libel for more than eight days where the defendant has never surrendered or been detained in custody. Justices adjourned the hearing of a summons for libel for three months, there being in their opinion a strong probability of a settlement. The defendant was never in custody or detained as a prisoner:—*Held*, that the Justices had a discretion to order such adjournment. *Rex v. Southampton Justices*, 96 L. T. 697; 71 J. P. 332—D.

Justices Equally Divided—Power to Adjourn Case for Re-hearing.—Where an information was heard before two Justices, who, after hearing the evidence, announced in open Court that they were divided in opinion,—*Held*, that the Justices had nevertheless power to adjourn the case for re-hearing before a reconstituted Court. *Bagg v. Colquhoun*, 73 L. J. K.B. 272; [1904] 1 K.B. 554; 90 L. T. 336; 52 W. R. 494; 68 J. P. 159; 20 Cox C.C. 605—D.

Summary Jurisdiction—Trifling Offence—Suffering Gaming on Licensed Premises.—An information was preferred against an innkeeper for unlawfully suffering gaming, to wit, card playing for money, to be carried on on his premises, contrary to section 17 of the Licensing Act, 1872. The Justices, after hearing the evidence, came to the conclusion that a technical offence had been committed, but on the ruling of LORD COLERIDGE, C.J., in *Somerset v. Hart* (12 Q.B. D. 360), they dismissed the information on payment of costs, and refused to state a Case:—*Held*, refusing a rule requiring them to state a Case, that the Justices might properly come to the conclusion that the offence charged was of a trifling nature within section 16 of the Summary Jurisdiction Act, 1879. *Marshall, Ex parte*, 71 J. P. 501—D.

Selling Intoxicating Liquor without Licence.—The duly licensed tenant of a public-house gave up possession of the house. For nine days after his departure no sessions sat at which application could be made for a temporary transfer of the licence. The incoming tenant carried on the business of the house for the nine days without a licence:—*Held*, that the latter was guilty of a serious offence, and one which could not be treated by a Court of summary jurisdiction as an offence of a trifling nature under section 16 of the Summary Jurisdiction Act, 1879. *Barnard v. Barton*, 75 L. J. K.B. 326; [1906] 1 K.B. 357; 92 L. T. 859; 69 J. P. 281; 20 Cox C.C. 870—D.

Right to Trial by Jury—Omission to Inform Defendant of his Right to be so Tried—Intention of Defendant to Plead Guilty—Waiver.—A person charged before a Court of summary jurisdiction with an offence to which the provisions of section 17 of the Summary Jurisdiction Act, 1879, apply, is entitled to be informed, in the manner provided by the section, of his right to be tried by a jury; and neither the fact that he knows of his right to be so tried, nor the fact that the Court is aware of his intention to plead guilty, can give the Court jurisdiction to convict him if he pleads guilty without having been informed of his right. *Reg. v. Cockshott; Rickerby, Ex parte*, 67 L. J. Q.B.

467; [1898] 1 Q.B. 582; 78 L. T. 168; 62 J. P. 325; 19 Cox C.C. 3—D.

— **Aiding and Abetting—Counselling Commission of Offence.**—Where a person aids or abets an offence which is punishable on summary conviction, he is liable under section 5 of the Summary Jurisdiction Act, 1848, to be proceeded against in every respect as if he were a principal offender. Therefore a person who knowingly counsels the owner of a horse to perpetrate an act of cruelty upon the animal may be convicted, upon an information under section 2 of the Cruelty to Animals Act, 1849, for cruelly ill-treating the horse, although the advice given by him to the owner was the remote and not the proximate cause of the cruelty. *Benford v. Sims*, 67 L. J. Q.B. 655; [1898] 2 Q.B. 641; 78 L. T. 718; 47 W. R. 46—D.

— **Right to Costs—Summary Jurisdiction—Information on Behalf of the Crown.**—Section 53 of the Summary Jurisdiction Act, 1879, gives power to a Court of summary jurisdiction to make an order for the payment of costs in a proceeding under any statute relating to the revenue of the Crown under the control of the Commissioners of Inland Revenue or Customs to which the Crown or some one on behalf of the Crown is a party. *Thomas v. Pritchard*, 72 L. J. K.B. 23; [1903] 1 K.B. 209; 87 L. T. 688; 51 W. R. 58; 67 J. P. 71; 20 Cox C.C. 376—D.

“**Res judicata**”—**Street.**—See LOCAL GOVERNMENT.

— **Time for Commencement of—Food and Drugs—False Warranty.**—See LOCAL GOVERNMENT.

For the several Topics of Jurisdiction, see *infra*, col. 1889.

3. DISQUALIFICATION.

— **Alleged Bias.**—An allegation that Justices hold strong views on the subject-matter of the offence charged before them is not enough to entitle the person convicted of such an offence to a rule for a *certiorari* to bring up and quash the conviction. *Wilder, Ex parte*, 66 J. P. 761—D.

— **Evidence.**—An objection to an adjudication by a Justice on the ground of bias must be supported by evidence to shew some reasonable likelihood of bias. *Reg. v. Waterford Justices*, [1901] 2 Ir. R. 548—Q.B. D.

— **Pecuniary Interest—Member of Incorporated Law Society—Proceedings against Unqualified Person Acting as Solicitor.**—In proceedings taken at the instance of the Council of the Incorporated Law Society against an unqualified person for acting as a solicitor a Justice is not disqualified from adjudicating by reason of the fact that he is a member of the Incorporated Law Society. *Reg. v. Burton; Young, Ex parte*, 66 L. J. Q.B. 831; [1897] 2 Q.B. 468; 77 L. T. 364; 46 W. R. 127; 61 J. P. 727; 18 Cox C.C. 647—D.

— **Membership of Temperance Association—Engaging a Solicitor to Oppose Licence.**—An application by F. for a publican's licence was refused by the quarter sessions for the county

of Dublin. Three of the Justices composing the quarter sessions were subscribers to the funds of the Irish Association for the Prevention of Intemperance, whose objects were to secure a diminution in the number of licensed houses, and to organise strong opposition to licensing applications, and whose solicitor actually attended the sessions and opposed, in the name of local objectors, the granting of licensing applications, the application of F. among the number. A fourth Justice was member of a firm which had subscribed to the funds of the association, and two others, A. and B., were members of the executive committee of the association, which, before each licensing sessions, decided upon the licensing applications to be opposed, and in the case of F.'s application directed that the solicitor of the association should oppose. A. was not proved to have been a party to this decision. B. was present, but exerted his influence in favour of allowing F.'s application to pass without opposition; his determination to vote for a refusal of the application was arrived at during the hearing at the sessions. It was the practice of the executive committee before each licensing sessions to send circulars to over one hundred magistrates apprising them of the dates, with a view to insuring their attendance:—*Held*, that no disqualification attached to any of the Justices from taking part in the determination of F.'s application. *Held*, also (BARTON, J., dissenting), that a Justice in opposing, or retaining a solicitor to oppose, a licensing application is not thereby disqualified from hearing and determining the application as a member of the licensing authority. *Reg. v. Dublin Justices*, [1904] 2 Ir. R. 75—K.B. D.

— **Justice Holding Brewery Shares—Likelihood of Bias—Disqualification.**—An application was made to the licensing committee of the borough of T. for the removal of a licence to new premises. Three of the Justices were members of the borough council of T., and one held shares in a brewery company that sold beer within the district. A suggestion was made before the committee that if the transfer was granted another licence would be given up and certain property would be placed at the disposal of the corporation for town improvements. The transfer was granted. The confirming authority, which included the four Justices, confirmed the transfer, but the offer above stated was withdrawn:—*Held*, that there was not any likelihood of bias on the part of the three Justices who were members of the borough council, so as to render the orders made invalid; and *held*, further, that the orders were not invalid by reason of the fact that the fourth Justice adjudicated, owing to proviso (3) of section 60 of the Licensing Act, 1872. *Secus*, where actual bias could be shewn in fact to exist. *Reg. v. Tempest*, 86 L. T. 585; 66 J. P. 472—D.

— **Real Likelihood of Disqualifying Interest—Confirmation of Provisional Grant of Licence.**—An agreement made between a borough corporation and a brewery company recited the intention of the company to apply at the next licensing meeting for a full licence for certain new premises; and the agreement then provided that if the application were granted the company would pay 10,000L. to the corporation, and

that the corporation would on the opening of the new premises close a certain fully licensed hotel which had been purchased, amongst other property, by the corporation with a view to street improvements in the borough; and the corporation also agreed not to apply or suffer any application to be made for the renewal of any licence thereof, and that, should the grant and confirmation of the licence to the company be revoked by any proceedings in the High Court, the sum of 10,000*l.* should be repaid to the company by the corporation. Certain members of the corporation, who had taken an active part in bringing about the above agreement, subsequently, in their character as Justices, sat on the licensing committee when the company applied for a provisional grant of a licence for the new premises. The application for such licence was granted, and the grant was afterwards confirmed at a meeting of the confirming authority, amongst whom were the above-mentioned members of the corporation:—*Held*, that, as under the circumstances there was a real likelihood of bias on the part of such members of the corporation with regard to the grant or refusal of the licence by reason of the part which they had taken in bringing about the agreement between the company and the corporation, they had incapacitated themselves from adjudicating upon the application for the licence. *Rea v. Sunderland Justices*, 70 L. J. K.B. 946; [1901] 2 K.B. 357; 85 L. T. 183; 65 J. P. 599—C.A.

— **Assessment Appeal—Justice Member of another Assessment Committee.**—One of the Justices who sat at quarter sessions upon the hearing of an appeal against an assessment made by the Greenwich Assessment Committee in the County of London was a member of the Holborn Borough Council and chairman of the Holborn Assessment Committee, also in the County of London. The Justice had no personal or pecuniary interest in the appeal:—*Held*, that the Justice was not disqualified from sitting. *Rea v. London Justices; South Metropolitan Gas Co., Ex parte*, 71 J. P. 476; 5 L. G. R. 1064; 23 T. L. R. 726—D. Affirmed, 72 J. P. 137—C.A.

Appeal to Quarter Sessions—Presence on the Bench of Justices whose Decision is Appealed against.—On the hearing of a licensing appeal at quarter sessions two of the Justices whose order was appealed against were present on the bench during the argument, accompanied the other Justices on their adjourning to consider their decision, and had resumed their places on the bench when the decision was pronounced. The chairman and several of the other Justices, including the two Justices in question, stated on affidavit that the latter had taken no part in the hearing of the appeal or in influencing or arriving at the decision:—*Held*, that the mere presence on the bench of the two disqualified Justices rendered the constitution of the Court of quarter sessions irregular, and that its order must be set aside. *Rea v. Lancashire Justices*, 75 L. J. K.B. 198; 94 L. T. 481; 70 J. P. 337—D. *And see* INTOXICATING LIQUORS.

Solicitor—Clerk to Justices.—A solicitor who has ceased to practise as such, and has transferred his business to others, but continues to take out his certificate as a solicitor under the belief that it is necessary for him to do so as

Registrar of a County Court, is not disqualified from acting as a Justice of the peace under the Justices' Qualification Act, 1871. *Reg. v. Douglas*, 67 L. J. Q.B. 406; [1898] 1 Q.B. 560; 78 L. T. 193; 46 W. R. 377; 62 J. P. 277; 19 Cox C.C. 6—D.

The office of Justice of the peace is incompatible with that of clerk to the Justices, and if a clerk to the Justices, not having resigned that office, becomes one of the Justices, he, by his acceptance of the latter office, vacates the former, even though he continues to draw the salary thereof, inasmuch as he has the right to determine his position as Justices' clerk, subject to any complaint against him for having violated the terms of his appointment. Such Justice of the peace can therefore lawfully adjudicate upon a case heard before the bench of Justices of which he has become a member. *Id.*

4. PROTECTION.

Action against—Reasonable and Probable Cause—Malice.—Where, upon the face of a summons before a Justice, it appears that the Justice has no jurisdiction, and the Justice convicts, and the conviction is subsequently set aside, and an action is brought against the Justice to recover damages, it is not necessary for the plaintiff to allege and prove that the act was done maliciously and without reasonable and probable cause, and the fact that neither the want of jurisdiction nor the facts shewing such want of jurisdiction were expressly brought to the notice of the Justice at the hearing is no defence. *Johnston v. Meldon* (30 L. R. Ir. 15) distinguished. *Polley v. Fordham* (No. 2), 91 L. T. 525; 63 J. P. 504; 20 T. L. R. 639—D.

Liability to Action—Public Authorities Protection—Conviction without Jurisdiction—Distress Warrant—Distress—Commencement within Six Months of "act complained of"—Act Complained of, whether Conviction or Distress.—The defendant, a police magistrate, convicted the plaintiff of an offence and ordered him to pay a fine. The plaintiff having failed to pay the fine, the defendant issued a distress warrant by virtue of which the plaintiff's goods were distrained upon. The conviction was subsequently quashed. The plaintiff thereupon brought an action against the defendant claiming damages for illegal distress. The action was commenced more than six months after the conviction was made, but less than six months after the distress warrant was issued:—*Held*, that the action was not barred by section 1 (a) of the Public Authorities Protection Act, 1893. *Polley v. Fordham* (No. 1), 73 L. J. K.B. 687; [1904] 2 K.B. 345; 90 L. T. 755; 53 W. R. 48, 188; 68 J. P. 321; 20 T. L. R. 435—D. *And see* PUBLIC AUTHORITIES PROTECTION ACT.

Practice—Application for Rule under Section 5 of the Justices' Protection Act, 1848—Applicant in Person—Counsel.—An application for a rule under section 5 of the Justices' Protection Act, 1848, calling upon a Justice of the peace to shew cause why he should not do any act relating to the duties of his office must be made by counsel. *Wallace, Ex parte*, 71 L. J. K.B. 788; [1902] 2 K.B. 488; 50 W. R. 678—C.A.

5. TOPICS OF JURISDICTION.

(a) *Assault.*

• **Title to Interest in Land—Ouster of Jurisdiction.**—Where an assault is committed by one commoner upon another commoner for an alleged improper use of the common by the latter, and no question of title to the common or to any interest therein is in dispute between the parties, the jurisdiction of the Justices to hear and determine summarily the charge of assault is not ousted by the proviso in section 46 of the Offences Against the Person Act, 1861. *Rex v. French; Roberts, Ex parte*, 71 L. J. K.B. 382; [1902] 1 K.B. 637; 86 L. T. 587; 50 W. R. 555; 66 J. P. 487; 20 Cox C.C. 200—D.

The word "title" in the proviso governs not only the words "lands, tenements, or hereditaments," but also the words "any interest therein or accruing therefrom." *Ib.*

(b) *Brothel.*

Permitting Premises to be a Brothel.—A conviction for permitting premises to be used as a brothel upon several separate days is good, as the offence is a continuing one. *Rex v. Burnby or Burnby, Ex parte*, 70 L. J. K.B. 739; [1901] 2 K.B. 458; 85 L.T. 168; 20 Cox C.C. 25—D.

(c) *Building.*

Erection of Building beyond Front Main Wall of Building on Either Side—Dismissal of Information—Justices Equally Divided—Subsequent Information for Continuing Offence.—Where Justices are equally divided upon the hearing of an information laid under section 3 of the Public Health (Buildings in Streets) Act, 1888, for erecting a building in a street beyond the front main wall of the building on either side thereof, the proper course for the Justices to take is to adjourn the case in order that a re-hearing may be had before a reconstituted bench. If, however, the Justices dismiss the information, a subsequent information for continuing the offence will not lie against the same party if the circumstances remain the same. As long as the dismissal of the first information stands, it exists as a decision between the same parties upon the same subject-matter given by a competent tribunal, and the second bench of Justices has no power to re-open the hearing. *Kinnis v. Graves*, 67 L. J. Q.B. 583; 78 L. T. 502; 46 W. R. 480—D.

(d) *Coal Mines.*

Use of Explosives in Mines—Conviction of Separate Offences on same Facts.—A complaint against the owners of a coal mine, charged them—first, with a contravention of an Order under the Coal Mines Regulation Act, 1896, by allowing a shot charged with gunpowder to be fired in the mine, which was not naturally wet throughout; and secondly, with a contravention of the Coal Mines Regulations Act, 1887, by allowing the said shot to be fired in a dry and dusty place without using the statutory precautions. The accused were con-

victed on each charge and a penalty imposed in each case:—*Held*, that the conviction must be quashed, inasmuch as, although there was only one act proved, the accused had been convicted of two offences. *Moore v. Wilson*, 5 F. (Just. Cas.) 88—Ct. of Justy.

(d¹) *Contempt of Court.*

Petty Sessions—Publication Tending to Prejudice Fair Trial—Jurisdiction of High Court.—The High Court has jurisdiction to attach for contempt of Court a person who publishes comments which tend to prejudice the fair trial of a prisoner who in the regular course of things must be tried at assizes, notwithstanding that the comments are published during the preliminary proceedings at petty sessions, and before the prisoner has been committed for trial to the assizes. *Rex v. Parke*, 72 L. J. K.B. 839; [1903] 2 K.B. 432; 89 L. T. 439; 52 W. R. 215; 67 J. P. 421—D.

Whether the High Court has a general jurisdiction to punish by attachment for contempt any interference with the administration of justice by an inferior Court, *quære. Ib.*

(e) *Cruelty to Animals.*

Aiding and Abetting—Counselling Commission of Offence.—Where a person aids or abets an offence which is punishable on summary conviction, he is liable under section 5 of the Summary Jurisdiction Act, 1848, to be proceeded against in every respect as if he were a principal offender. Therefore a person who knowingly counsels the owner of a horse to perpetrate an act of cruelty upon the animal may be convicted, upon an information under section 2 of the Cruelty to Animals Act, 1849, for cruelly ill-treating the horse, although the advice given by him to the owner was the remote and not the proximate cause of the cruelty. *Benford v. Sims*, 67 L. J. Q.B. 655; [1898] 2 Q.B. 641; 78 L. T. 718; 47 W. R. 46; 19 Cox C.C. 141—D.

(f) *Debt, Committal for.*

Evidence of Means.—Summonses were issued against two officers of local branches of a certain trade union under the Trade Union Act, 1871, s. 12, charging them with wilfully withholding certain sums of money belonging to the union. Both defendants admitted the charges against them, and orders, headed "Civil Debt," were made upon them for payment of the amounts due, or in default distress and sale. Both defendants defaulted, and application was then made for their committal to prison under the section. The magistrate refused the application on the ground that the section was modified by the Summary Jurisdiction Act, 1879, s. 6, and that, the proceedings being civil and not criminal, in order to obtain committal a judgment summons must be issued, and the prosecution must prove possession of means by the defendants. An order *nisi* was then obtained, addressed to the magistrate and the two defendants, calling on them to shew cause why the orders should not be removed and quashed on the ground that the moneys ordered to be paid were not civil debts:—*Held*, that, as the orders

were regular on the face, the rule must be discharged. *Reg. v. Truscott*, 81 L. T. 188; 19 Cox C.C. 379—D.

(g) *Disorderly Meeting.*

Recognisance to Keep the Peace and be of Good Behaviour—Obstruction of Streets—Using Insulting Language whereby Breach of the Peace may be Occasioned—Conduct not in itself Illegal, but Provoking other Persons to Break the Peace—Jurisdiction of Magistrate.]—The appellant, in carrying on a Protestant "crusade," held meetings in the public streets of a city in which there was a large Roman Catholic population. The meetings were attended by many Roman Catholics as well as by his own supporters. At the meetings he made use of language and gestures insulting and annoying to the Roman Catholics and calculated to provoke them to commit breaches of the peace; and breaches of the peace were in consequence committed by them. The appellant did not himself commit any breach of the peace, and advised his supporters not to do so; but at one of the meetings he said that he had received a letter stating that the Catholics were going to bring sticks to a subsequent meeting, and told his supporters that the police had refused him protection and that he looked to them to protect him. The meetings caused an obstruction of the streets. A local Act imposed a penalty upon every person who in any street used any threatening, abusive, or insulting words, or behaviour whereby a breach of the peace might be occasioned. The appellant threatened and intended to hold similar meetings in the future. The appellant having been bound over by the order of a magistrate to keep the peace and be of good behaviour,—*Held*, that the order was valid. *Wise v. Dunning*, 71 L. J. K.B. 165; [1902] 1 K.B. 167; 85 L. T. 721; 50 W. R. 317; 66 J. P. 212; 20 Cox C.C. 121—D.

Though a person's conduct is not in itself illegal, yet, if its natural consequence is to provoke other persons to commit a breach of the peace, he may properly be bound over to be of good behaviour. *Id.*

(g^u) *Dog.*

Order as to Control of.]—*Reg. v. Owen Sewell*, *Ex parte*, 72 J. P. 60—D. See col. 6.

(h) *Fire Brigade.*

Order for Payment of Expenses—"Order for payment of money or otherwise"—Limitation of Proceedings.]—An order made by Justices under section 33 of the Town Police Clauses Act, 1847, as to the amount of expenses incurred in respect of the fire brigade being sent to a fire outside the limits of the special Act is not "an order for the payment of money or otherwise" within section 8 of the Summary Jurisdiction Act, 1848, and therefore the six months' limitation contained in section 11 of that Act has no application to a complaint for the determination of the amount of such expenses. *Reg. v. Part*, 70 J. P. 398; 4 L. G. R. 1122—D.

(i) *False Imprisonment.*

Governor of Prison—Clerk of the Peace—Action against Governor and Clerk of the Peace

—Governor Receiving Prisoner without Proper Warrant of Commitment—Warrant by Magistrate—Sentence Altered on Appeal by Quarter Sessions—No Fresh Warrant by Quarter Sessions—Liability of Governor and Clerk of the Peace.]—The plaintiff was convicted by a Court of summary jurisdiction and sentenced to a term of imprisonment with hard labour. He was taken to prison under a warrant of commitment made out by the magistrate, but released pending an appeal to quarter sessions. The conviction was affirmed, but the sentence was altered. No fresh warrant of commitment was made out by the Recorder at quarter sessions, but the original conviction by the magistrate was altered by the Recorder in accordance with his sentence. The plaintiff was then taken to prison, and the only documents handed to the governor of the prison were a copy of the original conviction by the magistrate as altered by the Recorder and the original warrant of commitment by the magistrate. He was detained in prison for some days, when the conviction was quashed upon other grounds, and he was released. In an action for false imprisonment against the clerk of the peace of the borough and the governor of the prison for unlawfully imprisoning the plaintiff,—*Held*, that the action could not be maintained against the clerk of the peace, as he was merely a ministerial officer and his act was a ministerial act; but that the action was maintainable against the governor, as he was not justified in receiving the plaintiff into custody and detaining him without a fresh warrant of commitment by the Recorder, and that the documents which the governor received were not equivalent to such warrant of commitment, and that the governor was liable in damages to the plaintiff. *Demer v. Cook*, 88 L. T. 629; 67 J. P. 206—Lord Alverstone, C.J.

(j) *Food.*

Unsound Meat—Exposure of, for Sale—Aiding and Abetting Exposure—Negligence—Sufficiency for Conviction.]—Negligence on the part of a veterinary surgeon in making an examination and giving a certificate that meat which is in fact unsound is sound and healthy is not of itself sufficient to justify a conviction against the veterinary surgeon for aiding and abetting the exposing of the unsound meat for sale, although such negligence in fact causes the exposure of the meat. *Carrow v. Tillstone*, 83 L. T. 411; 64 J. P. 823; 19 Cox C.C. 576—D.

Amendment of Information.]—The non-fulfilment of the requirements of section 19 of the Sale of Food and Drugs Act, 1899, is not a matter capable of amendment under *Jervis's Act*. *Bull v. Mattinson*, 82 L. T. 800; 64 J. P. 615—D. And see LOCAL GOVERNMENT, col. 1341.

(k) *Larceny—Restitution Order.*

"Person aggrieved."]—The purchaser against whom an order of restitution under section 100 of the Larceny Act, 1861, has been made is a "person aggrieved" within the meaning of section 23, sub-section 1 of the Summary Jurisdiction Act, 1879, and is therefore entitled to appeal against the order to the High Court by way of Special Case. *Moss v. Hancock*, 68 L. J. Q.B. 657; [1899] 2 Q.B. 111; 80 L. T. 693; 47 W. R. 698; 63 J. P. 517—D.

(l) *Licence.*

Carriage—Penalty—First Offence.—Section 4 of the Summary Jurisdiction Act, 1879, as far as reduction of fines is concerned, applies only to first offences. Fines for second and subsequent offences are regulated by 7 & 8 Geo. 4, c. 53, s. 78, under which such fines cannot be reduced below one-fourth of their full amount as imposed by statute. To constitute a second offence under 32 & 33 Vict. c. 14, s. 27, it is not necessary to be convicted twice in the same year of keeping a carriage without having a licence for that year. A conviction in one year of keeping a carriage without a licence for that year following a conviction in a previous year for keeping a carriage without a licence for that year, is a second conviction for the same offence. *Phillips v. Stephens*, 79 L. T. 280; 62 J. P. 789; 19 Cox C.C. 172—D.

Same Dealer's Licence—Stating Case.—See GAME.

Intoxicating Liquors, for—Proof of Previous Convictions—Register of Police Court.—For the purpose of enabling a Court of summary jurisdiction, on the conviction of the offender, to make an order under section 6, sub-section 1 of the Licensing Act, 1902, that notice of the conviction be sent to the police authority, the previous convictions of the offender, where they have taken place before the same Court, need not be formally proved by production of the record, but may be proved by the register of the Court kept pursuant to section 22 of the Summary Jurisdiction Act, 1879. *London School Board v. Harvey* (48 L. J. M.C. 130; 4 Q.B. D. 451) followed. *Metropolitan Police Commissioner v. Donovan*, 72 L. J. K.B. 545; [1903] 1 K.B. 895; 88 L. T. 555; 52 W. R. 14; 67 J. P. 147; 20 Cox C.C. 435—D.

Charge Proved—Information Dismissed because Offence of Trifling Nature—Selling by Retail without a Licence.—Selling intoxicating liquor without a licence for nine days is not an offence of a trifling nature which justifies Justices in dismissing informations therefor merely because the transfer sessions are not held for that period, and there is a *bona fide* intention to apply for a transfer of the licence at such sessions. *Barnard v. Barlon*, 92 L. T. 859; 69 J. P. 281; 75 L. J. K.B. 326; [1908] 1 K.B. 357; 20 Cox C.C. 870—D.

Part of County Transferred to Another County—Licensing.—Where part of a county is transferred to another county under section 2 of the County Police Act, 1840, the licensing jurisdiction over the part transferred does not pass from the Justices of the former county to those of the latter. *Reg. v. Worcestershire Justices*; *Reg. v. Warwickshire Justices*, 68 L. J. Q. B. 109; [1899] 1 Q.B. 59; 79 L. T. 393; 47 W. R. 134; 62 J. P. 836; 19 Cox C.C. 198—C.A. And see INTOXICATING LIQUORS.

(m) *Lunacy.*

Application under Lunacy Act—Court of Summary Jurisdiction—Power to State Case.—Justices acting under section 299 of the Lunacy Act, 1890, are not a Court of summary jurisdiction, and have therefore no power to state a Case. *Bethel, In re*, 80 L. T. 492; 63 J. P. 453—D.

(n) *Maintenance of Parent.*

Jurisdiction to Commit Defendant—Evidence of Means.—Justices have no jurisdiction to commit to prison a person for disobedience to an order made upon him for the payment of a weekly sum towards the maintenance of his father in the absence of proof that such person has, or has had since the date of the order, the means of payment, and has refused or neglected to pay in accordance with the terms of the order. *Gamble, In re*, 63 L. J. Q.B. 195; [1899] 1 Q.B. 305; 79 L. T. 642; 63 J. P. 101; 19 Cox C.C. 225—D.

Money due under such an order is merely a civil debt, and comes within the provisions of sections 6 and 35 of the Summary Jurisdiction Act, 1879. *Id.*

Order for Payment of more than 3l.—Appeal to Quarter Sessions.—An order of a magistrate adjudging payment of 2s. 6d. a week towards the maintenance of an adult female pauper is not an order in which the sum adjudged to be paid is more than 3l. within the meaning of section 50 of the Metropolitan Police Courts Act, 1839, and, consequently, no appeal lies to quarter sessions under that section against such an order. *Reg. v. London Justices; Greenwich Union, Ex parte*, 69 L. J. Q.B. 364; [1900] 1 Q.B. 438; 82 L. T. 296; 48 W. R. 319; 64 J. P. 357—D.

(o) *Malicious Damage to Property.*

"Fair and reasonable supposition" of Right—Bona Fides.—By section 52 of the Malicious Damage Act, 1861, "whosoever shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatever either of a public or private nature," may be convicted before a Justice of the peace and imprisoned and fined, "provided that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of," &c. The appellants pulled down a hedge bounding Fernworthy Down, which was held in undivided shares by the respondents. They had done so on several previous occasions. Both of them lived in houses near the down, and under leases granted by the predecessors of one of the respondents. They had committed the acts complained of in pursuance of a supposed right of pasture on the down which they contended was a common, and, although for many years they had attempted to carry out their supposed rights, they had always been disputed. There was no mention in any of the leases of any grant. The Justices were of opinion that the rights they had claimed could not exist in law, and that their jurisdiction was not ousted, and they convicted the appellants:—*Held*, that the conviction was right, as there was no fair and reasonable claim of right. *Brooks v. Hamlyn*, 79 L. T. 734; 63 J. P. 215; 19 Cox C.C. 231—D.

Growing Plants—Destroying Vegetables in Garden—Assertion of Public Right of Recreation—Unnecessary Violence.—The appellants, who, in the alleged exercise of a supposed public right of recreation over certain uninclosed lands, trampled down and rooted up the entire vege-

table produce of a small inclosed garden (the site of which had formed part of such lands), doing more damage than could reasonably be supposed necessary for the assertion or protection of the alleged right, were convicted by Justices of unlawfully and maliciously damaging the plants in question, under section 23 of the Malicious Damage Act, 1861:—*Held*, that the jurisdiction of the Justices was not ousted by the claim of right set up, and that the appellants were rightly convicted. *Heaven v. Crutchley*, 1 L. G. R. 473; 68 J. P. 53—D.

(p) *Married Woman.*

Summons out of Time—Previous Summons Withdrawn—Revival—Jurisdiction of Justices.—Where a summons under the Summary Jurisdiction (Married Women) Act, 1895, is withdrawn at the hearing the complaint on which it is founded comes to an end and the Justices have no jurisdiction to allow a fresh summons to be issued founded on the same matter of complaint. *Pickavance v. Pickavance*, 70 L. J. P. 14; [1901] P. 60; 84 L. T. 62—D.

Time when Cause of Complaint Arises.—See *Keeton v. Sheffield Coal Co.*, 70 L. J. K.B. 374, *post*, LOCAL GOVERNMENT; and *Corbett v. Badger*, 70 L. J. K.B. 640, *post*, METROPOLIS.

Appeal from Order under Summary Jurisdiction (Married Women) Act.—See HUSBAND AND WIFE.

(q) *Master and Servant.*

Agreement between Employer and Workman—Penalty.—The jurisdiction of Justices under the Employers and Workmen Act, 1875, is not ousted by the provisions of section 1 of the Truck Act, 1896, and proceedings may be taken before Justices to recover a penalty under a contract between an employer and a workman, although particulars under section 1, sub-section 2 (b) of the Truck Act, 1896, have not been supplied to the workman. *Buxton Lime Firms Co. v. Howe*, 69 L. J. Q.B. 498; [1900] 2 Q.B. 232; 82 L. T. 422; 48 W. R. 472; 64 J. P. 503—D.

(r) *Motor.*

Dangerous Speed—Evidence—Statement as to Previous Conviction—Notice not Taken of Statement.—C. was charged with having unlawfully driven a motor car on a public highway at a speed dangerous to the public having regard to all the circumstances of the case, "the same being his second offence." The summons so worded was read in full in Court, and in the course of the hearing evidence of a previous conviction was given by two constables. Counsel for the defendant objected to such evidence; but the Bench, saying they would take no notice of the statement by the two constables, continued the hearing and convicted the defendant:—*Held*, that there was no reception of inadmissible evidence, and that the appeal against the conviction must be dismissed. *Cholerton v. Coppington*, 70 J. P. 484—D.

— **Conviction in the Alternative—Duplicity.**

—The provisions of section 1, sub-section 1 of the Motor Car Act, 1903, prohibiting the driving

of a motor car "at a speed or in a manner which is dangerous to the public" create two distinct offences; and a conviction for driving a motor car "at a speed or in a manner which was dangerous to the public" is therefore bad for duplicity. *Rex v. Wells*, 91 L. T. 98; 2 L. G. R. 918; 68 J. P. 392; 20 Cox C.C. 671; 20 T. L. R. 549—D.

Warrant of Commitment—No Distress Levied—Evidence of Insufficiency of Goods upon which Levy could be Made.—The defendant was committed to prison, having been convicted by Justices of an offence under the Motor Car Act, 1903, and fined 10*l.*, with the alternative of one month's imprisonment. The warrant of commitment recited that it appeared to the Court that the defendant had no sufficient goods whereon to levy a distress. From the affidavit filed on behalf of the Justices it appeared that the defendant's solicitor stated that the defendant had no means whatever beyond his wages as a second chauffeur, and that the solicitor made an appeal for time to pay the fine, as otherwise the defendant would have to go to prison. An affidavit filed on behalf of the defendant stated that his solicitor asked for time for payment of the fine, but that the chairman of the Justices replied, "10*l.*, or alternatively one month's imprisonment," whereupon the solicitor left the Court and the defendant was removed in custody. It was contended for the defendant on the return to a writ of *habeas corpus* that there was no evidence that the defendant had not goods upon which a sufficient distress could be levied, and that the warrant was therefore bad:—*Held*, that the warrant was good on its face, and, assuming the Court could go into the facts, there was no evidence to displace the finding of the Justices, and that therefore the writ must be discharged. *Rex v. Mortimer*, 70 J. P. 542—D.

(s) *Music.*

Order for Forfeiture of Pirated Copies of Music—No Summons—Jurisdiction.—See COPYRIGHT.

(t) *Nuisance.*

Order for Abatement of made by Three Justices—Signature by One Justice only—Validity.—An order under section 96 of the Public Health Act, 1875, was made by three Justices sitting in petty sessions, requiring the defendant to abate a nuisance existing on his premises and to execute certain works necessary for that purpose. The order when drawn up was signed by only one of the Justices:—*Held*, that the order was invalid. *Wing v. Epsom Urban Council*, 73 L. J. K.B. 389; [1904] 1 K.B. 798; 90 L. T. 543; 52 W. R. 461; 68 J. P. 259; 2 L. G. R. 714; 20 T. L. R. 310—D.

(u) *Penalty.*

Penalty or Compensation—Failure to Deliver Minimum Quantity of Compensation Water.—By a section of their private Act the defendants in case they omitted or failed to deliver into a certain brook a minimum quantity of compensation water were to be liable to a penalty of five pounds a day for every day on which such omission or failure should occur,

the penalty to be recoverable summarily by the party or parties interested in the delivery of such water before Justices in manner provided by the Summary Jurisdiction Acts:—*Held*, that the five pounds a day mentioned in the section was a penalty as distinguished from compensation money, and that the Justices were not bound to give the full five pounds a day, but could reduce it. *Held*, also, that the defendants were liable to the penalty, although they had not constructed the whole of their authorised works. *Cooke v. Hawarden Waterworks Co.*, 96 L. T. 906; 5 L. G. R. 731; 71 J. P. 223—D.

Right of Informer to Share of Penalty—Discretion of Police Magistrate.—Notwithstanding section 9 of the Betting Act, 1853, a Metropolitan police magistrate who imposes a penalty on a defendant charged on an information with an offence under that Act has, by section 34 of the Metropolitan Police Courts Act, 1839, a discretion to deprive the informer of any share in the penalty, even though the informer has been guilty of no corrupt practice. *Hawke v. Mackenzie* (No. 3), 71 L. J. K.B. 570; [1902] 2 K.B. 234; 87 L. T. 131; 51 W. R. 239; 66 J. P. 712; 20 Cox C.C. 324—D.

(v) *Public Footpath.*

Obstruction of—Claim of Right—Dedication to Public.—To a complaint before Justices at petty sessions under section 28 of the Towns Police Clauses Act, 1847, for obstructing a public footway, it is a good defence that such footway was dedicated to the public subject to the right of the defendant to commit the acts of obstruction complained of, and such a defence, if raised *bona fide*, ousts the jurisdiction of the Justices. The evidence, however, to establish such defence should be of a cogent character. *Reg. v. Londonderry Justices*, [1902] 2 Ir. R. 266—K.B. D.

(w) *Rates.*

Water—Recovery of—Summary Procedure—Demand—Time—"Rate made under this Act."—A person from whom a sum of money is due to a local authority under an agreement for the supply of water made under section 56 of the Public Health Act, 1875, is a person assessed to a "rate made under this Act" within the meaning of section 256, and may therefore, if in default for fourteen days after demand in writing, be summoned before a Court of summary jurisdiction. *Elliott v. Russell*, 72 L. J. K.B. 15; [1902] 2 K.B. 748; 88 L. T. 204; 51 W. R. 269; 67 J. P. 158—D.

When Matter of Complaint Arises.—For the purposes of section 11 of the Summary Jurisdiction Act, 1848, the matter of complaint arises at the date of the demand, and the summons may be taken out within six months from that date. *Id.*

Poor Rate—Proceedings for Recovery of.—See POOR LAW.

(x) *River Pollution.*

Trivial Offence—Dismissal of Information—Discharge of Sewage into River.—*Prima facie*, the discharge of night sewage into a river

cannot, under ordinary circumstances, be regarded as a trivial offence so as to justify the Justices before whom an information is laid in respect of such discharge of sewage dismissing the information under section 16 of the Summary Jurisdiction Act, 1879, but they may take that course if *bona fide* they come to the conclusion that the offence was of so trifling a nature that it was inadvisable to inflict any punishment. The mere fact that there have been negotiations between the parties, subsequent to the service of a notice served upon the defendants to discontinue the discharge of sewage, does not warrant the Justices dismissing the information. *Lee Conservancy Board v. Bishop's Stortford Urban Council*, 70 J. P. 244; 4 L. G. R. 641—D.

(y) *Roman Catholic Religion.*

Offence under Relief Act—Discretion of Magistrate.—Upon a rule *nisi* for a *mandamus* to command a Metropolitan magistrate to hear and determine an application for a summons for an offence under section 34 of the Roman Catholic Relief Act, 1829,—*Held*, that, though the information disclosed a *prima facie* case that the offence was committed, nevertheless the magistrate was entitled in the exercise of his discretion to refuse to issue a summons, and, if he did so, the Court had no jurisdiction to compel him to review his decision unless the discretion was exercised on improper and extraneous grounds. *Ree v. Kennedy*, 86 L. T. 753; 50 W. R. 633—D.

In prosecutions under section 34 of the Roman Catholic Relief Act, 1829, the fact that there have never been any prosecutions under the section, and that the magistrate was of opinion that if any prosecutions under it were now to be commenced they should be commenced by the Crown, are not improper and extraneous grounds in considering an application by a private person for a summons under section 34. There is nothing in that Act to prevent private persons from commencing prosecutions under section 34. *Id.*

(z) *Salmon Fishery.*

Unlawful Possession of Unseasonable Fish—Recovery of Penalty—Time.—The time within which penalties may be recovered in a summary manner under section 62 of the Salmon Fishery Act, 1873, is to be calculated in accordance with the provisions of section 11 of the Summary Jurisdiction Act, 1848. It is therefore unnecessary that a conviction and recovery of a penalty should take place within six months from the actual date of the offence so long as an information has been laid within the six months. *Morris v. Duncan*, 68 L. J. Q.B. 49; [1899] 1 Q.B. 4; 79 L. T. 379; 47 W. R. 96; 62 J. P. 823; 19 Cox C.C. 186—D. *And see* FISHERY, col. 863.

(aa) *Street.*

Constructing and Laying out New Street Contrary to By-laws—Conviction—Two Offences—Uncertainty.—A person was convicted for that he did "neglect to comply with a certain notice . . . specifying certain matters therein mentioned in respect of which the laying out or construction of the said streets was in con-

travention of the by-laws relating to new streets, and requiring him . . . to do the works therein specified which had been omitted by him to be done contrary to the form of the said by-laws," &c.:—*Held*, that the conviction was bad on two grounds—first, that it referred to two offences; and secondly, for uncertainty. *Rees v. Slater*, 67 J. P. 299—D. And see col. 1389.

(bb) *Trade Union.*

Moneys of—Withholding by Officers.]—Summonses were issued against two officers of local branches of a certain trade union under the Trade Union Act, 1871, s. 12, charging them with wilfully withholding certain sums of money belonging to the union. Both defendants admitted the charges against them, and orders, headed "Civil Debt," were made upon them for payment of the amounts due, or in default distress and sale. Both defendants defaulted, and application was then made for their committal to prison under the section. The magistrate refused the application on the ground that the section was modified by the Summary Jurisdiction Act, 1879, s. 6, and that, the proceedings being civil and not criminal, in order to obtain committal a judgment summons must be issued, and the prosecution must prove possession of means by the defendants. An order *nisi* was then obtained, addressed to the magistrate and the two defendants, calling on them to shew cause why the orders should not be removed and quashed on the ground that the moneys ordered to be paid were not civil debts:—*Held*, that, as the orders were regular on the face, the rule must be discharged. *Reg. v. Truscott*, 81 L. T. 148—D.

G. INFORMATION AND SUMMONS.

Power to Lay Information—Throwing Stones—No Authority of Urban Council—Police.]—By section 28 of the Towns Police Clauses Act, 1847, every one who to the annoyance and danger of the passengers wantonly throws stones is liable to a penalty. By section 171 of the Public Health Act, 1875, the provisions of the Towns Police Clauses Act, 1847, with respect to the above was "for the purpose of regulating such matters in urban districts" incorporated in that Act. It is provided by section 253 of the Public Health Act, 1875, that "proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved or by the local authority of the district in which the offence is committed"—*Held*, that the district superintendent of police could lay an information under section 28 of the Towns Police Clauses Act, 1847, although not the party aggrieved or authorised by the local authority. *Jobson v. Henderson*, 82 L. T. 260; 64 J. P. 425; 19 Cox C.C. 477—D.

Two Informations—Distinct Charges—Proceeding with Second Information before Disposing of First—Legality of Conviction.]—It is contrary to the rules and principles of the criminal law that Justices in petty sessions should mix up two criminal charges and convict or acquit in one of them with any reference to the facts appearing in the other. But where a defendant

has been charged upon two informations relating to distinct offences, it is open to the Justices, so long as they apply the evidence in each case to that case alone, to postpone the announcement of their decision in the first case until they have heard and determined the second. *Reg. v. Fry; Masters, Ex parte*, 67 L. J. Q.B. 712; 78 L. T. 716; 46 W. R. 649; 62 J. P. 457; 19 Cox C.C. 135—D.

Amendment of Information.]—The non-fulfilment of the requirements of section 19 of the Sale of Food and Drugs Act, 1899, is not a matter capable of amendment under Jervis's Act. *Batt v. Mattinson*, 82 L. T. 800; 64 J. P. 615; 19 Cox C.C. 532—D.

Offence under the Roman Catholic Relief Act—Discretion of Magistrate.]—Upon a rule *nisi* for a *mandamus* to command a Metropolitan magistrate to hear and determine an application for a summons for an offence under section 34 of the Roman Catholic Relief Act, 1829,—*Held*, that, though the information disclosed a *prima facie* case that the offence was committed, nevertheless the magistrate was entitled in the exercise of his discretion to refuse to issue a summons, and, if he did so, the Court had no jurisdiction to compel him to review his decision unless the discretion was exercised on improper and extraneous grounds. *Rees v. Kennedy*, 86 L. T. 753; 50 W. R. 633; 20 Cox C.C. 230—D.

In prosecutions under section 34 of the Roman Catholic Relief Act, 1829, the fact that there have never been any prosecutions under the section, and that the magistrate was of opinion that if any prosecutions under it were now to be commenced they should be commenced by the Crown, are not improper and extraneous grounds in considering an application by a private person for a summons under section 34. There is nothing in that Act to prevent private persons from commencing prosecutions under section 34. *Ib.*

Variance between Information and Conviction—Conviction Signed but not Sealed by Justices.]—An information was laid before Justices against D. for having "unlawfully exposed to view . . . a certain indecent exhibition, to wit, certain obscene pictorial postcards contrary to the statute in such case made and provided." A summons was issued in the terms of the information, and at the hearing the solicitor for the prosecution stated that the summons was taken out under the Vagrancy Act, 1824, whereupon the defendant's solicitor objected that the summons did not set out an offence under the Vagrancy Act, 1824, as it did not charge the defendant with being "a rogue and vagabond," but that the offence charged was that contained in section 28 of the Towns Police Clauses Act, 1847. No objection was taken by the defendant's solicitor that the word "wilfully" contained in section 4 of the Vagrancy Act, 1824, was omitted from the summons. The Justices convicted the defendant "of being a rogue and vagabond within the intent and meaning of 5 Geo. 4, c. 83, that is to say for that the defendant . . . did unlawfully wilfully expose to public view a certain indecent exhibition . . ."; and they imposed a fine of 20*l.*, signing, but not also sealing, the conviction. On an application to

quash the conviction.—*Held*, that, as the defendant did not ask for an adjournment or require the summons to be amended, and as no information is required when a defendant is before the Justices, the Court would not quash the conviction. *Held*, further, that under section 7 of the Quarter Sessions Act, 1849, the Court had power to direct the Justices to draw up a properly sealed conviction. *Rev v. Tabrum*, 97 L. T. 551; 71 J. P. 325; 23 T. L. R. 474—D.

Dismissal of Information—Justices Equally Divided—Subsequent Information for Continuing Offence.—Where Justices are equally divided upon the hearing of an information laid under section 3 of the Public Health (Buildings in Streets) Act, 1888, for erecting a building in a street beyond the front main wall of the building on either side thereof, the proper course for the Justices to take is to adjourn the case in order that a re-hearing may be had before a reconstituted bench. If, however, the Justices dismiss the information, a subsequent information for continuing the offence will not lie against the same party, if the circumstances remain the same. As long as the dismissal of the first information stands, it exists as a decision between the same parties upon the same subject-matter given by a competent tribunal, and the second bench of Justices has no power to re-open the hearing. *Kinnis v. Graves*, 67 L. J. Q.B. 583; 78 L. T. 502; 46 W. R. 480; 19 Cox C.C. 42—D.

— **Discretion.**—See *Salt v. Scott-Hall*, 72 L. J. K.B. 627; *post*, LOCAL GOVERNMENT.

— **Trifling Offence.**—See VACCINATION.

Summons—Application for—Prima facie Evidence of Offence—Discretion of Magistrate.—On an application for a summons, if the magistrate, after hearing the applicant's statement, is of opinion that if the summons were issued and the offence were proved he would nevertheless under the circumstances dismiss the summons at the hearing, he may in the exercise of his discretion refuse to issue the summons. *Rev v. Bros*, 85 L. T. 581; 66 J. P. 54; 20 Cox C.C. 89—D.

— **Service of—Offence Punishable Summarily.**—Service of a summons upon a limited joint-stock company for an offence punishable summarily must be effected at their registered office in accordance with the terms of section 62 of the Companies Act, 1862. *Pearks v. Richardson*, 71 L. J. K.B. 18; [1902] 1 K.B. 91; 85 L. T. 616; 50 W. R. 286; 66 J. P. 119; 20 Cox C.C. 96—D.

— **Distinct Offences Charged—Defendant Convicted Generally.**—M. was charged on summons for that, without being duly authorised, he did go and enter upon the lands of the complainant, provided with a gun, to look for, set, spring, start, follow, shoot, course, hunt, or otherwise pursue, take, or destroy, game, contrary to a certain statute. An order was made by the Justices, "defendant duly convicted and ordered to pay," &c.:—*Held*, that the conviction was bad, inasmuch as several distinct offences were charged, and it did not appear of which the defendant was convicted. *Rev v. Donegal Justices*, [1907] 2 Ir. R. 386—K.B. D.

— **One Conviction on charging Several Offences—Appeal to Quarter Sessions—Affirmance of Order Wrongly Certified.**—M., a publican, was charged at petty sessions on a summons alleging five distinct offences under the Licensing Acts, on one of which he was convicted and fined, the other four charges being dismissed without prejudice. The order was properly entered in the petty sessions book. M. appealed to quarter sessions. The certificate of the order of the petty sessions recited the several charges, and stated that the defendant was convicted and fined, but contained no statement as to the charge on which he was convicted or as to the other charges having been dismissed. The order as so certified was affirmed by the quarter sessions:—*Held*, that the order so affirmed was bad on its face, as not shewing on which charge the defendant was convicted; that even if the King's Bench Division had power to amend the error in the order of quarter sessions, the present was not a case for the exercise of such power; and that therefore the order of the quarter sessions affirming the conviction must be quashed. *Rev v. Louth Justices*, [1904] 2 Ir. R. 64—K.B. D.

7. MANDAMUS.

Quarter Sessions—Form of Application—Previous Request.—To entitle a party to obtain a *mandamus* to compel the Court of quarter sessions to make an order in a given matter, it is not necessary that he should have requested that Court to make any specific order, provided he requested it to exercise its jurisdiction in the matter. *Rev v. Cornwall Justices*, 72 L. J. K.B. 622; [1903] 2 K.B. 178; 88 L. T. 775; 52 W. R. 31; 67 J. P. 290; 1 L. G. R. 605—D.

Application for Summons made to Justices' Clerk—No Application to Justices.—Where an application for a summons was made to the clerk to Justices, and refused by him, and no application was made to the Justices themselves, the Court refused to grant a *mandamus* to the Justices requiring them to show cause why they should not issue a summons. *Andrews, Ex parte*, 65 J. P. 490—D.

Equal Division of Votes at Quarter Sessions—Adjournment—Discretion.—In discretionary applications to quarter sessions, where there is an equal division of opinion among the Justices and they decline to make the order sought, and refuse to adjourn and rehear the matter, the King's Bench will not compel them by *mandamus* to do so. *Semble, per Gibson, J.*, that the same principle applies to complaints under the Petty Sessions Act. *Rev v. Tipperary Justices*, [1903] 2 Ir. R. 108—K.B. D.

8. CERTIORARI.

Affidavit of Service of Rule on Justices.—Rule 21 of the Crown Office Rules, 1906, provides for proof by affidavit that the order *nisi* for a writ of *certiorari* has been served on Justices six days before the return day:—*Held*, that the absence of such an affidavit does not preclude the Court from entering upon the question whether the rule should be made absolute or not. The writ, however, will not be drawn up unless an affidavit of service has been supplied.

Rea v. Northumberland Justices, 71 J. P. 331; 5 L. G. R. 1110—D.

9. STATING SPECIAL CASE.

Jurisdiction.—Under section 5 of the Summary Jurisdiction Act, 1857, the High Court has full discretion to determine whether it is proper to order the Justices to state a Special Case. Therefore if the Justices acquit in a case in which they ought to inflict a merely nominal penalty, the High Court is not compelled to order them to state a Special Case. *Reg. v. Davey; Bishop, Ex parte*, 6; L. J. Q.B. 675; [1899] 2 Q.B. 301; 80 L. T. 798; 63 J. P. 515; 19 Cox C.C. 365—D.

Appeal by Case Stated—Case Expressed to be Stated under Act of 1879 only.—The Summary Jurisdiction Acts, 1857 and 1879, in so far as they provide for the stating of a Special Case by Justices for the opinion of the High Court, are to be read together, and a Case, though expressed only to be stated under the later Act, is stated under both Acts. *Stokes v. Mitcheson*, 71 L. J. K.B. 677; [1902] 1 K.B. 857; 86 L. T. 767; 50 W. R. 553; 66 J. P. 615—D.

Whether an unsuccessful prosecutor is a "person aggrieved" within the meaning of section 33 of the Summary Jurisdiction Act, 1879, *quere. Ib.*

Mandamus to Justices to State—Decision "erroneous in point of law"—Previous Decision of High Court Binding on Justices.—A magistrate ought not to be ordered to state a Case, upon the ground that his decision was erroneous in point of law, when he has decided in accordance with a previous decision of the Queen's Bench Division upon the same point from which there was no right of appeal. *Reg. v. Sheil*, 82 L. T. 587; 19 Cox C.C. 507—C.A.

Application to State—Summary Jurisdiction Act.—By a rule dated March 20, 1906, made in substitution of rule 18 of the Summary Jurisdiction Rules, 1886, "An application to a Court of Summary Jurisdiction under s. 33 of the Summary Jurisdiction Act, 1879, to state a special case shall be made in writing and shall be left with the clerk of the Court at any time within seven clear days from the date of the proceeding to be questioned, and there shall also be left with him a copy of such application for each of the justices constituting such Court which shall be duly forwarded by him to each of the said justices. . . ." Where a person summarily convicted before two Justices of an offence under section 8 of the Licensing Act, 1872, personally served each of the Justices with a copy of an application to state a Case, and left with the assistant clerk to the Justices another copy of the application addressed to the clerk to the Justices, *Held*, that there had been a sufficient compliance with the rule, and that the Justices were bound to state a Case. *Rea v. Woodcock*, 76 L. J. K.B. 683; [1907] 2 K.B. 104; 96 L. T. 672; 71 J. P. 241—D.

Case Stated by Quarter Sessions—Form.—Where a Court of quarter sessions consent to state a Case for the opinion of the High Court, the order of the quarter sessions sent up with the Case to the High Court ought to state the fact that a Case has been stated by them, to give the High Court jurisdiction. *London and*

North-Western Railway v. Amptill Union, 94 L. T. 314—D.

Necessity for Signature of all Justices taking part in Determination of Case.—A Case stated for the opinion of the Court ought to be signed by all the Justices who took part in the hearing and determination of same, although some of the Justices may have dissented from the decision arrived at. *Barker v. Hodgson*, 68 J. P. 310—D.

Power to State Case—Application under Lunacy Act—Court of Summary Jurisdiction.—Justices acting under section 299 of the Lunacy Act, 1890, are not a Court of summary jurisdiction, and have therefore no power to state a Case. *Bethel, In re*, 80 L. T. 492; 63 J. P. 453; 19 Cox C.C. 262—D.

Special Petty Sessions to Revise Jury Lists—Court of Summary Jurisdiction.—Justices sitting in special petty sessions under section 10 of the County Juries Act, 1825, for the purpose of revising the jury lists, are not a Court of summary jurisdiction, and have therefore no power to state a Case for the opinion of the High Court. *Hagmair v. Willesden Overseers*, 73 L. J. K.B. 638; [1904] 2 K.B. 316; 90 L. T. 683; 52 W. R. 654; 68 J. P. 343; 2 L. G. R. 965; 20 T. L. R. 494—D.

Appeal—Order of Quarter Sessions—"Final" Order—Right to State Case—Police—Pension.—Section 11 of the Police Act, 1890, which provides that a police constable who claims pension as of right and is aggrieved by the decision of the police authority upon a reconsideration of his claim, may apply to quarter sessions, and that Court may make an order, "which order shall be final," does not prevent the quarter sessions from stating a Special Case for the opinion of the High Court, or the High Court from entertaining the case so stated. *Westminster City Council v. Gordon Hotels, Ltd.* (76 L. J. K.B. 482; [1907] 1 K.B. 910), distinguished. *Kydd v. Liverpool Watch Committee*, 76 L. J. K.B. 1155; [1907] 2 K.B. 591; 97 L. T. 453; 71 J. P. 409; 5 L. G. R. 1168; 23 T. L. R. 621—C.A.

Criminal Charge—Acquittal—Refusal of Justices to Commit Defendant for Trial—Jurisdiction to State Case.—*Seemle*, that where on an information charging the defendant with a purely criminal offence which cannot be tried summarily, the Justices refuse to commit the defendant for trial, and dismiss the information, they have no power, on the application of the prosecutor, to state a case for the opinion of the High Court on the question whether their determination was right in law. *Ferens v. O'Brien* (52 L. J. M.C. 70; 11 Q.B. D. 21) distinguished. *Reg. v. London Justices* (25 Q.B. D. 357) applied. *Poss v. Best, infra.*

Refusal to State Case—Recognisance—Rule Absolute to State Case—Death of Surety and Bankruptcy of Appellant—Necessity for Fresh Recognisance.—The applicant, against whom an order had been made under the London Building Act, 1894, applied to the magistrate to state a Case for the opinion of the High Court. The magistrate refused to state a Case, whereupon the applicant entered into a recognisance with a surety under section 3 of the Summary Jurisdiction (Appeals) Act, 1857,

and then applied to the High Court for, and obtained, a rule calling upon the magistrate to shew cause why he should not state a Case, and this rule was afterwards made absolute. Between the date of the application for the rule and the date when it was made absolute the applicant was adjudicated bankrupt and his surety died. The magistrate having refused to deliver the Case unless a fresh recognisance was entered into,—*Held*, that the recognisance already entered into was still valid, that a fresh recognisance was not required under section 5 of the Summary Jurisdiction (Appeals) Act, 1857, and that the magistrate must deliver the Case. *Rev v. Kettle and London County Council*; *Ellis, ex parte*, 74 L. J. K.B. 254; [1905] 1 K.B. 212; 92 L. T. 59; 53 W. R. 364; 69 J. P. 55; 3 L. G. R. 112; 20 Cox C.C. 753; 21 T. L. R. 151—D.

Private Street Works—Land of Railway Company—Whether Used Solely as Part of Line.—A railway company owned a piece of land which they alleged to be necessary for the proper working of their undertaking, but as it was otherwise vacant land for the time being they allowed their servants to use it as garden ground at a nominal rent. It was separated from the adjoining street by iron railings in which there were step-ladders by which those using the garden ground could get on to it from the street. On an objection by the railway company to the inclusion of this piece of land in the provisional apportionment of the expenses of making up the street which abutted thereon, on the ground that by section 22 of the Private Street Works Act, 1892, they were not to be deemed the owner of such land for the purposes of that Act, the Justices came to the conclusion as a question of fact that the land was not used solely or in any way or at all as a part of their railway sidings, station, or works, and therefore that the railway company's objection to the provisional apportionment failed. The Justices having declined to state a Case, as they were of opinion that no question of law was involved,—*Held*, that, the question being one of fact, the Justices should not be ordered to state a Case. *Rev v. Jones*; *Mein, Ex parte*, 96 L. T. 723; 71 J. P. 326—D.

Criminal Charge—Acquittal—Refusal of Justices to Commit Defendant for Trial—Jurisdiction to State Case.—*Seemle*, that where on an information charging the defendant with a purely criminal offence, which cannot be tried summarily, the Justices refuse to commit the defendant for trial, and dismiss the information, they have no power, on the application of the prosecutor, to state a Case for the opinion of the High Court on the question whether their determination was right in law. *Ferens v. O'Brien* (52 L. J. M.C. 70; 11 Q.B. D. 21) distinguished. *Reg. v. London Justices* (25 Q.B. D. 357) applied. *Foss v. Best*, 75 L. J. K.B. 575; [1906] 2 K.B. 105; 95 L. T. 127; 70 J. P. 383; 22 T. L. R. 542—D.

Impossibility of Service of Notice of Appeal and Copy of Case.—The High Court has no jurisdiction to entertain an appeal on a Case stated by Justices, unless there has been due service upon the respondent under section 2 of the Summary Jurisdiction Act, 1857, of notice of the appeal with a copy of the Case, or something equivalent thereto, even though the want

of such service is due to the fact that the respondent has disappeared and cannot be found. *Syred v. Carruthers* (27 L. J. M.C. 273; E. B. & E. 469) distinguished. *Foss v. Best*, 75 L. J. K.B. 575; [1906] 2 K.B. 105; 95 L. T. 127; 70 J. P. 383; 22 T. L. R. 542—D.

Notwithstanding the non-service of the Special Case with notice in writing of the appeal on the respondent, the Court decided to hear the appeal, where it was satisfied that every effort had been made to serve the respondent with a copy of the Special Case, and that the respondent knew of the appeal. *Teddington Urban Council v. Vile*, 70 J. P. 381—D.

Appeal by Case Stated—Case Expressed to be Stated under Act of 1879 only.—The Summary Jurisdiction Acts, 1857 and 1879, in so far as they provide for the stating of a Special Case by Justices for the opinion of the High Court, are to be read together, and a Case, though expressed only to be stated under the later Act, is stated under both Acts. *Stokes v. Mitcheson*, 71 L. J. K.B. 677; [1902] 1 K.B. 857; 86 L. T. 767; 50 W. R. 553; 66 J. P. 615; 20 Cox C.C. 254—D.

Whether an unsuccessful prosecutor is a "person aggrieved" within the meaning of section 33 of the Summary Jurisdiction Act, 1879, *quære. Ib.*

Point not taken in Court below. See *Smith's Dock Co. v. Tynemouth Corporation*, 77 L. J. K.B. 175; [1908] 1 K.B. 315; 72 J. P. 64; 6 L. G. R. 223.

Power to State Case in Licensing Matters.—*See INTOXICATING LIQUORS.*

9. APPEAL.

"Person aggrieved."—The purchaser against whom an order of restitution under section 100 of the Larceny Act, 1861, has been made is a "person aggrieved" within the meaning of section 33, sub-section 1 of the Summary Jurisdiction Act, 1879, and is therefore entitled to appeal against the order to the High Court by way of Special Case. *Moss v. Hancock*, 68 L. J. Q.B. 657; [1899] 2 Q.B. 111; 80 L. T. 693; 47 W. R. 698; 63 J. P. 517; 19 Cox C.C. 324—D.

Personal Service of Notice of Appeal.—Personal service of notice of appeal on the other party is not required by section 31 of the Summary Jurisdiction Act, 1879, upon an appeal to quarter sessions from a conviction by a Court of summary jurisdiction. *Reg. v. Somersetshire Justices*; *Talbot, Ex parte*, 69 L. J. Q.B. 311; 64 J. P. 341—D.

—Service of Notice of Appeal on Solicitor—Duration of Solicitor's Authority.—Notice of intention to prosecute an appeal against a conviction under the Fishery Acts was served upon the solicitor who had appeared for the complainant at petty sessions:—*Held*, that his retainer having come to an end upon the making of the order at petty sessions, he had no authority to accept service of the notice of appeal, and that there was no valid service of the notice. *Reg. v. Oxfordshire Justices* (62 L. J. M.C. 156; [1893] 2 Q.B. 149) followed. *Reg. v. Leitrim Justices*, [1900] 2 Ir. R. 397—Q.B. D.

— **Special Case—Notice of Appeal—Disappearance of Respondent—Impossibility of Service of Notice of Appeal and Copy of Case.**—The High Court has no jurisdiction to entertain an appeal on a Case stated by Justices, unless there has been due service upon the respondent under section 2 of the Summary Jurisdiction Act, 1857, of notice of the appeal with a copy of the Case, or something equivalent thereto, even though the want of such service is due to the fact that the respondent has disappeared and cannot be found. *Syred v. Carruthers* (27 L. J. M.C. 273; E. B. & E. 469) distinguished. *Foss v. Best*, 75 L. J. K.B. 575; [1906] 2 K.B. 105; 95 L. T. 127; 70 J. P. 383; 21 Cox C.C. 226; 22 T. L. R. 542—D. *And see* col. 1192.

— **Service of Notice of Appeal and Case—Sufficiency.**—The notice of appeal and copy of the Case stated by a magistrate could not be personally served on the defendant, who was a master mariner and was at sea, within three days after the receiving of the Case by the appellant, but within the three days the appellant served the notice and copy of the Case on the solicitor who had represented the defendant before the magistrate, but who had ceased to represent him in the matter, and efforts were made to have the defendant personally served on his return, and he was personally served with the notice and Case some months afterwards on his return to the United Kingdom:—*Held*, that the provisions of section 2 of the Summary Jurisdiction Act, 1857, as to giving notice of appeal to the defendant, were sufficiently complied with to enable the Court to hear the appeal in the absence of the defendant. *Anderson v. Reid*, 86 L. T. 713; 66 J. P. 564—D.

— **Case Delivered to Respondent, but no Notice of Appeal Given—Indorsement on Case of Acceptance of Service—Condition Precedent.**—By section 2 of the Summary Jurisdiction Act, 1857, either party, if dissatisfied with the determination of the Justices, may apply for a Case, and such party shall within three days after receiving the Case transmit the same to the Court, "first giving notice in writing of such appeal, with a copy of the Case so stated and signed, to the other party." An appellant duly delivered a copy of the Case to the respondents' solicitors, but he did not with such copy give notice in writing of such appeal, and the respondents' solicitors indorsed upon the Case that they accepted service thereof on behalf of the respondents:—*Held*, that the giving of the notice of appeal was a condition precedent to the right of the appellant to have his appeal heard, and that the Court had no jurisdiction to hear the appeal, notwithstanding that the Case had been duly delivered to the respondents' solicitors, and that a statement had been indorsed thereon by the respondents' solicitors that they accepted service of the Case on behalf of the respondents. *Trust v. St. Botolph, Bishopsgate, Churchwardens*, 94 L. T. 575—D.

— **Sum Adjudged to be paid—Fine and Costs.**—A person who is adjudged to pay a fine under the Motor Car Act, 1903, has under section 11, sub-section 2 of the Act the right to appeal where the fine, taken by itself, exceeds 20s., but any costs which he may be ordered to pay cannot be taken into consideration in calculating

the amount of the fine for the purpose of ascertaining whether he has the right of appeal. *Rev v. Novis*, 74 L. J. K.B. 633; [1905] 2 K.B. 456; 93 L. T. 534; 69 J. P. 288; 3 L. G. R. 753; 21 T. L. R. 517—D.

— **Taxation of Costs out of Sessions—Consent by Conduct.**—Several bills of costs of Licensing Justices in respect of unsuccessful licensing appeals from the same licensing division were carried in for taxation out of sessions. No express consent for taxation out of sessions had been given, but at a meeting of the parties an agreement was come to as to the apportionment of the common charges in the respondent Justices' bills among the several unsuccessful appellants, and one of the bills was taxed on this footing. Objection was then taken on behalf of one of the other appellants that there was no jurisdiction to tax the costs out of sessions, as no consent to do so had been given:—*Held*, that consent to tax out of sessions must be implied from the conduct of the parties. *Rev. v. Cumberland Justices*, 63 J. P. 153—D.

As to the application of section 20 of the Licensing Act, 1902, in such cases, *quære. Ib.*

— **Conviction Pursuant to Direction of High Court—Case Stated.**—Where there is a right of appeal to quarter sessions from a conviction by Justices, this right is not excluded by the fact that the conviction has been made pursuant to the direction of the High Court on a Case stated. The order of the High Court directing the Justices to convict is final and conclusive within the meaning of section 14 of the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), but the conviction itself is a different thing from the order to convict, and is not final and conclusive. *Reg. v. Waterford Justices*, [1900] 2 Ir. 307—Q.B. D.

— **Appeal from Conviction—Order as to Costs—Borough having no Court of Quarter Sessions—Liability to Costs.**—The word "place" in section 9 of the Vagrant Act, 1824, means a place having a separate Court of quarter sessions. *Reg. v. Yorkshire (West Riding) Justices*, 69 L. J. Q.B. 13; [1900] 1 Q.B. 291—D.

Upon an appeal against a conviction under that Act, the Court of quarter sessions has therefore no power to make an order for the payment of the prosecutor's costs by the borough in which the conviction took place, where such borough has no separate Court of quarter sessions. The order should be made upon the county treasurer. *Ib.*

— **Joint Conviction—No Recognisance by some Defendants.**—Where a Court of quarter sessions allows an appeal against a joint conviction against several defendants, the conviction as against all of them must fall, even though one of such appellants has not validly entered into the necessary recognisances to prosecute the appeal. *Reg. v. Waterford Justices*, [1901] 2 Ir. R. 548—Q.B. D.

— **Costs of Justices.**—In appeals from Justices the Justices ought not, except under very special circumstances, to appear by counsel in the Court of Appeal, and if they do so their costs will be disallowed. *Reg. v. Thornton*, 67 L. J. Q.B. 249; [1898] 1 Q.B. 334; 78 L. T. 95; 46 W. R. 241; 62 J. P. 196—C.A.

Costs—Respondent not Appearing.—Costs may be granted in a proper case against a respondent, the defendant before the Justices, even although he does not appear upon the appeal to the Divisional Court. *Usk Urban Council v. Mortimer*, 90 L. T. 25; 68 J. P. 38; 2 L. G. R. 135; 20 T. L. R. 96—D.

Poor Rate.—See POOR LAW.

Sale of Food and Drugs Act.—See LOCAL GOVERNMENT, col. 1332.

10 CLERK TO JUSTICES.

Fees Payable to on an Application for the Grant of a Licence—Court Fees—Right of Clerk to Fees for Administering the Oath to Persons Objecting to Grant.—Section 15 of the Alehouse Act, 1828, is exhaustive as to the fees which may be taken by a clerk to the Justices on an application for the grant of a licence at a general licensing meeting or at any special sessions held under the Act, and therefore a clerk to the Justices is not entitled to demand a fee for administering the oath to a person who appears and objects to the grant of a licence. *Whittuck v. Withy*, 76 L. J. K.B. 773; [1907] 2 K.B. 526; 96 L. T. 912; 71 J. P. 317; 23 T. L. R. 458—D.

LACHES.

See WAIVER.

LADING, BILL OF.

See SHIPPING.

LANCASTER PALATINE COURT.

See COURT.

LAND REGISTRATION.

Land Transfer Acts.—Per COZENS-HARDY, L.J.—There is no compulsion, either direct or indirect, under the Land Transfer Acts, 1875 and 1897, to register, except on the first sale after the Act of 1897 has become applicable; and notwithstanding that the land has become registered land, it may still be dealt with by deeds having the same operation and effect as if the land were unregistered, subject to the title being impaired by the exercise of the statutory powers of disposition given to the registered proprietor. The transfer by such disposition takes effect by virtue of an overriding power, and not by virtue of any estate, and the register of proprietors is not material for ascertaining where the legal estate is. *Capital and Counties Bank v. Rhodes*, 72 L. J. Ch. 336; [1903] 1 Ch. 681; 88 L. T. 255; 51 W. R. 470—C.A.

Per COZENS-HARDY, L.J.—A mortgagor cannot insist upon the registration of a deed of charge in the statutory form, with the addition of a conveyance of the legal estate; but as to whether such an addition is a "stipulation" which the Registrar can admit, under rule 107, no opinion given. *Ib.*

Charge—Forged Transfer—Registration—Innocent Transferee—Rectification—Right to

Indemnity out of Insurance Fund.—In 1901 C. was registered under the Land Transfer Acts as proprietor of a charge on certain property in London for 350l. In 1903 her solicitor, T., produced to O. what purported to be a transfer of the charge, upon which 300l. was then owing, from C. to O., together with an authority, also purporting to be signed by C., to pay the money to T. O. paid the 300l. to T., and took the transfer to the Land Registry and was registered as proprietor of the charge. The transfer and the authority were both forged. There was no negligence on the part of C., and O. was quite honest in the transaction and had acted with reasonable care. At the instance of C. the Court ordered the register of charges to be rectified by removing the name of O. therefrom and restoring the name of C., and that was done. O. claimed to be entitled to indemnity under sub-section 4 of section 7 of the Land Transfer Act, 1897:—*Held*, by VAUGHAN WILLIAMS, L.J., and COZENS-HARDY, L.J., that the act of the Registrar in putting O. on the register was a mere ministerial act, and not a judicial act as on the registration of a person first registered as proprietor of land, and it conferred on him no estate or right which he had not before registration, and he could not shew that he had a transfer from some one previously on the register, and in that sense relied on the register. He therefore could not claim any beneficial interest in the charge, and had not suffered any loss by the rectification, and was not entitled to any indemnity:—*Held*, by STIRLING, L.J. (without differing on the above point), that, applying the principles laid down in *Sheffield Corporation v. Barclay* (74 L. J. K.B. 747; [1905] A.C. 392), O., by bringing the transfer to the Registrar and requesting him to register it, affirmed and warranted that the transfer was genuine, which it was not; and this act of his, though innocent, directly brought about the registration of the charge in his name, and caused or substantially contributed to his loss, and he was therefore not entitled to indemnity. *Att.-Gen. v. Odell*, 75 L. J. Ch. 425; [1906] 2 Ch. 47; 94 L. T. 659; 54 W. R. 566; 22 T. L. R. 466—C.A.

Registration of Deeds—Equitable Mortgage—Deposit of Title-deeds—Conveyance—Consideration—Antecedent Debt—Priority.—A customer of a bank in Ireland, having overdrawn his account and being pressed by the bank, undertook by letter to deposit a title-deed of an Irish estate as security for his overdraft. He deposited the title-deed with the bank, who did not register the charge. The customer afterwards mortgaged the estate to the appellants, who registered their charge without notice of the prior charge. Upon the question of the priority of the two incumbrances, *Held*, that the customer's letter amounted to an agreement to create an equitable charge upon the estate, and ought to have been registered as a conveyance under 6 Anne (Ir.), c. 2; and that in default of registration it ranked after the mortgage to the appellants. *Fullerton v. Provincial Bank of Ireland*, 72 L. J. P.C. 79; [1903] A.C. 309; 89 L. T. 79; 52 W. R. 238—H. L. (Ir.)

Title of Executors under Land Transfer Act, 1897.—See col. 832.